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1a PLEAS had at a regular term of the United States District Court for the Eastern Divisjon of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of June (it being the 6th day thereof) in the Year of Our Lord One Thousand Nine Hundred Fifty-Five and of the Independence of the United States of America, the 179th Year.

Present:

Honorable John P. Barnes, Chief District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge

Roy H. Johnson, Clerk

William W. Kipp, Sr., Marshal

Thursday, June, June 16, 1955

Court met pursuant to adjournment

Present: Honorable Win G. Knoch, Trial Judge

2a

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

United States of America,
Plaintiff,
vs.
Sam Achilli,
Defendant.
No. 53 CR 154

PREFIX TO RECORD
Rule 10(b)

Style of Court: District Court of the United States for the Northern District of Illinois, Eastern Division.

Title of Case: United States of America *v.* Sam Achilli No. 53-Cr.-154.

Commencement of Action: Indictment filed March 9, 1953.

Parties: United States of America, Plaintiff,
Sam Achilli, Defendant
732 Brook Street, Elgin, Illinois

Pleadings filed: Indictment March 9, 1953, charging the filing of false and fraudulent income tax returns, with intention to evade the tax for the calendar years 1946, 1947 and 1948.
Not Guilty plea May 13, 1953.

Defendant Status: Bail taken for trial in District Court. Bail taken for this Appeal.

3a Trials: First trial: November 8 to 22nd, 1954, resulting in declaration of mistrial by Court.
Second trial: April 11 to May 27th, 1955, resulting in conviction on all three counts of Indictment.

Judge: Hon. Win G. Knoch

Verdict: Trial by Jury. Verdict of guilty by Jury on all three counts of Indictment

Final Decree: Judgment and sentence of the Court was on June 16, 1955.

Sentence: Two years on each count, sentences to run concurrently; and fine of two thousand ($2,000) dollars on each count.

Date of Appeal: June 24, 1955.

/s/ Carl J. Batter
Carl J. Batter
Attorney for Defendant

4a

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 53 CR 154)

Be It Remembered, that on to wit, the 9th day of March, 1953, the above-entitled action was commenced by the filing of the Indictment in the office of the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division, in words and figures following, to wit:

5

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

United States of America, Plaintiff, vs. Sam Achilli, Defendant.	No. 53 CR 154

The March 1953 Grand Jury charges:

That on or about the 10th day of March, 1947, in the Northern District of Illinois, Eastern Division, the defendant,

Sam Achilli,

late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $11,753.96 and that the amount of tax due and owing thereon was the sum of $2,780.15; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $44,254.60, upon which

said net income he owed to the United States of America an income tax of $20,856.74.

In violation of Section 145(b), Internal Revenue Code: Title 26, United States Code.

6a COUNT TWO

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1948, in the Northern District of Illinois, Eastern Division, the defendant,

Sam Achilli,

late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $16,785.52 and that the amount of tax due and owing thereon was the sum of $4,620.98; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,785.75, upon which said net income he owed to the United States of America an income tax of $39,484.76.

In violation of Section 145(b), Internal Revenue Code: Title 26, United States Code.

7a COUNT THREE

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1949, in the Northern District of Illinois, Eastern Division, the defendant,

Sam Achilli,

late of Elgin, Illinois, who during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, a false and fraudulent joint income

tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $34,053.12 and that the amount of tax due and owing thereon was the sum of $8,968.52; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $52,805.05, upon which said net income there was owing to the United States of America an income tax of $17,997.25.

In violation of Section 145(b), Internal Revenue Code; Title 26, United States Code.

A True Bill:
P. C. Massie
Foreman

Otto Kerner, Jr.
United States Attorney

8a UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

The United States of America
vs.
Sam Achilli

INDICTMENT

VIO: Section 145(b), Internal Revenue Code; 26 U.S.C., Section 145(b) (Wilfully and knowingly attempting to defeat and evade large parts of the income tax due and owing by him to the United States by filing and causing to be filed with the Collector of Internal Revenue false and fraudulent income tax-returns.)

A true bill,
P. C. Massie
Foreman.

Filed in open court this 9th day of March, A. D. 1953

Roy H. Johnson, Clerk.

9a And afterwards, to wit, on the 13th day of May, 1953, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in

said entitled cause, before the Honorable Michael L. Igoe, District Judge, appears the following entry, to wit:

10a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This day comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him pleads not guilty thereto and it is

Ordered that the defendant be and he is hereby given 20 days herefrom within which time to file any preliminary motions; that the United States be and is hereby given 20 days thereafter within which time to answer said motions and that this cause be and the same is hereby continued to June 19, 1953 at 2 o'clock P.M. for hearing on said motions, if any.

11a-12a * * *

13a And afterwards on, to wit, the 10th day of June, 1953 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion To Dismiss And Alternative Motions, Affidavit In Support Thereof, etc., in words and figures following, to wit:

14a

IN THE
UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

MOTION TO DISMISS AND
ALTERNATIVE MOTIONS.
AFFIDAVIT IN SUPPORT THEREOF.
BRIEF IN SUPPORT THEREOF.

JOSEPH A. STRUETT,
Attorney for Sam Achilli,
105 West Madison Street,
Chicago 3, Illinois,
FRanklin 2-0665.

(Filed Jun 10 1953)

15a

IN THE
UNITED STATES DISTRICT COURT

(Caption—No. 53 CR 154)

MOTION OF DEFENDANT TO DISMISS INDICTMENT, OR IN THE ALTERNATIVE, TO ORDER A BILL OF PARTICULARS, SUPPRESS EVIDENCE AND FURNISH CERTAIN INFORMATION AS TO INTERVIEWS OF CUSTOMERS OF HIGHLAND MOTOR SALES.

Now comes Sam Achilli, the defendant herein, by his attorney, Joseph A. Struett, and makes the following motions:

1. Moves that the indictment and each count thereof be dismissed, on the grounds (a) that the statute on which said indictment and each of said counts is founded, namely, Section 145(b) of the Internal Revenue Code, when read together with Section 3761(a) of the Internal Revenue Code and other statutes which are in pari materia therewith, amounts to an unconstitutional delegation of
16a authority to the executive branch, in violation of Article I, Section I of the Constitution of the United States manifesting the doctrine of separation of powers, and in violation of the due process clause of the Fifth Amendment of said Constitution; and (b) that the executive branch has employed unconstitutional practices and procedures in the enforcement of said Section 145(b), as applied to the defendant herein, resulting in his indictment herein, in violation of the due process clause of the Fifth Amendment of said Constitution.

In the alternative,

2. Moves, pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure, that the Court direct the United States Attorney to file a bill of particulars as to each separate count of the indictment herein to make full and specific the charge therein, such bill of particulars to identify, list, explain and make clear the following matters with at least as much information and details as are commonly found in a Revenue Agent's report accompanying a notice to a tax payer of a proposed deficiency assessment of federal income taxes viz:

a. The extent, if any, that any alleged understatement of net income of the defendant was caused by items of alleged unreported gross income of the defendant. listing each such item by date and amount, describing the transaction out of which each such item arose, and furnishing the name and address of the person, firm or corporation who or which was the source of such item of unreported gross income of the defendant;

b. The extent, if any, that any alleged understatement of net income of the defendant was caused by items of alleged unallowable deductions of the defendant, listing each item by date and amount and describing the nature of each such item;

17a c. The adjustments of defendant's reported income and deductions, and the computations of federal income taxes, by means of which the figures set forth in each count of the indictment were arrived at, purporting to show the true and correct amount of federal income taxes due from defendant with respect to each taxable period covered in the indictment; and

d. The source of the government's data as to the matters set forth in subparagraphs a to c, inclusive, above, both documentary and oral, to the extent not privileged by law, including, without limiting the generality of the foregoing, a detailed specification of the information, both documentary and oral, concerning defendant's transactions and affairs involved directly or indirectly in the indictment herein, obtained by the government from Earl H. Gromer, defendant's attorney.

e. That the government file the net worth statement and compilations thereof on which it intends to rely at the trial--and further that it also file a detailed statement of its evaluations, and how they were arrived at of all properties of the defendant Sam Achilli which may be included in said net worth statement.

3. Moves that this Court suppress all evidence, whether documentary, oral or otherwise, obtained by the government directly or indirectly from Earl H. Gromer concerning defendant's transactions and affairs involved di-

rectly or indirectly in the indictment herein, on the ground that such evidence stemmed and was derived from confidential information obtained by Earl H. Gromer in his capacity as attorney for the defendant herein and that defendant did not and does not waive the privilege of confidential communication inherent in and surrounding said attorney-client relationship.

4. Moves that this Court direct the United States Attorney to furnish a list of the names and addresses of
18a all customers of Highland Motor Sales who were interviewed by Revenue Agents in connection with the investigation of the instant case, and a copy of each written statement made by any such customer at the behest of said Agents and a copy of each memorandum of any such interview made by said Agents, pertaining to transactions involved in the instant case, including, without limiting the generality of the foregoing, any such statement or memorandum relating that a customer paid or may have paid money to Earl H. Gromer or that said Earl H. Gromer was ppresent when money was allegedly paid by a customer to defendant or anyone else in connection with the business of Highland Motor Sales, or relating to any fact that said Earl H. Gromer participated in any manner in any transactions of Highland Motor Sales which were not fully and accurately reflected on the books of account thereof for each and all of the prosecution years.

In support of the above motions there is hereto attached and made a part hereof by reference the affidavit of Joseph A. Struett and a Brief of the Law.

/s/ Joseph A. Struett,
Joseph A. Struett,
Attorney for Defendant.

* * *

19a * * *

20a

ALTERNATIVE MOTIONS.

Motion for Bill of Particulars.

The right of a defendant to a Bill of Particulars, and under what circumstances, is fully developed in a brief filed in this Court in the case of U. S. *v.* Lawrenz, 52 Cr. 132. A

In the

United States Court of Appeals

For the Seventh Circuit

No. 11575

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SAM ACHILLI,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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further discussion of these rights would only prolong this unduly long affidavit; hence; this Court's attention is respectfully invited to the brief mentioned.

Both the Bureau and Justice have advised Deponent that the alleged case against Mr. Achilli is a net worth case. In such a net worth case the Government, of necessity, started with what it believed to be Mr. Achilli's net worth, viz.: his assets less his liabilities as of December 31, 1945, starting point. It then determined his net worth as of December 31st for each of the succeeding prosecution years. That
21a is, December 31, 1946, 1947 and 1948. The increase is net worth so computed by the Government for each of these years over the previous year, according to the Government, exceeding the amount of reported income for that particular year. The difference between the increases in net worth for each of these years as computed by the Government and the amount of income reported by Mr. Achilli for each of these years, according to the Government, represented fraudulent unreported income by Mr. Achilli. As will hereafter be devoloped, the Government has used and given Deponent so many different figures concerning its computations, that no one can have any conception of how the Government arrived at its figures.

• • •

22a-94a • • •

95a And afterwards on, to wit, the 2nd day of October, 1953 came the United States of America by its attorneys and filed in the Clerk's office of said Court its certain Answer In Opposition To Defendant's Motion To Dismiss Incitment and Alternative Motions etc., in words and figures following, to wit:

96a-97a • • •

98a Excerpt from Government's Brief, filed October 2, 1953:

"In the present case the defendant is already aware of the theory upon which the Government intends to proceed (see affidavit of defense counsel filed in support of motion to dismiss and alternative motions, Record pages 20a-21a, Motion, pages 68 and 69, printed herein at pages 9-16).

99a-153a • • •

154a And afterwards, to wit, on the 23rd day of June, 1954, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

155a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

ORDER

This matter came on to be heard on motions of the defendant (1) to dismiss the indictment for want of due process, or, in the alternative, (2) to order the filing of a bill of particulars; (3) to suppress all evidence obtained from one Earl H. Gromer, as privileged communications between client and attorney; (4) to be furnished with a list of customers interviewed and statements, memoranda etc. made in connection with such interviews; and (5) to order United States Attorney Otto Kerner, Jr. to produce certain documents for use of defendant in support of allegations in affidavits supporting defendant's said motion to dismiss; and the Governments' motions (1) to restrict the hearing on defendant's said motion to dismiss to arguments of law with opportunity to the Government to deny the facts at a later date should the Court rule that defendant was entitled to legal relief on the assumed facts; and (2) to quash subpoenae duces tecum heretofore served on Regional Commissioner Ernest C. Wright, Commissioner of Internal Revenue T. Coleman Andrews and Attorney General Herbert C. Brownell, caused to be served by defendant for the purpose of supporting the facts set forth in the affidavits supporting defendant's said motion to dismiss.

The Court has carefully considered all of said motions, has had the benefit of briefs and oral argument of counsel, and is fully advised in the premises.

It is ordered that the motion of the Government to
156a restrict the hearing of said motion to dismiss to arguments of law be and it is hereby granted, and that for purposes of considering defendant's said motion to dismiss, the facts be assumed as stated in the affidavits supporting the said motion to dismiss.

It is further ordered that defendant's said motion to dismiss be and it is hereby denied, want of due process, as a matter of law, not having been shown; that the Government's motions to quash subpoenae duces tecum be and they are hereby granted; that defendant's motion for a bill of particulars be and it is hereby denied; that defendant's motion to suppress all evidence obtained from said Earl H. Gromer as privileged be and it is hereby denied, existence of an attorney-client relationship not having been established; that defendant's motion to be furnished with a list of customers interviewed, etc., and defendant's motion for order on United States Attorney Otto Kerner, Jr. to produce certain documents, be and they are hereby denied, good cause for such production not having been shown.

Date: Jun 23 1954

Win G. Knoch
United States District Judge

158a And on, to wit, the 8th day of November, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment Of Acquittal, With Exhibits A to F, Inclusive Attached Thereto, in words and figures following, to wit:

159a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

DEFENDANT'S MOTION
FOR
JUDGMENT OF ACQUITTAL

And now comes the defendant, Sam Achilli, and moves that the Court will order the entry of a judgment of acquittal

(a) On the first count of the indictment;
(c) On the second count of the indictment; and
(c) On the third count of the indictment;

upon the grounds that:

1. The prosecution is now committed to the so-called "Net Worth" method of establishing the defendant's annual net income for the years 1946, 1947 and 1948; and, such method is not authorized by statute in the case at

bar; therefore, the prosecution is unable to establish a prima-facie case of the making of a false and fraudulent return with intent to evade the tax;

2. The statute, in Section 41 of the Internal Revenue Code prescribes that the defendant's annual net income be determined "in accordance with the method of
160a accounting regularly employed" by the tapayer, unless such method does not clearly reflect the income; in which event the statute provides that the "computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income." Therefore, it is clear that in the absence of the Commissioner determining that the "Net Worth" method "does clearly reflect the income" the prosecution cannot prove the making of a false and fraudulent return with intent to evade the tax by the "Net Worth" method.

3. The Commissioner, by his delegate, E. C. Wright, did determine, that the defendant's method of accounting, subject to corrections, did "clearly reflect the income". He did this as provided by statute, that is the issuance of deficiency notices pursuant to Section 272 of the Internal Revenue Code, wherein he did not change the method of accounting employed by the taxpayer. The Commissioner by his delegate did issue deficiency notices to the taxpayer, as follows:

For the year 1946 by notice dated June 27, 1951 (Exhibit A attached hereto);

For the year 1947 by notice dated March 9, 1951 (Exhibit B attached hereto);

For the year 1948 by notice dated January 31, 1952 (Exhibit C attached hereto).

The method of determining net income is set forth on sheet 2 of each of the exhibits attached hereto (A, B, and C) offered here and limited to the sole purpose of proving the method employed by the Commissioner to "clearly reflect the income".

Therefore, the prosecution, unable to proceed on the method determined by the Commissioner; and unable
161a to proceed legally on the "Net Worth" method must fail for lack of proof.

4. The Commissioner did not determine that the "Net Worth" method "clearly reflects the income" in his deficiency notices (Exh. A, B, and C), and at no time since

the issuance of such notices has he changed his method. The civil cases are pending before the Tax Court of the United States (Docket Nos. 36,819, 34,923 and 40,481), and the Commissioner has not amended his notices or changed the basis from Exhibits A, B, and C which form the basis of the petitions to the Tax Court. In this connection this Court will notice the docket entries in the above cases as certified by the Clerk of the Tax Court (Exhibits D, E, and F) offered for this purpose only.

Therefore, the prosecution, unable to proceed on the method determined by the Commissioner; and unable to proceed legally on the "Net Worth" method must fail for lack of proof.

We attach hereto the exhibits set forth above A to F inclusive; and a memorandum of law in support of our position.

Wherefore, we pray that this motion be granted and the Court order the entry of a judgment of acquittal on all counts at this time.

Carl J. Batter
E. A. Ferrari

162a

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT OF ACQUITTAL

We ground our motion for judgment of acquittal on all counts at this time on three grounds:

(a) That the prosecution is committed to the "Net Worth" method of determining net income as a method that "clearly reflects the income"; and, that the prosecution is precluded from proving its case by any other method; and

(b) That the statute reposes in the Commissioner and his delegates, and no one else, the authority to adopt a method other than that employed by the taxpayer; that the Commissioner has adopted method of the taxpayer with corrections and adjustments. Such method is controlling, and the prosecution now confined to the "Net Worth" method is unable to prove the charges by the method adopted by the Commissioner; and

(c) The "Net Worth" method, under the circumstances here existing lacks all probative value, and the prosecution must fail for lack of proof.

We shall first address ourselves to the requirements of the statute; and then to the limitations to the proof that can be adduced in the case at bar.

THE STATUTE

The controlling statute is section 41 of the Internal Revenue Code which reads as follows:

163a "The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year."

The determination of net income is a highly technical subject and Congress has very wisely left that determination in the hands of the Commissioner. Congress further prescribed that the method employed must "clearly reflect the income"; and if it does not the Commissioner and his highly trained delegates are authorized to make "the computation in accordance with such method as in" his opinion "does clearly reflect the income".

Stripping section 41 of the parts not pertinent here, it reads:

> "The net income shall be computed * * * in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * *"

No prosecuting attorney, no Grand Jury, and no other person other than the Commissioner, or his delegates, can compute the income or determine the method that clearly reflects the income.

Of course the Commissioner's method is subject to review by the Courts, but that is not the issue here. The issue is not whether the Commissioner has made the computation by such method as clearly reflects the income—the issue is, can the prosecution, in direct opposition to the Commissioner choose a method other than that 164a determined by the Commissioner. We say not. We submit that this Court under the clear mandate of the statute must restrict the prosecution to the method determined by the Commissioner to clearly reflect the income.

Here the situation differs from any other prosecution we have been able to find. In most cases, the criminal prosecution comes first, and is followed by the civil accounting. Here, the Commissioner made the determination that clearly reflects the income over a year before the criminal prosecution was initiated by indictment.

Reference to page 2 of Exhibits A, B and C show that the Commissioner determined the net income for each year by adding to the income reported, other items of income. We cannot find any listing of assets and liabilities in Exhibits A, B and C, in order to determine the net income. In fact, the Commissioner has not changed the method of accounting employed by the taxpayer—he begins with the income reported and adds items of income to, and disallows deductions, as the following tabulation will show:

	Exhibit A 1946	Exhibit B 1947	Exhibit C 1948
Income reported	$11,753.96	$16,785.52	$34,053.60
Unallowable deductions and additional income:			
Income from rents	200.00	11,833.91	11,940.60
Net Capital Gains	2,550.00	2,900.00	833.60
Loss from Fire	-11,320.36		
Loss from joint venture in building house		1,385.29	
Other Income	100,963.99	95,000.00	23,704.94
Partnership Income	4,283.64	3,293.28	
Income from trust	1,350.00	1,350.00	1,450.00
Itemized deductions		9,663.40	
165a Net Income adjusted	$132,421.95	$142,211.40	$71,982.26

Each of the above items bears a reference, such as (a) etcetera which are then explained on page 2 and succeeding pages of the Exhibits. Reference to the explanations makes it very clear that the adjustments are adjustments of income and deductions; and not a grouping of assets and liabilities.

Section 41 of the Internal Revenue Code (Title 26 U.S.C.) has been before the Courts on numerous occasions; but we search in vain for an instance where an inconsistent position was taken as here. One branch of the Government, the Department of Justice contends that the "Net Worth" method "clearly reflects the income"; and, the Commissioner in the civil case adheres to the method employed by the taxpayer, making additions and disallowing deductions.

The Justice Department here is assuming powers it does not possess. All the decisions clearly lodge the authority to determine the method of computing income in the Commissioner. Section 41 has been incorporated in all the Revenue Acts since the Revenue Act of 1918.

In Lucas v. American Code Co. (1930) (50 S. Ct. 202, 203; 280 U.S. 445, 449) the Supreme Court of the United States speaking through Mr. Justice Brandeis said:

> "And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful." (Underscoring supplied)

166a It would seem to us that it is presumptious on the part of the Department of Justice to bring an indictment and prosecute on a mode of computing income at complete variance with the method employed by the Commissioner to clearly reflect the income.

To allow the prosecution to adopt methods other than that adopted by the Commissioner; we believe, would create such uncertainty in the penal section as to void it for the purpose of spelling out a crime.

In Niles Bemont Pond Co. *v.* United States (1930)

(50 S. Ct. 251, 252; 281 U.S. 357, 360, 362) the Supreme Court of the United States, speaking through Mr. Justice Stone said:

> "Even if not so charged, it was competent for the Commissioner, under the Act of 1916, as well as under the express provisions of section 212(b) of the Act of 1918, to correct the taxpayer's return by deducting payments in the year in which they accrued so as to reflect true income by conforming to the dominating or controlling character of the taxpayer's system of accounts. * * * If that assumption is made, failure of the Commissioner to correct the returns in these respects is as attributable to his error or oversight or lack of information as to any opinion on his part as to the propriety of the deductions in the years made." (Underscoring supplied)

The District Court for the Eastern District of Louisiana in Robert P. Hyams Co., Inc., *v.* United States (1928) (26 F. 2d 805, 809) in discussing Section 41 stated:

> "Certainly the statute could be no plainer. Much is left to the sound discretion of the Commissioner. This does not mean that he may, capriciously or arbitrarily, sacrifice the facts of a case to theory or fiction."

If the Commissioner cannot be arbitrary or capricious, certainly the Department of Justice cannot prevail by doing violence to the determination of the Commis-
167a sioner and proceed to prosecute on a theory diametrically opposed to that adopted by the Commissioner.

In Huntington Securities Corporation *v.* Busey (1940) (112 F. 2d 368,370) the Sixth Circuit in reversing the lower Court had this to say in discussing section 41:

> "In our opinion, the errors of the taxpayer did not bring into operation the wide discretion of the Commissioner to reject its method of valuing inventories which was approximately correct and to select one which was at variance with the taxpayer's consistent method." (Underscoring supplied)

In concluding this phase of our argument, we submit, that the Commissioner of Internal Revenue, having determined the income of the defendant by adding items of income and disallowing deductions; and, imposed such

method upon the defendant by the issuance of statutory deficiency notices, subject to the action of the Tax Court in deciding whether the taxpayer's method is correct or whether the Commissioner's method more clearly reflects the income; that there is no statutory authority for the prosecution to endeavor to prove the crime by a completely inconsistent method such as the "Net Worth" method.

If the penal statute created a crime out of such inconsistent—in fact diametrically opposed—methods, it would fail for lack of certainty.

The proof of a crime here must be grounded upon the method employed by the defendant; or, the method employed by the Commissioner as the method that "clearly reflects the income". The Commissioner has spoken, and the prosecution is bound by that act.

168a We now come to the second phase of our argument. The prosecution, by the indictment, the Motion for the Bill of Particulars, and the prosecution's reply to such motion precludes the prosecution from proceeding by the method determined by the Commissioner, and, it must if it can proceed on the determination by the "Net Worth" method. That method, in view of the action by the Commissioner lacks all probative value under the circumstances, and the prosecution should not be permitted to proceed on its committed course. The motion for judgment of acquittal should be granted at this time.

The facts are:

The indictment does not set forth the manner or details of the difference between the income reported and the income alleged to be correct.

The defendant's motion for a Bill of Particulars at pages 68, 69 states in part:

> "Both the Bureau and Justice have advised Deponent that the alleged case against Mr. Achilli is a net worth case. In such a net worth case the Government, of necessity, started with what it believed to be Mr. Achilli's net worth, viz.; his assets less his liabilities as of December 31, 1945, starting point. It then determined his net worth as of December 31st for each of the succeeding prosecution years. That is, December 31, 1946, 1947 and 1948. The increases in net worth so computed by the Government for each of these years over the previous year, according to

the Government, exceeded the amount of reported income for that particular year."

The prosecution in its brief opposing the motion for a Bill of Particulars filed October 2, 1953 (the motion was denied) makes the following commitment on page 21:

169a "In the present case the defendant is already aware of the theory upon which the Government intends to proceed. (see affidavit of defense counsel filed in support of motion to dismiss and alternative motion, pages 68, 69)"

Here then, we have a definite commitment that the prosecution will be grounded on the "Net Worth" method, and that commitment was continued in the opening statement of the prosecution today.

A Bill of Particulars is intended to serve several purposes; including to enable a defendant to prepare for trial and to limit the proof.

In United States *v.* Kessler (1942) (43 Fed. Supp. 408, 412) the District Court for the Eastern District of New York stated:

> "The effect of a bill of particulars is to limit the proof. The filing of such bill of particulars would estop the Government from offering evidence which it obtained after the granting of the motion for the bill of particulars."

The Seventh Circuit in United States *v.* Glasser (1941) (116 F. 2d 690, 702) states:

> "The object of a bill of particulars is to give the defendant notice of the specific charges against him and to inform him of the particular transactions in question, so that he may be prepared to make his defense. Its effect, therefore, is to limit the evidence to the transactions set out in the bill of particulars."

In United States *v.* Slaughter (1950) (89 F. Supp. 205, 207) the District Court for the District of Columbia said:

> "The function of a bill of particulars is to enlarge an indictment so that the defendant may be more specifically informed of the nature of the charge against him. It strictly limits the prosecution to proof within the area of the bill but it does not require disclosure of the evidence by which the government expects to prove its case."

170a In United States *v.* Chapman (1948) (7 C.C.A.) 168 F. 2d 997, 999) this Circuit said:

"The bill of particulars as amended and supplemented sufficiently apprised appellant of the theory of the charge against him and of the general character of the evidence the Government expected to rely upon to sustain that charge. He was not entitled to more."

The Third Circuit cited the above case in United States *v.* Caserta (1952) (199 F. 2d 905, 910) and said:

"What has been said by our brethren in the Seventh Circuit applies to the situation here. In United States v. Chapman, 7 Cir., 1948, 168 F. 2d 997, the court pointed out that in a case in which the government proposed to use the expenditure theory, the most that the defendant could be entitled to prior to trial was the fact that the prosecution was to proceed upon this theory. * * * The same reasoning applies here. The defendant now knows all the government knows about the theory of the case and nothing further regarding the bill of particulars can come into it."

The defense knows, the prosecution knows, the Jury knows, and your Honor knows that the theory of the prosecution case is the "Net Worth" method. The admissions of the prosecution in its brief opposing the Motion for Bill of Particulars (supra) took the same stand. The proof is limited to the "Net Worth" method.

But the "Net Worth" method has not been determined by the Commissioner as the computation that most "clearly reflects the income".

We submit that the "Net Worth" method under these circumstances is immaterial and irrelevant, and lacking in probative value; further that the prosecution by its admissions is precluded from presenting to this Court and Jury the method determined by the Commissioner.

171a Therefore, we pray the Court to order the entry of a Judgment Of Acquittal on all counts.

Carl J. Batter
Carl J. Batter
E. A. Ferrari
E. A. Ferrari

EXHIBIT A

172a U. S. TREASURY DEPARTMENT
Office of Internal Revenue Agent in Charge
Room 1100, Bankers Building
105 W. Adams Street
Chicago 3, Ill.
Jun 27 1951

Mr. Sam Achilli
732 Brook Street
Elgin, Illinois

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1946 discloses a deficiency of $86,371.42 and $43,185.71 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalty mentioned.

Within 90 days (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiency and penalty.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Chicago 3, Illinois for the attention of SN:IT. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and penalty, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,
Geo. J. Schoeneman,
Commissioner,
By E. C. Wright
Internal Revenue Agent in Charge

Enclosures:
Statement
Form of Waiver
Form 1276
RFD:HMG

173a

STATEMENT

Mr. Sam Achilli
732 Brook Street
Elgin, Illinois

Tax Liability for the Taxable Year Ended December 31, 1946

	Deficiency	50% Penalty
Income tax	$86,371.42	$43,185.71

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated June 13, 1951.

The 50% penalty shown herein has been asserted in accordance with the provisions of section 293(b) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$11,753.96
Unallowable deductions and additional income:	
(a) Net capital gains	2,550.00
(b) Loss from fire	11,320.36
(c) Other income	100,963.99
(d) Income from rents	200.00
(e) Partnership income	4,283.64
(f) Income from trust	1,350.00
Net income adjusted	$132,421.95

EXPLANATION OF ADJUSTMENTS

(a) On your return a $900.00 long-term capital loss was taken into account and was claimed as resulting from the sale of a supposedly capital asset purported to have been acquired in 1942 at an alleged cost of $5,500.00. It is held that this $900.00 is unallowable as a loss under any of the provisions of section 23 of the Internal Revenue Code, inasmuch as there are no records as required by section 54 of the Internal Revenue Code and regulations issued thereunder to substantiate that any loss was sustained on this transaction. Furthermore, it is determined that on the disposition of this property you realized a gain of $1,650.00 as computed under the provisions of sections 111 and 112 of the Internal Revenue

Code. Your income is accordingly increased $2,550.00 computed as follows:

174a

Sale price per return	$3,300.00
Cost basis	None
Gain	$3,300.00
Gain to be taken into account (50% $3,300.00)	$1,650.00
Add: Unallowable loss (claimed per return)	900.00
Increase in income	$2,550.00

(b) A deduction of $11,320.36 was claimed on your return as an alleged loss from fire. This deduction is held to be unallowable because there were no records either presented or made available, as required by section 54 of the Internal Revenue Code and regulations issued thereunder, to substantiate that a fire loss of any amount was sustained and if sustained that such loss is within the purview of any of the provisions of section 23 of the Internal Revenue Code.

(c) It is determined that you received during the year of 1946 income in the amount of $100,963.99 which you did not include in the return you filed. Therefore, this $100,963.99 is held to be taxable to you under the provisions of sections 22, 41 and 42 of the Internal Revenue Code.

(d) Due to the lack of substantiation, as required by section 54 of the Internal Revenue Code, of your cost basis of a pool hall shown on your return as rental property, it is held that the $200.00, which was claimed as alleged depreciation expense, does not qualify under section 23 (l) and 23(n) of the Internal Revenue Code as a deduction.

(e) It has been determined that you were a member of the partnership of the Elgin Acceptance Company during the year of 1946 and that from this partnership you realized income in the amount of $4,283.64 which you failed to include in your 1946 return. It is held that this $4,283.64 is taxable to you in accordance with the provisions of sections 22(a) and 182 of the Internal Revenue Code and regulations issued thereunder.

(f) It is determined that under the provisions of sections 166 and 167 of the Internal Revenue Code you realized income in the amount of $1,350.00 during 1946 from the Sam Achilli and Earl H. Groner Trust No. 127 and it is held that this $1,350.00 constitutes taxable income to you under the provisions of section 22(a) of the Internal Revenue Code.

Under the provisions of section 25 of the Internal Revenue Code you are allowed an additional exemption for normal tax and surtax purposes.

175a COMPUTATION OF ALTERNATIVE TAX

Net income adjusted	$132,421.95
Minus: Excess of net long-term capital gain over net short-term capital loss	2,740.72
Ordinary net income	$129,681.23
Less: Exemption	1,500.00
Normal tax and surtax net income	$128,181.23
Tentative normal tax and surtax on $128,181.23	$ 92,401.29
Less: 5% of $92,401.29	4,620.06
Partial tax	$ 87,781.23
Plus: 50% of net long-term gain	1,370.36
Alternative tax	$ 89,151.59

COMPUTATION OF TAX

Net income adjusted	$132,421.95
Less: Exemption	1,500.00
Normal tax and surtax net income	$130,921.95
Tentative normal tax and surtax on $130,921.95	$ 94,840.53
Less: 5% of $94,840.53	4,742.03
Total normal tax and surtax	$ 90,098.50
Alternative tax from above	$ 89,151.59
Applicable income tax (lesser of two lines above)	$ 89,151.59
Correct income tax liability	$ 89,151.59
Income tax liability disclosed by return	2,780.17
Deficiency in income tax	$ 86,371.42
Penalty under Section 293(b) of the Internal Revenue Code, 50% of $86,371.42	$ 43,185.71

EXHIBIT B

176a U. S. TREASURY DEPARTMENT
Office of Internal Revenue Agent in Charge
Room 1100, Bankers Building
105 W. Adams Street
Chicago 3, Ill.
Mar 9 1951

Mr. Sam Achilli
732 Brook Street
Elgin, Illinois

Sir:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1947 discloses a deficiency of $93,754.52 and $46,877.26 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalty mentioned.

Within 90 days (not counting Saturday, Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States, at its principal address, Washington 4, D. C. for a redetermination of the deficiency and penalty.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, Chicago 3, Illinois, for the attention of SN:IT. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and penalty, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Very truly yours,
Geo. J. Schoeneman,
Commissioner
By E. C. Wright
Internal Revenue Agent in Charge

Enclosures:
Statement
Form of Waiver
Form 1276
CTD:PC

177a

STATEMENT

Mr. Sam Achilli
732 Brook Street
Elgin, Illinois

Tax Liability for the Taxable Year Ended December 31, 1947

	Deficiency	Penalty
Income Tax	$93,754.52	$46,877.26

In making this determination of your income tax liability careful consideration has been given to the report of examination dated February 26, 1951.

The 50% penalty shown herein has been asserted in accordance with the provisions of Section 293(b) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return	$16,785.52
Unallowable deductions and additional income:	
(a) Income from rents	11,833.91
(b) Net capital gains	2,900.00
(c) Loss on joint venture in building house	1,385.29
(d) Other income	95,000.00
(e) Itemized deductions	9,663.40
(f) Income from partnership	3,293.28
(g) Income from Trust	1,350.00
Net income adjusted	$142,211.40

178a

EXPLANATION OF ADJUSTMENTS

(a) The amount of $11,833.91 was alleged on your return as expenses incurred in connection with income from rent and royalties. It is held that these purported expenses in the above stated amount are not allowable as deductions because there are no records as required by Section 54 of the Internal Revenue Code and Regulations issued thereunder to establish that this 11,$833.91, or any part thereof, is within the purview of any of the provisions of Section 23 of the Internal Revenue Code.

(b) Under the provisions of Sections 54, 111, 112,

113 and 117 of the Internal Revenue Code it has been determined that you realized a gain of $2,500.00 on the sale of your interest in a pool hall. It is held that the $400.00 alleged on your return as the net long term capital loss sustained on this sale, does not qualify as a deduction under any of the provisions of Section 23 of the Internal Revenue Code. Accordingly your income is increased $2,900.00 under the provisions of Section 22(a) of the Internal Revenue Code.

(c) A claimed deduction of $1,385.29, which was alleged as a loss incurred on a joint venture in building a house; is held to be unallowable inasmuch as there are no records as required by Section 54 of the Internal Revenue Code and Regulations issued thereunder to establish that a loss of any amount was sustained and if one was sustained that it is allowable as a deduction under any of the provisions of Section 23 of the Internal Revenue Code.

(d) It has been determined that you received income during the year of 1947 in the amount of $95,000.00 which was failed to include in your return and which is held to be taxable to you in accordance with the provisions of Sections 22(a), 41, and 42 of the Internal Revenue Code.

(e) Deductions in the amount of $9,663.40 are determined to be unallowable because there are no records as required by Section 54 of the Internal Revenue Code to substantiate that expenditures totaling the above amount were made, and if made, that such disbursements were made for items that qualify as deductions under any of the provisions of Section 23 of the Internal Revenue Code.

(f) It has been determined that you were a member of the partnership of the Elgin Acceptance Company during the year of 1947, and that from this partnership you realized income in the amount of $3,293.28 which you failed to include in your 1947 return. It is held that this $3,293.28 is taxable to you in accordance with the provisions of Sections 22(a) and 182 of the Internal Revenue Code and Regulations issued thereunder.

179a (g) It is determined under the provisions of Sections 166 and 167 of the Internal Revenue Code that you realized income in the amount of $1,350.00 is held that this $1,350.00 is taxable to you under the provisions of Section 22(a) of the Internal Revenue Code.

COMPUTATION OF TAX

Net income adjusted	$142,211.40
Less: Exemption	1,500.00
Normal tax and surtax net income	$140,711.40
Tentative normal tax and surtax on $140,711.40	$103,553.15
Less: 5% of $103,553.15	5,177.65
Total normal tax and surtax	$ 98,375.50
Correct income tax liability	$ 98,375.50
Income tax liability disclosed by return	$ 4,620.98
Deficiency in income tax	$ 93,754.52
Penalty under Sec. 293(b) of the Internal Revenue Code, 50% of $93,754.52,	$ 46,877.26.

180a

EXHIBIT C

SN:IT

U. S. TREASURY DEPARTMENT
Office of Internal Revenue Agent in Charge
Room 1100, Bankers Building
105 W. Adams Street
Chicago 3, Ill.
Jan 31 1952

Mr. Sam Achilli and
Mrs. Ruth Achilli
Husband and Wife
732 Brook Street
Elgin, Illinois

Sir and Madam:

You are advised that the determination of your income tax liability for the taxable year ended December 31, 1948, discloses a deficiency of $19,435.15 and $9,717.58 in penalty, as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency and penalty mentioned.

Within 90 days from the date of the mailing of this letter you may file a petition with The Tax Court of the United States at its principal address, Washington 4, D. C., for a redetermination of the deficiency and penalty. In counting the 90 days you may not exclude any day unless the 90th day is a Saturday, Sunday, or legal holiday in the District of Columbia, in which event that day is not counted as the 90th day. Otherwise Saturdays, Sundays,

and legal holidays are to be counted in computing the 90-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to this office for the attention of SN:IT. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency and penalty, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,
John B. Dunlap
Commissioner
By /s/ E. E. Wright
Internal Revenue Agent
in Charge

Enclosures:
Statement
Form 1276
Agreement Form.
MA:MDS

181a SN:IT STATEMENT

Mr. Sam Achilli and
Mrs. Ruth Achilli
Husband and Wife
732 Brook Street
Elgin, Illinois

Tax Liability for the Taxable Year Ended
December 31, 1948

	Deficiency	50% Penalty
Income Tax	$19,435.15	$9,717.58

In making this determination of your income tax liability, careful consideration has been given to the report of examination dated November 14, 1951.

The 50% penalty shown herein has been asserted in accordance with the provisions of section 293(b) of the Internal Revenue Code.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$34,053.12
Unallowable deductions and additional income:		
(a) Income from rents	$11,940.60	
(b) Income from trust	1,450.00	
(c) Other income	23,704.94	
(d) Net capital gain	833.60	37,929.14
Net income adjusted		$71,982.26

EXPLANATION OF ADJUSTMENTS

(a) The loss of $6,662.86 reported in your return from rents and royalties has been adjusted to a profit of $5,277.74 resulting in an addition to income of $11,940.60. The changes are as follows:

Excessive depreciation		$ 8,903.98
Depreciation allowed is computed as follows:		
Brick building—Cost $20,000.00, estimated life 40 years, depreciation allowable	$ 500.00	

(a) (cont'd)		
Brought forward	$ 500.00	$ 8,903.98
Night club (brick)—Cost $91,733.31, estimated life 50 years, depreciation allowable	1,834.66	
Night club equipment, cost $10,119.82, estimated life 15 years, depreciation allowable	674.60	
Oil well depletion, as claimed in return	33.00	
Total depreciation and depletion allowable	$ 3,042.26	
Claimed in return	11,946.24	
Excessive	$ 8,903.98	
Other expenses		3,036.62

Disallowed for lack of substantiation that the items contained therein constitute allowable deductions for 1948 under any of the provisions of section 23 of the Internal Revenue Code.	
Total deductions from rental income disallowed	$11,940.60

(b) Taxable income in 1948 was realized by you in the amount of $1,450.00 from the Sam Achilli and Earl H. Gromer Trust No. 127, a revocable trust. Your net income has been increased by this amount in accordance with the provisions of sections 22(a), 166, and 167 of the Internal Revenue Code.

(c) It has been determined that you received during the year 1948 income in the amount of $23,704.94 which you did not include in your return and which is taxable to you under the provisions of sections 22, 41, and 42 of the Internal Revenue Code. Accordingly, your net income has been increased by this amount.

(d) Long-term capital gain reported in your return in the amount of $1,930.26 (Schedule C $1,645.78 plus $284.48 from partnership share of Highland Motor Sales) has been increased to $2,763.86. The additional long-term capital gain of $833.60 was realized on the sale of the Red Lion stock, the cost of which was overstated in your return. Computation is as follows:

183a Mr. Sam Achilli and
Mrs. Ruth Achilli — Statement

(d) (cont'd)

Sales price	$5,894.85
Cost	3,006.00
Profit	$2,888.85
Long-term capital gain, 50% of $2,888.85	$1,444.43
Reported in your return, 50% of $1,221.67 ($5,894.85 less $4,673.18 alleged cost)	610.83
Additional	$ 833.60

COMPUTATION OF ALTERNATIVE TAX

Net income adjusted		$71,982.26
Minus: Excess of net long-term capital gain over net short-term capital loss		2,763.86
Ordinary net income		$69,218.40
Less: Exemptions		2,400.00
Balance normal tax and surtax net income		$66,818.40
Joint return: One-half of $66,818.40		$33,409.20
Tentative normal tax and surtax on $33,409.20		$15,375.98
Less: Tax reduction:		
17% of $ 400.00	$ 68.00	
12% of $14,975.98	1,797.11	
Total tax reduction		1,865.11
Partial tax		$13,510.87
Joint return: 2 x $13,510.87		$27,021.74
Plus: 50% of net long-term gain		1,381.93
Alternative tax		$28,403.67

184a Mr. Sam Achilli and Mrs. Ruth Achilli — Statement

COMPUTATION OF TAX

Net income adjusted		$71,982.26
Less: Exemptions		2,400.00
Income subject to tentative tax		$69,582.26
Joint return: One-half of $69,582.26		$34,791.13
Tentative tax on $34,791.13		$16,274.23
Less: Tax reduction:		
17% of $ 400.00	$ 68.00	
12% of $15,874.23	1,904.90	
Total tax reduction		1,972.90

Balance	$14,301.33
Joint return: 2 x $14,301.33	$28,602.66
Combined normal and surtax	$28,602.66
Alternative tax from above	$28,403.67
Correct income tax liability (lesser of above amounts)	$28,403.67
Income tax liability disclosed by return	8,968.52
Deficiency of income tax	$19,435.15
Penalty, 50% of $19,435.15	$ 9,717.58

185a

EXHIBIT D

THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 36819) * *

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, hereby certify the attached to be a true and correct copy of the Docket Entries of record in the above-entitled proceeding.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in the District of Columbia, this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

186a THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 36819) * *

I, John W. Kern, Chief Judge of The Tax Court of the United States, the same being an independent agency in the executive branch of the Government, do hereby certify that Victor S. Mersch is clerk of said Court and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 3rd day of November, 1954.

/s/ John W. Kern
Chief Judge.

(Seal)

187a THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 36819) * *

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that John W. Kern whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chief Judge of The Tax Court of the United States, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

188a DOCKET NO. 36819

Sam Achilli, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Appearances: For Petitioner: Herbert M. Hauptman, Esq. For Respondent: Harold H. Hart, Esq.

DOCKET ENTRIES

1951

Sept. 19—Petition received and filed. Taxpayer notified. Fee paid.

Sept. 19—Copy of petition served on General Counsel.

Sept. 19—Entry of appearance of Herbert M. Hauptman as counsel filed.

Nov. 16—Answer filed by General Counsel.

Nov. 16—Request for hearing in Chicago filed by General Counsel.

Nov. 20—Notice issued placing proceeding on Chicago calendar. Service of answer and request made.

1952

Jan. 2—Reply to answer filed by petitioner. Copy served.

Aug. 25—Hearing set October 13, 1952, Chicago.

Sept. 26—Motion to continue generally filed by General Counsel.

Sept. 29—Hearing set October 13, 1952, Chicago, Illinois.

Oct. 13—Hearing had before Judge Raum, on respondent's motion for continuance, motion granted.

189a EXHIBIT E

THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 34923) * *

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, hereby certify the attached to be a true and correct copy of the Docket Entries of record in the above-entitled proceeding.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in the District of Columbia, this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

190a THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 34923) * *

I, John W. Kern, Chief Judge of The Tax Court of the United States, the same being an independent agency in the executive branch of the Government, do hereby certify that Victor S. Mersch is clerk of said Court and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 3rd day of November, 1954.

/s/ John W. Kern
Chief Judge.

(Seal)

191a THE TAX COURT OF THE UNITED STATES
Washington

(Caption—Docket No. 34923)

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that John W. Kern whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chief Judge of The Tax Court of the United States, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

192a DOCKET NO. 34923

Sam Achilli, Petitioner, v. Commissioner of Internal Revenue, Respondent.

Appearances: For Petitioner: Herbert M. Hauptman, Esq. For Respondent: Harold H. Hart, Esq.

DOCKET ENTRIES

1951

Jun. 6—Petition received and filed. Taxpayer notified. Fee paid.

Jun. 7—Copy of petition served on General Counsel.

Jun. 6—Appearance of Herbert M. Hauptman as counsel filed. Copy served.

Aug. 6—Answer filed by General Counsel.

Aug. 6—Request for hearing in Chicago filed by General Counsel.

Aug. 15—Notice issued placing proceeding on Chicago calendar. Service of answer and request made.

Sept. 19—Reply to answer filed by taxpayer. Copy served.

1952

Aug. 25—Hearing set October 13, 1952; Chicago.

Sept. 26—Motion for continuance generally filed by General Counsel.

Sept. 29—Hearing set October 13, 1952, Chicago, Illinois.

Oct. 13—Hearing had before Judge Raum, on respondent's motion for continuance, motion granted.

193a EXHIBIT F

THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 40481) * *

CERTIFICATE

I, Victor S. Mersch, Clerk of The Tax Court of the United States, hereby certify the attached to be a true and correct copy of the Docket Entries of record in the above-entitled proceeding.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in the District of Columbia, this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

194a THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 40481) * *

I, John W. Kern, Chief Judge of The Tax Court of the United States, the same being an independent agency in the executive branch of the Government, do hereby certify that Victor S. Mersch is clerk of said Court and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law and by the proper officer.

In testimony whereof, I do hereby subscribe my name at Washington, D. C., this 3rd day of November, 1954.

/s/ John W. Kern
Chief Judge.

(Seal)

195a THE TAX COURT OF THE UNITED STATES
Washington

* * (Caption—Docket No. 40481) * *

I, Victor S. Mersch, clerk of The Tax Court of the United States, do hereby certify that John W. Kern whose name is subscribed to the foregoing certificate, was at the time of subscribing the same Chief Judge of The Tax Court of the United States, duly commissioned and qualified and that full faith and credit are due to all his official acts as such.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, D. C., this 3rd day of November, 1954.

/s/ Victor S. Mersch
Clerk,
The Tax Court of the
United States.

(Seal)

196a DOCKET NO. 40481

Sam Achilli and Ruth Achilli, (Husband and Wife), Petitioners, v. Commissioner of Internal Revenue, Respondent.

Appearances: For Petitioner: Herbert M. Hauptman, Esq. For Respondent:

DOCKET ENTRIES

1952

Apr. 29—Petition received and filed. Taxpayer notified. Fee paid.

May 1—Copy of petition served on General Counsel.

Apr. 29—Entry of appearance of Herbert M. Hauptman as counsel filed.

Jun. 27—Answer filed by General Counsel.

Jun. 27—Request for hearing in Chicago filed by General Counsel.

Jul. 7—Notice issued placing proceeding on Chicago, Illinois calendar. Service of answer and request made.
Aug. 13—Reply filed by taxpayer. Copy served.

197a And on the same day, to wit, on the 8th day of November, 1954, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

198a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This cause this day being called for trial comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the defendant having heretofore interposed a plea of not guilty to the indictment filed herein against him for his defense puts himself upon the country and it is

Ordered that a Jury come whereupon come a Jury of Twelve good and lawful men and women, to-wit:

Frank Martin Jalovec	Erma E. Baer
Josephine Denham	Patrick J. Tunney
Paul J. Senkpiel	Leslie L. Railsback
Robert M. Barnett	Theresa M. Cook
Emmett W. Sellers	Ethel R. O'Connor
Sidney Virginia Muhlhauser	Harry A. Jacobson

who are duly elected, empaneled and sworn well and truly to try the issues joined herein and a true deliverance to make between the United States of America, plaintiff, and Sam Achilli, defendant, and a true verdict to render according to the law and evidence and trial of this cause proceeds and at the close of the Government's opening statements the defendant by his counsel moves for judgment of acquittal and the Court having heard the arguments of counsel and being fully advised it is,

Ordered that in addition to the regular Jury that two persons be called and empaneled and to sit as Alternate Jurors and thereupon come Rosetta Brown and Mildred M. Carey who are duly elected, empaneled and sworn as Alternate Jurors and trial of this cause proceeds and the

Government defers further opening statements and the defendant defers opening statements during the hearing of evidence on behalf of the Government the hour of adjournment having arrived it is

Further Ordered that the Jury and Alternate Jurors be permitted to separate and that this cause be and the same is hereby adjourned until November 9, 1954, for further trial.

199a And afterwards, to wit, on the 18th day of November, 1954 being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

200a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and during the hearing of further evidence on behalf of the Government the defendant by his counsel renews his motion for the withdrawal of a Juror and to declare a mistrial and the Court having heard arguments of counsel in part on said motion it is Ordered that the Jury and Alternate Jurors be permitted to separate and that this cause be and the same is hereby adjourned until November 22, 1954.

201a And afterwards, to wit, on the 22nd day of November, 1954, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

202a

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 53 CR 154)

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and renews his motion for judgment of acquittal or in the alternative for the withdrawal of a jury and declaration of a mistrial and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that the motion for judgment of acquittal be and the same is hereby denied and that the defendant's motion to declare a mistrial be and the same is hereby granted therefore it is

Ordered by the Court that a Juror be and is hereby withdrawn and a mistrial declared and that this cause be and the same is hereby reset for trial on April 11, 1955

203a And on the same day, to wit, the 22nd day of November, 1954 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment Of Acquittal Or In Alternative For Withdrawal Of a Juror And Declaration Of A Mistrial in words and figures following, to wit:

204a

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 53 CR 154)

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

or in alternative

FOR WITHDRAWAL OF A JUROR AND DECLARATION OF A MISTRIAL

And now comes the defendant, Sam Achilli, and renews his motion that the Court will order the entry of a Judgment of Acquittal on all three counts of the indictment, upon the grounds that:

Whereas, the defendant has heretofore placed before the Court the determination of the Commissioner of

Internal Revenue, determining the income of the defendant for each of the years 1946, 1947 and 1948 by making income and deduction adjustments to the income reported; and

Whereas, the evidence so far adduced by the prosecution through scores of witnesses clearly demonstrates that the income of the defendant can be determined by adjustments, if any there need be, to the income reported; and

205a Whereas, by such evidence the prosecution has shown that recourse to the net worth method is not necessary to clearly reflect the income; and

Whereas, the prosecution restricted to the net worth method, by the evidence it has adduced is precluded from adducing evidence respecting net worth;

Therefore, the prosecution must fail for lack of proof and this Motion should be granted.

ALTERNATIVE

Should the Court deny the motion for Judgment of Acquittal; then, in that event the defendant, Sam Achilli, renews his motion for the Withdrawal of a Juror and the Declaration of a Mistrial on the grounds that:

Prejudicial error was committed by the prosecution in extracting from an involuntary witness the evidence that the defendant had been in prison and was on parole in 1938; and

The defendant will, in the absence of the granting of this motion, be denied a fair trial.

Therefore, it is respectfully prayed that the Motion for Judgment of Acquittal be granted; or, in the alternative the Motion for Withdrawal of a Juror and Declaration of a Mistrial be granted.

/s/ C. J. Batter
Carl J. Batter
/s/ E. A. Ferrari
E. A. Ferrari

"Defendant's Memorandum Attached But Not Copied):

206a And afterwards, to wit, on the 2nd day of March, 1955, being one of the days of the regular February term of said Court, in the record of proceedings thereof,

in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

207a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This cause coming on to set a date for hearing on the defendant's motions to dismiss or suppress certain evidence comes the United States by the United States Attorney comes also the defendant by his counsel and the Court having heard the arguments of counsel and being fully advised it is

Ordered that leave to the defendants to file both motions be and the same is hereby denied

208a And afterwards on, to wit, the 17th day of March, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion To Reconsider Denial Of Defendant's Motions To Dismiss Or Suppress Certain Evidence And Amendment To Motion To Suppress in words and figures following, to wit:

209a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

MOTION TO RECONSIDER DENIAL OF DEFENDANT'S MOTIONS TO DISMISS CERTAIN EVIDENCE AND AMENDMENT TO MOTION TO SUPPRESS

Comes Now, the defendant, Sam Achilli, by his counsel Carl J. Batter and Moves the Court to:

Reconsider its denial on March 3, 1955 of the defendant's motions to dismiss the indictment or in the alternative to suppress certain evidence; and

The Motion to Suppress is hereby amended by adding thereto the affidavit of the defendant; and

To hear argument and consider briefs thereon.

Gives As Reasons Therefore:

Respecting the motion to dismiss;

That, due to the late entry of present counsel into the case the defendant has at no time had an opportunity to fully argue the questions; and

That, counsel has prepared, and is delivering this date through the Secretary to your Honor, a brief comprising twenty-seven pages, that the Court should consider, and hear argument on before disposing of the question of dismissing the indictment; and

210a That, said brief cites three Supreme Court cases, not heretofore brought to the attention of the Court; that the defendant believes entitles him to the relief sought, and

That, Lucas *v.* American Code Co. (280 U.S. 445, 449) quoted in part in defendant's brief (p. 18) deals with the subject matter of the motion and in discussing the issue of methods of determining net income employed by the Commissioner of Internal Revenue states:

> "And the direction that net income be computed according to the method of accounting regularly employed by the taxpayer is expressly limited to cases where the Commissioner believes that the accounts clearly reflect the net income. Much latitude for discretion is thus given to the administrative board charged with the duty of enforcing the act. Its interpretation of the statute and the practice adopted by it should not be interfered with unless clearly unlawful." (Underscoring supplied.)

That, in Brown *v.* Helvering (291 U.S. 193) the Supreme Court, citing Lucas *v.* American Code Co. (supra) (see page 18, 19 our brief) discussing the same subject stated:

> "It is not the province of the Court to weigh and determine the relative merits of systems of accounting."

That, in Morgan *v.* U. S. (298 U.S. 468, 304 U.S. 1, and 307 U.S. 183) the Supreme Court in dealing with the exercise of power has under similar circumstances, set up a rule of law, that would seem to require a decision in favor of the defendant.

Wherefore it is prayed the Court will hear argument, consider the brief on this most important subject, and grant the relief sought.

Respecting the motion to suppress:

That, this motion is grounded on Rule 41,(e) of the Federal Rules of Criminal Procedure; and

211a That, the property was illegally seized without warrant; and

That, there is attached hereto the affidavit of the defendant respecting the circumstances under which his records were made available to the Internal Revenue Service; and

That, Counsel has prepared, and is delivering this date, through the Secretary to your Honor a brief on the subject; and

That, witnesses will be called, the Court permitting, in order to place before the Court all the facts necessary to rule upon the merits of the motion; and

That, subpoenas must issue for the attendance of adverse witnesses and the production of manuals of instructions at the hearing, if the Court will grant one in order to establish that the defendant did not voluntarily waive his Constitutional rights and privileges.

That, the procedure sought to obtain relief is in conformity with the method employed by the United States District Court for the Southern District of New York in the case of U. S. *v.* Isidor Walrich, decided February 8, 1955 and reported on 1955 Prentice-Hall Federal Tax Service at paragraph 72, 432.

Wherefore, it is prayed the Court will hear argument, and thereafter set the issue for hearing and the attendance of witnesses, in order that the Court may be fully informed in the premises, and reach a decision based on the evidence adduced.

/s/ C. J. Batter
Carl J. Batter
Counsel for Defendant.

212a Copy of the foregoing motion:
Mailed To:
Vincent Russo, Esq., Special Assistant to the Attorney General, Department of Justice, Washington, D. C.
Delivered To:
Hon. Robert Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, Post Office Building, Clark & Adams St., Chicago, Illinois, on the 17th day of March, 1955.
E. A. Ferrari

213a AFFIDAVIT

Sam Achilli, of 732 Brook St., Elgin, Illinois, being duly sworn, deposes and says:

That, from January 1st, 1945 until July 1951 he and Earl H. Gromer conducted an automobile sales business in the city of Elgin, Illinois, as co-partners under the name of Highland Motor Sales; and

That, some time during the year 1948 or 1949 two men appeared at deponents place of business, and after identifying themselves as Mr. Weber and Mr. Hall stated they were from the Internal Revenue Bureau and wanted to check his books; and

That, deponent advised Messrs. Weber and Hall that he did not have the books in his possession; that Mr. Gromer. his partner had them; and

That, thereupon, deponent telephoned to Mr. Gromer, advised him of the presence of Messrs. Weber and Hall, and said Gromer directed deponent to send the agents to his, Gromer's office. This deponent did.

That, about a week later, the said Gromer brought the books and records back to the Highland Motor Sales premises, and Messrs. Weber and Hall appeared, and continued their examination; and

That, at no time did Mr. Weber advise your deponent that he was a Special Agent of the Internal Revenue Service and that his purpose was to procure proof of fraud to establish a criminal charge nor did he advise deponent of his Constitutional rights; and

That, the examination continued over a period of
214a two or three months; and

That, Weber discontinued his contacts with deponent, and one Cottington accompanied Hall in the continuance of the examination; and

That, that Cottington and Hall for several months continued to examine the books and records of the partnership; but at no time, not on his first arrival or any time thereafter did said Cottington inform your deponent that his purpose was to procure proof of fraud to establish a criminal charge nor did he advise deponent of his Constitutional rights; and

That, after about three or four months, Mr. Cottington ceased his visits to deponent's place of business; and

That, thereafter Mr. Weber resumed the examination with Mr. Hall, and

That, the foregoing examinations were not of a continuous nature, their being lapses from time to time; and

That, there did come a time prior to 1951 when Messrs. Hall and Weber did complete their examination; and

That, before the completion of such examination there was an occasion when one Perrillo, an Italian friend of deponent, who was an attorney, while on deponent's premises, noticed the presence of Messrs. Weber and Hall, inquired of deponent who they were, and upon being told they were Revenue Agents, advised deponent he had better be represented by Counsel; and

That, thereupon deponent informed the said Perrillo that Earl Gromer, was his partner, an accountant and a lawyer; nevertheless Perrillo advised deponent to retain separate Counsel; and

215a That, thereupon deponent did retain Perrillo, and the said Perrillo spoke to Mr. Weber and Mr. Hall and told them he represented deponent; and that when they were ready he would discuss the case with them; and

That, Perrillo did not succeed in having a conference with Weber or Hall until after the examination was completed; and deponent is informed and believes that one such conference did take place at the office of Internal Revenue in Elgin; and

That, deponent was not informed after such conference and at no time theretofore, that the purpose of the examination was to adduce proof of fraud to establish a criminal charge.

That, thereafter and before the death of Perrillo in February or March 1952, deponent was directed by Perrillo to attend a conference at the Internal Revenue offices in Chicago; and deponent did so, those present being a stenographer, Mr. Weber, Mr. Hall, Mr. Perrillo, Mr. Hauptman and deponent; and

That, as deponent recalls he was not sworn, but Mr. Weber began interrogating him respecting his name, his address, his age, his marital state, number of children and their ages, his business and whether he was engaged in any other business; and

That, at that point Mr. Perrillo inquired as to the nature of the examination stating that he understood the purpose of the meeting was to resolve issues; and

That, Mr. Weber informed Mr. Perrillo that he was not in a position to discuss the Government side of the case; and

That, Mr. Perrillo at that point said "You might as well sign off" and directed deponent to leave with him; and

216a That, before the Elgin meeting at Internal Revenue office above referred to and subsequent thereto Messrs. Weber and Hall from time to time, on perhaps twenty or thirty occasions called on deponent to check a particular item and would take information from the records and then leave; and

That, at no time during any of these short visits (twenty or thirty in number) did Mr. Weber disclose that he was a Special Agent, nor did either Messrs. Hall or Weber advise the petitioner that the purpose of such visits was to procure evidence to establish a criminal, nor did said Weber or Hall advise deponent of his constitutional rights.

Further deponent sayeth not

Sam Achilli

Sworn to and subscribed before
me this 17th day of March, 1955.

Joseph A. Izzo
(Seal) Notary Public

217a And afterwards, to wit, on the 7th day of April, 1955, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

218a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This day comes the United States Attorney comes also the defendant Sam Achilli by his counsel and enters his motion for leave to file and argue motion to dismiss and to suppress evidence and the Court being fully advised it is

Ordered that said motion be and the same is hereby denied

219a And afterwards on, to wit, the 22nd day of September, 1955 there was filed in the Clerk's office of said Court a certain Transcript Of Proceedings Had

In The Trial of the above-entitled cause on April 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28 and May 2, 3, 4, 5, 9, 10 and 11, 1955, Before The Honorable Win G. Knoch, District Judge, in words and figures following, to wit:

(The Above Transmitted Separately for Convenience in Seven (7) Volumes):

1 IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53-CR-154) * *

TRANSCRIPT OF PROCEEDINGS

had and testimony taken at the trial of the above-entitled cause before the Honorable Win G. Knoch, one of the Judges of said Court, and a jury, beginning on Monday, April 11, 1955, at ten o'clock a.m., in the United States Court House, Chicago, Illinois.

Present:

Hon. Herbert C. Brownell, Attorney General of the United States, by

Mr. Vincent P. Russo, Special Assistant to the Attorney General,

appeared for the United States of America;

Mr. Carl B. Batter, and

Mr. Frank J. Gagen, Jr.,

appeared for Defendant.

2-21 * * *

22 MR. BATTER: If your Honor please, I have here-
23 tofore made a motion to dismiss and motion to suppress evidence which have been denied by the Court, and I now renew those motions with the following amendments: The motion to suppress has no amendment, and I urge that with the full vigor I have heretofore urged in the briefs.

The motion to dismiss I amend to make it a motion for a judgment of acquittal on the grounds already advanced to the Court, and an amendment further amending that motion in this respect, that today for the first time the Government in its opening statement to the jury has made a complete about face, catches us completely by surprise, and depends upon a prosecution not heretofore advanced.

As recently as last Thursday when these motions were before the Court, and I quote from page 3 of the Government's brief, wherein they state:

"For whatever comfort the Defendant may derive from it, the Government has stated on several occasions before and now reiterates that proof to establish the guilt of the Defendant under the instant indictment will be made
24 by the increase in net worth plus non-deductible expenditures method of proof."

Now, this morning in counsel's statement to the jury it would seem as though he himself memorized the statement he made to the jury when this case was first tried last November, with the following additions—and I have asked the Reporter to hasten the transcript of this argument so we might have it before us.

Beginning on page 15 and continuing through pages 17 and 18, the Government now takes the position that it is going to prove the income tax fraud by specific items.

He states on page 17 of the record here:

". . . we will put on the stand a witness, a special agent, Mr. Weber, the gentleman sitting over here (indicating), sitting next to me, who will trace each of the transactions concerning which you have heard testimony through the books and records of Highland Motor Sales, and he will show you just how those transactions were recorded.
25 "He will show you the ones that appear on the books and records, those that appear on there in amounts less than the amounts for which they were sold, and those that were suppressed entirely from those books and records.

"He will testify concerning his examination of those books and he will tell you what he found and what he failed to find.

"Then through summaries Mr. Weber will prepare, he will point out to you the transactions that are suppressed entirely from the books and the income that was suppressed entirely from those books, and he will show you that in many instances the amounts that were recorded were substantially less than the amounts the witnesses testified they paid for those cars.

"In short, ladies and gentlemen, we will prove that Sam Achilli knowingly and wilfully attempted to evade and defeat his taxes by employing a scheme or device whereby he suppressed from his books and records transactions,
26 and that that scheme and device that he employed resulted in his attempt to defraud the Government."

27 Now, from there on again it is practically a repetition of the earlier statement, which is based on the

net worth theory, and we are in this position, your Honor: The prosecution by its present position says that it is going to prove, item by item, just what fraud was committed here, omissions, inclusions, differences and all of that, and then use the net worth method as corroboration.

Now, that is an entirely different procedure from using the net worth method as a primary method of proof, and a good deal of my argument in the briefs heretofore has been directed to the fact that in view of the action of the Commissioner, which to this day stands unchanged, of proceeding on the basis of specific items, and that he is the only authority charged by law who is permitted or able to change the method, that now the Government, according to its opening address this morning, is endeavoring to sneak in under this tent—

MR. RUSSO: I object to the word "sneak," if your Honor please.

MR. BATTER: I withdraw the word. The Government is coming in under that tent so they can prove their case by specific methods as well as the net worth as corroboration.

28 Now, I do not think anyone would dare venture that where it is possible to prove the income tax deficiency or fraud by specific methods, that the net worth method can be resorted to at all as a primary method of proof.

It can as corroboration, but this is a complete shift from using the net worth method as a primary method and now converting it to a corroborative method, and under those circumstances I think that the prosecution has varied its entire position and that it is too late to do so and that it cannot advance on the basis of specific proof, nor can it advance on the basis of net worth method because we have no bill of particulars in this case. It was denied by this Court over two years ago because the Government in their reply brief said that the defendant is already aware of how the Government intends to proceed—that is, by the net worth method—citing pages of the defendant's brief wherein he states that he had been informed by the Department of Justice and Department of Internal Revenue that the net worth method would be pursued.

I filed briefs with this Court pointing out that the Government, having committed itself to the net worth method just as firmly and as solidly as though it specifically
29 in a bill of particulars had said so, could not vary and deviate from it.

In the preceding trial, in the opening address to the jury, the Government Counsel completely relied on the net worth method. At the time we had the meeting in your office—or rather, your chambers—when my motion to dismiss was granted, the Government again took the position and tried to defend everything it had done as being consistent with and proper under the net worth method of proof, and as I say, more recently, as recently as last week, they again reiterated, for whatever comfort I may get from it, that they intended to proceed on the net worth basis.

Now we have a change this morning, and I think it puts them out of court and warrants this Court in granting the motion for acquittal.

MR. RUSSO: May it please the Court, the motion that Counsel for the defendant has filed was filed originally as a motion to dismiss. This morning he is changing the nomenclature, the denomination of the motion, from a motion to dismiss to a motion for a judgment of acquittal.

The motion to dismiss, as I understand it, was filed
30 pursuant to Rule 12 of the Federal Rules of Criminal Procedure. As the Court knows, Rule 12 abolished motions to quash, demurrers, pleas in abatement and pleas in bar.

31 Rule 12 didn't create any defenses or objections in addition to those that are specified in the Rule as they were known at the common law prior to the time of the enactment of those rules. As your Honor knows, the motion to quash raised only issues of law. By a motion to quash a Defendant could attack the drawing, summoning, impanelling and organization of a Grand Jury. They could attack the illegality of proceedings before the Grand Jury. They could attack the sufficiency of the indictment to state a cause of action.

Defendant's motion to dismiss, or his motions for acquittal, now purports to do none of those things.

The demurrer admitted the truth of all things well pleaded but challenged the sufficiency of the indictment to charge an offense and Defendant's alleged motions here don't purport to do any of those things.

A plea in bar was a plea by confession and avoidance in substance and raised defenses and objections such as the statute of limitations or former conviction or former acquittal. This alleged motion doesn't purport to do any
32 of those things.

A plea in abatement, as your Honor well knows, was one in which the pleading was required to be strictly accurate. It had to be concise and no averment could be supplied by intendment.

33 Conclusions of law could not be pleaded, relevance of facts could not be pleaded, but only facts that could be raised by the motion, which itself raised contested issues of facts and not of law, and on that there was a hearing before trial and that plea had to be verified. This alleged motion purports to do none of those things, so there is nothing before the Court then on the motion to dismiss that can be determined preliminarily by the Court without a trial of the general issue.

So much for the motion to dismiss.

On the motion for judgment of acquittal, Counsel is entirely premature because he says, anticipating that the Government is going to put on circumstantial evidence in the trial of this case, the Government is precluded from doing that by virtue of Section 41 of the Internal Revenue Code. That theory, as your Honor well knows, was excluded by the Supreme Court in a case decided December 6th of last year, in which the Court there said that Congress did not intend Section 41 to be a set of blinders which would prevent the Government from going beyond the self-serving declarations in a taxpayer's books.

In so far as the statement that Mr. Batter makes that I have changed my position as to method of proof is

34 concerned, he is entirely wrong. We have said before and I say again now before your Honor that we expect to proceed by the net worth method of proof and nothing that has been raised by Mr. Batter here or heretofore can be reached by any motions that he has filed in the case up until the present time.

MR. BATTER: If you. Honor please, the Government is bound by the statement it made to the jury this morning. That makes it very clear what he is going to do. It is a complete shift, a complete surprise.

I am surprised that Counsel has tried to argue that the rules don't help me instead of getting down to what he is really going to do.

Rule 12(b)1 provides for the raising by a motion of any defense or objection which is capable of determination without the trial of the general issue, which may be raised before the trial by motion. That was done in view of the commitment of the Government.

There is not a bill of particulars on paper, but we have had an equivalent of the bill of particulars in this case here and counsel's statement to the jury this morning is at complete variance with what the bill of particulars or its effective substitute provides. He comes here very clearly and says: "Mr. Weber, the gentleman sitting over here (indicating), sitting next to me, will trace each of the transactions concerning which we have heard testimony through the books and records of Highland Motor Sales, and will show you just how those transactions were recorded.

"He will show you the ones that appear on the books and records, those that appear on there in amounts less than the amounts for which they were sold, and those that were suppressed entirely from those books and records."

None of that was in the previous address.

Again quoting: "He will testify concerning his examination of those books and he will tell you what he found and what he failed to find.

"Then through summaries Mr. Weber will prepare, he will point out to you the transactions that are suppressed entirely from the books and the income that was suppressed entirely from those books, and he will show you that in many instances the amounts that were recorded were substantially less than the amounts the witnesses testified they paid for those cars."

That is not the net worth method, your Honor. That is a specific item of proof. Now this morning we have had a shift to the specific method.

MR. RUSSO: If your Honor please, you will recall that I told the jury that after we had shown these things we would ask them to find that the increase in net worth came from the suppressed items of income that would be shown by the appropriate books and records. There has been no change either in the Government's theory of proof nor the Government's statement to the jury this time over the last time as to what that method is going to be.

We told them we expect to prove the increase in the net worth by asking them to find that that increase came from the suppressed income of the partnership, the income that is not recorded in those books and records, the income that is not accounted for to his partner in the operation of that partnership. That, too, is in my address to the jury and Mr. Batter failed to call your Honor's attention to that.

There has been no shift in the Government's position.

There has been no change in this opening statement over the previous opening statement. Our position is the same.

THE COURT: Well, the motion of the defendant will be denied.

220a And to wit, on the 11th day of April, 1955, being one of the days of the regular April term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch District Judge, appears the following entry, to wit:

221a IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This cause this day being called for trial comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the defendant having heretofore interposed a plea of not guilty to the Indictment filed herein against him for his defense puts himself upon the country and it is

Ordered that a Jury come whereupon come a Jury of Twelve good and lawful men and women, to-wit:

Stephen F. Ochaba	Mary J. Nemmers
Thomas B. Ford	Ermil N. Thomas
Julia A. Calabrese	Florence J. Zwart
Carl H. Ehrhard	Meyer Goldstein
Florence A. Conrath	Christopher J. Davis
Helen Cardaras	Elsie M. Stewart

who are duly elected, empaneled and sworn well and truly to try the issues joined herein and a true deliverance to make between the United States of America, plaintiff, and Sam Achilli, defendant, and a true verdict to render according to the law and evidence and it is

Further Ordered that in addition to the regular Jury that two persons be called and empaneled and to sit as Alternate Jurors and thereupon come Ivan J. Yoder and Richard Kressmann who are duly elected, empaneled and sworn as Alternate Jurors No. 1 and No. 2, respectively and trial of this cause proceeds and at the close of the opening statements the defendant by his counsel renews his motions for dismissal and to suppress and amends said

motions by designating them as motion for acquittal and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that said motion be and the same is hereby denied the trial proceeds and during the hearing of evidence on behalf of the Government the hour of adjournment having arrived it is

Further Ordered that the Jury and Alternative Jurors be permitted to separate and that this cause be and the same is hereby adjourned until April 12, 1955 for trial

37 And thereupon the Government, to maintain the issues in its behalf, offered and introduced the following evidence, to-wit:

HELEN M. MINES, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q May we have your name, please, Miss Mines?
A Helen M. Mines.
Q Where do you live, Miss Mines?
A 7315 North Honore Street.
Q Is that in Chicago, Cook County, Illinois
A Chicago, Illinois.
38 Q What is your business or occupation?
A I am employed by the Director of Internal Revenue.
Q Where is that located?
A 22 West Madison Street.
Q Is that in Chicago?
A Yes.
Q How long have you been so employed?
A Thirty-six years.
Q What is your present capacity there?
A I am Chief of Control Accounts.
Q How long have you held that position?
A For ten years.
Q That is since about 1935?
A 1945.
Q 1945?
A Yes.
Q Will you please state briefly for the Court and Jury the duties that you have in connection with that position?

A Well, I am responsible for the recording of all tax assessments and payments made by individuals and corporations for all classes of taxes and for the submission and preparation of all accounting reports required by
39 the national office and the General Accounting Office.

Q Where is the office of the Director of Internal Revenue located?

A 22 West Madison Street, Chicago.

Q Is he the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois?

A He is.

Q What does the First Internal Revenue Collection District of Illinois comprise?

A Twenty-nine counties, northern counties.

Q Twenty-six?

A Twenty-six northern counties.

Q Northern counties. Does that include Kane County, Illinois?

A It does.

Q Was that true during the years 1946, 1947, and 1948?

A It was.

Q Where are the taxpayers who reside in the First Internal Revenue Collection District of Illinois required to file their income tax returns?

A With the Director of Internal Revenue, located
40 at 22 West Madison Street, Chicago, Illinois.

Q Chicago, Illinois?

A Chicago, Illinois.

Q How long has that been so?

A Well, to my knowledge, ever since 1913.

Q Are you familiar, Miss Mines, with the procedure that is followed in the Director's Office respecting the filing and processing of income tax returns?

A I am.

Q Will you please describe briefly to the Court and Jury just what that procedure is?

A Well, the mail is delivered to the cashier's division in gurneys, which are baskets on wheels, by the Post Office Department, and each gurney is labeled with the date that the returns were received before being opened, after which the returns, or the envelopes, are opened, the contents removed, and any remittance received with the return is pinned to the face of the return, after which the returns are stamped with the "Received" stamp, which indicates that the return was received by the Collector of Internal Revenue in Chicago, Illinois.

Then the checks are removed from the returns and
41 a remittance register is listed for the checks and money orders, and the documents register is listed on the returns, after which the returns were forwarded to the Income Tax Division where they were listed on bookkeeping machines, indicating the amount of tax to be assessed and the amount of payment.

MR. RUSSO: Mr. Reporter, will you mark these as Government's Exhibit 1, 2 and 3 for identification.

(The documents were thereupon marked Government's Exhibit 1, 2 and 3, respectively, for identification.)

MR. BATTER: May I see them before the witness sees them?

MR. RUSSO: Yes.

BY MR. RUSSO:

Q Miss Mines, I show you what purports to be the individual income tax return of Sam Achilli for the calendar year 1946. Will you examine it, please, and state where that return was filed?

A This return was filed with the Collector of Internal Revenue for the First District of Illinois as indicated
42 by the green button stamp in the upper right-hand corner of the return.

Q Where is the Collector's office located?

A It is located at 22 West Madison Street.

Q In Chicago?

A In Chicago, but during these years, the years involved, the office was located in the United States Court House.

Q When was it filed in your office?

A March—it looks like the 13th; March 13, 1947. There is a field stamp over the date.

Q Do you find any other marks that were placed on that return in the Collector's Office?

A Yes, the account number that is stamped in the upper right-hand corner of the return and "First District of Illinois" and the red check mark on the face of the return which indicates the return was mathematically verified.

Q The marks you have described are all the marks that appear on that return that were put on there in the Collector's Office?

A No.

Q Would you describe the others, please?

A Well, there is a red pencil figure on the left-hand
43 side of the tax to be assessed. That was put on by

typewriter at the time the taxpayer filed the return, showing that there was a correction of 2 cents, which makes a total of $2,780.17, instead of $2,780.15. There is also in red $115.15 which was put on in the Collector's Office and a black circle around that amount. That indicated that the taxpayer wanted that amount credited to his estimated tax for 1947.

Q Will you state, please, whether or not the taxpayer filed a declaration of estimated income for the year 1946?

A He did, as indicated on line 8(B) on the face of the return.

Q What amount was paid?

A $2,895.32.

Q Directing your attention to Government's Exhibit No. 1 for identification, is there any marking put on there by any person connected with the Office of the Collector which indicates the amount of tax to be assessed had not the estimated tax return been filed and paid?

A Yes, the red figure, in the amount of $2,780.17.

Q Was that marking placed on there in the regular
44 course of business?

A It was.

Q Was it the regular course of business to put such markings on there?

A It was.

Q Now, Miss Mines, I show you Government's Exhibit No. 2 for identification, purporting to be the income tax return of Sam Achilli for the calendar year 1947, and ask you to examine it and state where it was filed.

A It was filed with the Collector of Internal Revenue for the First District of Illinois on March the 15th, 1948, as indicated by the green button stamp in the upper right-hand corner of the return.

Q Do you now find on Government's Exhibit No. 2 for identification markings similar to those you described in connection with Exhibit 1, Government's Exhibit No. 1 for identification, which were placed on there in the Collector's Office?

A I did.

Q Will you state, please, whether or not the taxpayer filed a declaration of estimated tax for the calendar year of 1947?

A He did, as indicated by line 8(B) on the face of
45 the return.

Q Will you state, please, whether there were any

payments made by the taxpayer on his 1946 declaration of estimated tax?

A There was.

Q What was the amount?

A $5,715.17.

Q Now, directing your attention to Government's Exhibit No. 2 for identification, is there any marking put on there by anyone connected with the Collector's Office which indicates the amount of tax to be assessed had not the estimated tax return been filed?

A No, there is not. The amount of tax was shown by the taxpayer when the return was typed.

Q What was the amount?

A $4,620.98.

Q Is this marking you have described put there in the regular course of business?

A It is.

Q And is it the regular course of business to put such marking on those returns?

A It is.

Q In the Collector's Office?

46 A It is.

Q What does that marking indicate the amount was of the tax to be assessed against the taxpayer?

A The amount of $4,620.98.

Q Was that the amount of income taxes reported and paid by the taxpayer on the basis of the net taxable income reported on that return?

A Well, the net taxable income amounted to $4,620.98 but since the taxpayer filed an estimated tax and made payments of $5,715.17 there was an overpayment of tax for the year 1947 in the amount of $1,094.19, as indicated by the black circle around the amount.

Q In connection with that sum, $1,094.19, was there any request made in the return by the taxpayer as to the disposition of that overpayment?

A There was. The taxpayer elected to have the overpayment credited to his estimated tax for the year 1948.

47 Q Now, Miss Mines, I show you Government's Exhibit 3 for identification.

A Yes.

Q I will ask you to examine it and state, please, where that return was filed.

A This return was filed with the Director of Internal Revenue for the First District of Illinois as indicated by

the green button stamp on the upper right-hand corner of the return.

Q When was it filed?

A On March 15th, 1949.

Q Will you state please whether or not the taxpayer filed a declaration of estimated tax for the year 1948?

A He did, as indicated by line 8(b) on the face of the return.

Q Were there any payments made by the taxpayer on that declaration of estimated tax?

A There were.

Q In what amounts?

A In the amount of $5,794.19.

Q Now, was the amount paid by the taxpayer on the Declaration of Estimated Tax for the calendar year 1948 sufficient to satisfy the taxpayer's income tax liability
48 for that year?

A No.

Q Was there a deficiency?

A There was.

Q In what amount?

A In the amount of $3,174.33.

Q Is there any marking on Government's Exhibit 3 for identification indicating whether or not any payment accompanied that return?

A There is, as indicated by the blue pencil marking in the upper right-hand corner of the return.

Q Was that marking put on there in the regular course of business?

A It was.

Q And it is a regular course of business to put such markings on that return?

A It is.

Q What does that marking indicate?

A That marking indicates that the taxpayer made a remittance by an out of town check in the amount of $3,174.33 at the time he filed his return.

Q So that the total of the payment made on the taxpayer's Declaration of Estimated Tax for 1948—I be-
49 lieve you said that was $5,794.19?

A That is correct.

Q (Continuing)—plus the amount of payment that accompanied that return, which I believe you said is $3,174.33,

A That is correct.

Q (Continuing)—reflects the total amount of tax paid by the taxpayer on that return, is that correct?

A It is.

Q And what does that total?

A $8,968.52.

Q Directing your attention to Government's Exhibit 3 for identification, to the stamp about the middle of the page, is there anything on there that indicates the date on which payment was received?

A The green stamp in the upper right-hand corner of the return indicates the date that the return was received and the date that the payment was made.

The purple stamp on the face of the return is the date that the money was deposited in the bank.

50 Q Now, will you look at page 3 of Government's Exhibit 3 for identification, please.

A Yes.

Q There are markings on that page, are there?

A There are

Q What markings are there?

A There are red check marks.

Q Were those marks put on there in the Collector's Office?

A They were.

Q In the regular course of business?

A Yes.

Q Directing your attention to Government's Exhibit 2 for identification, the last page thereof, are there any markings on these that were placed on there in the Collector's Office?

A There are.

Q Were they put on there in the regular course of business?

A They were.

Q And was it the regular course of business to put those markings on there?

A It was.

Q Now, I direct your attention to page 3 of Gov-
51 ernment's Exhibit 1 for identification.

A Yes.

Q Are there any markings on that page that were put on there in the Collector's Office?

A There are.

Q Will you explain the markings that were placed on there in the Collector's Office, Miss Mines?

A There are red check marks and red X's, which indicates that the return was mathematically verified. Where there is a red check mark it indicates the amount listed thereon is the correct amount. Where there is an X, the correct amount is written in red pencil to the side of the typewritten figures.

Q Were there any corrections made in the Collector's Office in connection with this return?

A There were.

Q Will you tell the Court and Jury what those corrections were?

A Well, on line 6 the typewritten figure was in the amount of $2,926.47, and the red figure which is put on in the Collector's Office is in the amount of $2,926.50.

52 Q What does that indicate, if anything?

A That indicates that there was a 3-cent error in the typewritten figures.

Q Was that an error in computation?

A It was.

Q What other corrections are on there?

A. On line 7 there is a correction in the amount of one cent. The amount typed in was $146.32 and the red figures placed on the return by the Collector's Office was $146.33.

Q Now, is there any other correction on there?

A There is. On line 8 the typewritten figures disclose the amount of $2,780.15, and the red figure placed on the return in the Collector's Office is $2,780.17.

53 MR. RUSSO: Mr. Reporter, will you mark this as Government's Exhibit 4 for identification, please.

(The document was thereupon marked Government's Exhibit 4 for identification.)

MR. RUSSO: Will you mark this as Government's Exhibit 5 for identification, please.

(The document was thereupon marked Government's Exhibit 5 for identification.)

MR. RUSSO: Will you mark this as Government's Exhibit 6 for identification, please.

(The document was thereupon marked Government's Exhibit 6 for identification.)

BY MR. RUSSO:

Q Now, Miss Mines, I show you Government's Exhibit No. 4 for identification.

MR. BATTER: May I see them?

MR. RUSSO: She has not identified them yet. I do not

think you are entitled to it, but as a matter of courtesy I will show them to you now.

54 MR. BATTER: I think I have that right.

MR. RUSSO: You don't either; not yet.

MR. BATTER: Have all three of these been marked as Government's Exhibit 4?

MR. RUSSO: 4, 5 and 6. He used the same numbers as before.

MR. BATTER: Your Honor, I object to the witness being interrogated about any one of these four exhibits for identification, Government's Exhibits 4, 5 and 6.

Directing my attention first to Exhibit No. 4, it is signed by Earl H. Gromer. It does not bear the taxpayer's signature, and in no way at all is binding upon him nor does it commit him to anything.

With respect to No. 5, that return is signed by Earl H. Gromer and is signed as being prepared by William W. Brady of Gromer & Brady. It does not bear the taxpayer's signature and is in no manner binding upon him. I should say "defendant" when I say "taxpayer."

Directing your attention to Government's Exhibit 6 for identification, that is signed by Earl H. Gromer and

55 is in no manner binding upon the defendant.

MR. RUSSO: May it please the Court, the defense objection merely goes to the order of proof.

MR. BATTER: The objection goes to the document.

MR. RUSSO: It will be connected up later on, if your Honor please.

MR. BATTER: You cannot connect up and bind the defendant to anything he has not signed, and that definitely in one instance particularly states it was prepared by someone else.

MR. RUSSO: That remains to be seen by the evidence that is adduced, if your Honor please.

THE COURT: Well, the witness may answer. We will withhold our ruling on the admission of them, however.

BY MR. RUSSO:

Q Now, Miss Mines, I hand you Government's Exhibit 4 for identification, which purports to be the partnership income tax return for the calendar year 1946 of Sam

56 Achilli and Earl H. Gromer doing business as Highland Motor Sales, and ask you to examine it and state when and where it was filed.

A It was filed with the Collector of Internal Revenue for the First District of Illinois.

Q When?
A On March 6th, 1947.
MR. BATTER: If your Honor please, may I have a running objection to all the testimony with respect to those exhibits?
THE COURT: It may be so understood.
BY MR. RUSSO:
Q Now, I show you Government's Exhibit 5 for identification, Miss Mines, and I will ask you to examine that.
A Yes.
Q That purports to be the partnership return of income for the calendar year 1947 of Sam Achilli and Earl H. Gromer doing business as Highland Motor Sales. I ask you to examine that and state when and where it was filed.
A It was filed with the Collector of Internal Revenue for the First District of Illinois on March 15, 1948.
57 Q Now, I show you Government's Exhibit No. 6 for identification, which purports to be a partnership return of income of Earl H. Gromer and Sam Achilli doing business as Highland Motor Sales.
A Yes.
Q I ask you to state, please, when and where that return was filed.
A It was filed with the Collector of Internal Revenue for the First District of Illinois on March 14, 1949.
Q How do you know that those were filed as you testified they were filed, Miss Mines?
A By the green button stamp in the upper right-hand corner of the returns.
Q That is, on each of the three?
A Yes.
Q Government's Exhibits 4, 5 and 6 for identification?
A It is. For the year 1948 the stamp is rather blurred and the year does not appear. However, had it been filed in another year besides 1949, there would have been black pencil figures put in to indicate it was filed a year later.
Q So you know it was filed on March 14, 1949?
58 A Yes.
MR. RUSSO: Mr. Reporter, will you mark this as Government's Exhibit 7 for identification, please.
(The document was thereupon marked Government's Exhibit 7 for identification.)
MR. RUSSO: This will be No. 8.
(The document was thereupon marked Government's Exhibit 8 for identification.)

MR. RUSSO: And will you mark this No. 9, please?

(The document was thereupon marked Government's Exhibit 9 for identification.)

MR. BATTER: May I see those, Mr. Russo?

MR. RUSSO: I would like to have them identified, if your Honor please, before I show them to him. I do not think he is entitled to see them just now.

MR. BATTER: I would like to see them. I am entitled to see them if they are going to be handed to the witness.

59 THE COURT: I do not presume it makes too much difference. You may show them to counsel.

MR. BATTER: Your Honor, I object to the witness being interrogated about any part of these three exhibits marked for identification excepting pages 4 and 5 of No. 7.

My grounds are these: No. 8 relates to one Ruth Bohlin for the years 1930 to 1945. It has nothing to do with the defendant nor with the years we are considering here.

No. 9 relates to Ruth Achilli for the years 1930 to 1942 and the year 1945, and does not involve this defendant at all.

No. 7 covers the years 1930 to 1941 on page 1, 1942 and 1943 on page 2 and 1944 on page 3, which are definitely objected to.

With respect to pages 4 and 5 which cover the years that are before the Court, I think it is perfectly all right to interrogate the witness.

THE COURT: What have you to say, sir?

MR. RUSSO: With respect to the certificate of Assessment relating to Ruth Bohlin, if your Honor please,

60 the evidence will show that Ruth Bohlin is the maiden name of Mrs. Ruth Achilli.

61 With respect to the one entitled "Mrs. Ruth Achilli" and to the other one involving Sam Achilli himself referring to years prior to those in the indictment, the Government offers to prove that in making out its case by the net worth method of proof, the Government must negate as much as possible any contention that the income which he is charged with having evaded taxes on in the years under consideration were not attributable to income in prior years, and that proof goes to negative prior accumulated income.

MR. BATTER: If your Honor please, a list of assessments does not prove anything of the kind.

MR. RUSSO: That is for the jury to determine, if your Honor please.

MR. BATTER: The returns are the best evidence of that.

THE COURT: Well, I am going to permit her to identify them, but as far as the admission into evidence is concerned, I will withhold my ruling on that.

62 BY MR. RUSSO:

Q Miss Mines, I show you Government's Exhibit No. 7 for identification, purporting to be a Certificate of Assessments and Payments.

MR. BATTER: May I have a running objection to the testimony with respect to these Exhibits?

THE COURT: I do not think it should be divulged what the contents are.

MR. RUSSO: She can testify to what the records in her office show, if your Honor please.

MR. BATTER: Not with respect to something that has nothing to do with this case.

MR. RUSSO: Well, that remains to be seen, whether it is or not, if your Honor please. I have not asked any questions, yet.

THE COURT: Proceed with the examination.

BY MR. RUSSO:

Q Miss Mines, directing your attention to Government's Exhibit 7 for identification consisting of four pages—

63 is that correct?

A Yes.

Q (Continuing)—and purporting to be a Certificate of Assessments and Payments, I ask you whether it is a transcript of records kept in the Office of the Director of Internal Revenue covering the account of Sam Achilli in respect to income taxes paid by him in the years 1930 through 1945 inclusive?

A It is.

Q What do the records in the Office of the Collector of Internal Revenue show—

MR. BATTER: Just a minute. I object, your Honor, to any testimony with respect to the contents.

THE COURT: Objection sustained. I think the document speaks for itself now.

BY MR. RUSSO:

Q Directing your attention to the year 1930, do the records of the Collector show whether or not in 1930 Sam Achilli filed an income tax return?

MR. BATTER: I object, your Honor. The record speaks for itself.

64 MR. RUSSO: If your Honor please, your Honor examined the exhibits that we have here, Government's Exhibits 7, 8 and 9, and noticed that they carry certain symbols. The symbols themselves are not understandable by any person by mere examination of them.

It takes an expert from the Office of the Collector to explain what those symbols are, what they relate to and what the records in the Collector's Office show. I think under those circumstances this witness should be permitted to testify.

MR. BATTER: I think if your Honor will glance at the year 1930 and what is on that document, you would have no difficulty in understanding it at all.

THE COURT: Let's take a look at it, please.

(Mr. Russo handed a document to the Court.)

MR. RUSSO: By permitting the witness to answer, if your Honor please, it will preclude the necessity of my reading it to the jury, that portion of it.

65 THE COURT: I think the document speaks for itself, counsel.

BY MR. RUSSO:

Q I show you Government's Exhibit 8 for identification which purports to be a Certificate of Assessments and payments of Ruth Bohlin for the years 1930 to 1945 inclusive, and ask you to examine it and state if it is a transcript of records kept in the Office of the Collector of Internal Revenue covering the account of Ruth Bohlin for that period?

MR. BATTER: I object on the ground, your Honor, that Ruth Bohlin has nothing to do with this case.

THE COURT: Objection overruled. She may answer.

A It is.

BY MR. RUSSO:

Q What does Government's Exhibit 8 for identification disclose with reference to her filing history for the years 1930 to 1945?

MR. BATTER: I object to that, your Honor. The document speaks for itself.

66 THE COURT: Objection sustained.

BY MR. RUSSO:

Q I show you Government's Exhibit No. 9 for identification, Miss Mines, purporting to be a Certificate of Assessments and Payments of Ruth Achilli for the years 1930 to

1942 inclusive, and ask you if that is a record kept in the Office of the Collector of Internal Revenue?

A It is.

Q What does it reflect with respect to her income tax filing history for the years 1930 to 1942?

MR. BATTER: I object to that, your Honor. The document speaks for itself.

THE COURT: Objection sustained.

MR. RUSSO: At this time I offer in evidence, if your Honor please, Government's Exhibits 1, 2, 3, 4, 5, 6, 7, 8 and 9 for identification as Government's Exhibits 1 through 9 inclusive.

MR. BATTER: If the Court please, with respect to No. 1, No. 2 and No. 3, the tax returns of Mr. Achilli, there
67 is no objection at all to them.

THE COURT: They may be received in evidence, and the Court will withhold its ruling on the rest of them at the present time.

(The documents previously marked Government's Exhibits 1, 2 and 3 for identification, were thereupon received in evidence as Government's Exhibits 1, 2 and 3, respectively.)

BY MR. RUSSO:

Q Miss Mines, directing your attention to Government's Exhibit No. 7 for identification, will you examine it with respect to the year 1940 and state what it reflects with respect to the assessments and payments that were made by Sam Achilli in that year?

MR. BATTER: I object, your Honor. The document speaks for itself.

THE COURT: She may answer.

A It reflects that the income tax return as filed by Sam Achilli disclosed a tax liability in the amount of $42.76 which was paid on 3-15, 1941.

68 BY MR. RUSSO:

Q What does it reflect with reference to the year 1941?

A For the year 1941—

MR. BATTER: I object, your Honor.

THE COURT: The same ruling.

A For the year 1941 the income tax return disclosed a tax liability of $89.40 which was paid on March 16th, 1942.

BY MR. RUSSO:

Q Were any additional payments made during that year?

A There was an additional tax for the year 1941 in the amount of $483.65 plus $32.65 interest which was paid on May 5th, 1943, or a total amount of $516.30.

Q Now, directing your attention to the year 1942, were there any payments made in that year?

MR. BATTER: I object, your Honor.

THE COURT: She may answer.

A For the year 1942 the tax liability disclosed on the return was in the amount of $328.94. On March 13th, 1943, a payment was made in the amount of $82.23, and on June 10th, 1943, a payment was made in the amount of $82.23.

69 The rest of the tax, the other half of the tax, was abated due to the change in the tax law for the year 1943.

BY MR. RUSSO:

Q What does it show with respect to the year 1943-

MR. BATTER: The same objection.

THE COURT: The same ruling.

A For the year 1943 a joint return was filed in the name of Sam Achilli and Ruth Achilli which disclosed a tax liability of $1.99 which was paid on March 15th, 1944.

BY MR. RUSSO:

Q Was there any other record reflecting—or any other transaction reflected with respect to the year 1943?

A For the year 1943 the taxpayer filed an estimated tax return, on September 10th, 1943, made a payment of $93.96, and on December 15th, 1943, made another payment in the amount of $93.95.

Q Now, directing your attention to page 3 of Government's Exhibit 7 for identification, what does it reflect with respect to the year 1944?

MR. BATTER: Objection.

70 THE COURT: The same ruling.

A On April 13th, 1944, the taxpayer filed an estimated tax return and made a payment of $40.32.

On June 15th he made another payment in the amount of $40.32, and on September 15th another payment in the amount of $80.64.

On January 15th, 1945, he filed an amended Declaration of Estimated Tax and made a payment of $160.72, and his final return was filed for the year 1944 reflecting an overpayment in the amount of $296.85, which was refunded together with interest of $5.31.

BY MR. RUSSO:

Q Directing your attention to page 4 of Government's Exhibit 7 for identification, what does it reflect with respect to the year 1945?

A For the year 1945 a Declaration of Estimated Tax was filed on March 15th, 1945, and a payment made in the amount of $77.75.

On June 15th, 1945, another payment was made in the amount of $77.75. On September 14th, 1945, another payment was made in the amount of $77.75 and on December 10th, 1945, another payment was made in the amount of $77.75.

71 On January 15th, 1946, an Amended Declaration of Estimated Tax was filed on which a payment was made of $1,561.00. The final return for the year 1945 disclosed an overpayment in the amount of $211.79 which the taxpayer elected to have credited to his estimated tax for the year 1946.

Q Now, directing your attention to the last page of Government's Exhibit 7 for identification, what does it reflect with respect to the year 1946?

A For the year 1946 an estimated tax return was filed, on March 15th, 1946, accompanied with a payment of $93.84. An overpayment credit for the year 1945 of $211.79 was credited to the estimated tax return.

On September 16th, 1946, another payment was received in the amount of $89.68 and on January 15th, 1947, another payment was made in the amount of $2,500.

The final return for the year 1946 disclosed an overpayment credit to be applied to 1947 estimated tax in the amount of $117.17.

Q What does it reflect with respect to the year 72 1947?

A For 1947 an estimated tax return was filed on which the taxpayer disclosed a credit of $117.17 which was allowed, was credited to his estimated tax. On January 16th, 1948, the taxpayer made a payment of $5,600, there was a credit of $117.17 to estimated tax for the year 1947, and the final tax return disclosed an overpayment which the taxpayer elected to have credited to his 1948 estimated tax.

Q What did it reflect with respect to the calendar year 1948?

A For the calendar year 1948 an estimated tax return was filed, a joint return, in the name of Sam and Ruth Achilli, on which the overpayment credit of $1,094.19 was applied as a credit, and a payment was made on January 14th, 1949, in the amount of $4,500.

The 1948 final income tax return was filed on March 15th, 1949, which disclosed a tax liability of $3,174.33, and which was paid at the time of filing the return on March 15th, 1949.

Q Now, I show you Government's Exhibit 9 for identification and I direct your attention to page 2 thereof.

73 A Yes.

Q State, please, what the records show with respect to Ruth Achilli in the calendar year 1945.

A For the year—

MR. BATTER: I object to the year 1945, your Honor. It is not within the scope of the case before us.

THE COURT: Well, I think that you have not connected her with this picture yet, as I see it.

MR. RUSSO: Very well, sir.

THE COURT: I think we had better withhold our ruling on that.

MR. RUSSO: All right. At this time, if your Honor please, I offer in evidence as Government's Exhibit No. 7, Government's Exhibit 7 for identification.

MR. BATTER: This was offered before. This was the one your Honor reserved ruling on, I think.

THE COURT: I will withhold my ruling on it.

74 MR. RUSSO: Very well. May the identification marks be stricken from Government's Exhibits 1, 2 and 3? They have been admitted in evidence as Government's Exhibits 1, 2 and 3, and I just want to get these identification marks off.

THE COURT: Very well. We will now take a very short recess, ladies and gentlemen of the jury, and then return to the jury box, please.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

THE COURT: You may proceed.

MR. RUSSO: If your Honor please, I want to ask the witness one more question with respect to Government's Exhibit No. 7.

BY MR. RUSSO:

Q Miss Mines, directing your attention to Government's Exhibit 7 for identification, I will ask you if it correctly reflects the income tax filing history of Sam Achilli from the year 1930 through the year 1948, respectively?

75 MR. BATTER: I object to that, your Honor.

THE COURT: She may answer.

A It does.

BY MR. RUSSO:

Q And does it correctly reflect all the income tax returns that were filed by him in that period?

A It does.

Q Does it correctly reflect income taxes that were paid by him during that period?

A It does.

MR. RUSSO: Your witness, Mr. Batter.

Cross Examination by Mr. Batter:

Q Now, Miss Mines, directing your attention to Government's Exhibit No. 1, you testified with respect to some lead pencil marks on page 3 and a correction that was made there.

A Yes.

Q That correction was only two cents, was it not?

A That is correct.

Q Directing your attention to the figure of $115.15
76 encircled in red and $115.17 appearing on the face of the return, that was no additional assessment that the Commissioner made as a result of any of his own findings, but that was the tax that the taxpayer admitted was due when he filed his return, is that correct?

A That was a mathematical verification of the figures that the taxpayer had put on his return.

Q But this $115.17 which your Office changed to $115.15 was a tax liability that the taxpayer acknowledged and paid with the filing of his return, is that correct?

A That is correct.

Q Now, then, referring to Government's Exhibit No. 3 where there is a figure of $3,174.33 encircled in red, that likewise is the additional tax, the balance of tax that the taxpayer showed as due when he filed his return and paid at that time, is that correct?

A That is correct.

MR. BATTER: That is all.

MR. RUSSO: That is all, Miss Mines. Thank you.

(Witness excused.)

77 MR. RUSSO: Mr. Brady.

(The witness was thereupon duly sworn.)

WILLIAM W. BRADY, called as a witness on behalf of the Government here, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is William W. Brady?

A Yes, sir.

Q Where do you live, Mr. Brady?

A 332 Vincent Place, Elgin, Illinois.

Q What is your business or profession?

A I am an attorney and certified public accountant.

Q How long have you been an attorney, Mr. Brady?

A Since 1940.

Q How long have you been a certified public accountant?

A Since 1936.

Q Where is your office located?

A The Tower Building, Elgin, Illinois.

Q In addition to your profession as an attorney and certified public accountant, do you have any other pro-

78 fession or occupation?

A I am a member of the faculty of Northwestern University's School of Law and School of Commerce.

Q How long have you been a member of the faculty there?

A Since 1938; seventeen years.

Q Mr. Brady, do you know the Defendant, Sam Achilli?

A Yes, sir.

Q Do you see him in the Court Room?

A Yes, sir.

Q Will you point him out, please.

A He is the third gentleman sitting at the second table. (Indicating.)

MR. RUSSO: If your Honor please, at this time I would like to have the record show that the witness identified the Defendant, Sam Achilli.

THE COURT: It may so indicate.

BY MR. RUSSO:

Q How long have you known him, Mr. Brady?

A Since approximately March, 1946.

Q Now, directing your attention to the year 1946 and to the years 1947 and 1948, did you in any of those
79 years perform any legal services for him?

A No, sir.

Q Directing your attention to the same years did you, during any of those years, perform any accounting services for him?

A Yes, sir.

Q What accounting services did you render him?

A I assisted him in preparing his 1946, 1947 and 1948 income tax returns.

Q Mr. Brady, I show you Government's Exhibit No. 1, which purports to be the individual income tax return of Sam Achilli for the calendar year 1946, and I ask you if you have ever seen that before.

A Yes, sir.

Q Was Government's Exhibit No. 1 prepared by you?

A Yes, sir.

Q Will you state to the Court and jury, please, the circumstances under which you prepared that return?

A Well, Mr. Achilli came to my office and said that he wanted me to prepare his tax return.

Q Did you prepare that return at his request?

A Yes, sir.

80 Q Now, what if anything occurred at that time?

A Do you mean the—

Q The circumstances relating to your preparation of that return.

A Well, to the best of my recollection I took out a blank return and discussed each item on the return with Mr. Achilli, his name and address, and his occupation, whether he had any dependents such as children, and so forth.

Q What information did he give you as to that?

A The information that is shown on Government's Exhibit 1, that is, his name, address, occupation and his one son, Howard Achilli.

Q Yes.

81 A Then, in summary, to the best of my recollection, I took up each type of income that is called for in the return and asked him if he had any of that type of income.

Q Directing your attention to page 2 of Government's

Exhibit No. 1 and to Schedule B, Column 1, "Kind of Property," "Brick dwelling," where did you get that?

A To the best of my recollection, I got that from Mr. Achilli.

Q Directing your attention to Column 2 in Schedule B, "Amount of rent or royalty," $175.00, where did you get that information?

A To the best of my recollection, I got it from Mr. Achilli.

Q At that time did he give you any documents or supporting information that you entered on Government's Exhibit No. 1 in connection with the amount of rent or royalty that he got from that dwelling?

A My recollection is not distinct on that. I know on certain of his rental expenses he would have a written list of them, but I don't know whether this was one of them or not.

Q But your recollection is clear, is it not, that the information, $175.00, came from Mr. Achilli?

82 A Yes, sir.

Q Now, with respect to Column 3 in Schedule B, where did you get the information respecting depreciation?

A That comes from Schedule F on the same page, and to my recollection I got the information there from Mr. Achilli. In other words, the cost of the brick dwelling, and then I make a mathematical computation on the basis of estimated 20-year life that the depreciation for 1946 would be $550.00.

Q That figure was the result of a mathematical computation?

A Based on the cost that Mr. Achilli gave me, yes.

Q Directing your attention to Column 5, "Other expenses (Itemize in Schedule G)", and to the amount $262.01, where did you get that information?

A To the best of my recollection I got that information from Mr. Achilli.

Q With respect to the information you got there, that amount, did Mr. Achilli provide you with any corroborating documents to support that figure?

A As I testified before, I cannot recall for sure. I know that in certain instances in the three years that I have prepared these returns he did have a list of expenses.

83 Whether this was one, I don't know. If he did give them to me, he gave them to me orally.

Q Directing your attention again to Column 1, "Pool Hall," and the amount of rent or royalty, $1,000.00, from whom did you get that information?

A To the best of my recollection, from Mr. Achilli.

Q Directing your attention to Column 3 of Schedule B, Depreciation of $200.00, was that the result of a mathematical computation?

A Yes. It states in Schedule F the fact that the pool hall equipment was purchased in 1942 for $2,000, that there had been $200 prior depreciation, and that information I probably obtained, to the best of my recollection, from a prior return.

Q Submitted to you by whom?

A By Mr. Achilli.

Q Now, what did you find as a result of the information given you by Mr. Achilli and the computations that you made with respect to Schedule B his income from rent or royalties on those two to be?

A A net income of $162.99.

Q Now, directing your attention to Schedule D, showing a net gain of $190.72, from whom did you get that

84 information?

A To the best of my recollection, from Mr. Achilli.

Q Directing your attention to Schedule F, the brick dwelling, from whom did you get that information, as to the date on which that property was acquired and the cost of the property?

A To the best of my recollection, from Mr. Achilli.

Q What was the date of acquisition as told you by Mr. Achilli?

A Well, to the best of my recollection it is as stated here on the return, December 3, 1945.

Q What was the cost of the acquisition that he gave you?

A To the best of my recollection, as stated in the return, $11,000.

Q Directing your attention to the next item, pool hall equipment, from whom did you get the date of acquisition on that item?

A To the best of my recollection I got that date from a prior return of Mr. Achilli, since there is an indication that there had been depreciation allowed in a prior year.

Q Who made that prior return available to you?

A Mr. Achilli.

85 Q Directing your attention to Schedule E, "Income from Partnerships, Estates and Trusts, and Other

Sources," the first item, name and address of partnership, syndicate, and so forth, $23,375.23, where did you get that information?

A That was his share of the net profit of Highland Motor Sales, which was a partnership in which he and Earl Gromer were partners. I prepared the partnership income tax return and determined the taxable income of Mr. Achilli. I got it in that manner and placed it in his return.

Q As a result of that information, plus the information that you have on Schedule B and D, what was the total income of Sam Achilli for the calendar year 1946?

A The total income as stated on this return computed in the manner just described is $23,728.94.

86 Q After arriving at that figure did you make an entry of it in some other place in the return?

A Yes. In preparing a tax return the procedure as set forth in the return is to determine the total income and then deduct from that proper deductions and that is computed on page 3 of the return.

Q Directing your attention to Schedule G, the item of Insurance, $99.38, from whom did you get that information?

A To the best of my recollection, I got it from Mr. Achilli.

Q Calling your attention to the item of Legal Expense, $44.95, from whom did you get that information?

A I think to the best of my recollection I got it from Mr. Achilli.

Q Calling your attention to the item of taxes, $117.68, from whom did you get that information?

A To the best of my recollection I got it from Mr. Achilli.

Q Do you recall at this time whether or not any of those expenses were corroborated by documents provided by

87 Mr. Achilli?

A I couldn't make any answer other than the one I have already made, that one or more times during this period he gave me written reports of his regular rental expenses. I don't know whether this one was or not.

Q Directing your attention to that portion of the return headed "Long Term Capital Gains and Losses—Assets Held for More Than 6 Months," where did you get that information, concerning the brick building that is shown on there?

A To the best of my recollection I got it from Mr. Achilli.

Q Where did you get the information as to the date acquired?

A The same answer.

Q He told you he acquired it in December, 1945; is that correct?

A To the best of my recollection, yes.

Q What did he tell you with respect to the date on which he sold it?

A To the best of my recollection, December, 1946.

Q Did he tell you he had a gain or a loss in that 88 transaction?

A To the best of my recollection, he gave me the selling price.

Q What was that?

A $13,500.

Q What else did he give you?

A He already told me the cost. And I computed the depreciation.

Q What was the cost he gave you?

A $11,000.

Q Yes.

A And then to the best of my recollection he gave me the expenses of sale, $868.56, and from that I determined the taxable gain or loss of $2,181.44, but it was held over $1,090.72.

Q So there was a gain on that one on which there was a taxable income of $1,090.72; is that correct?

A Yes, sir.

Q Now, with respect to the second line across,—

A That was a poolhall.

Q That was a poolhall?

A Yes.

Q What did he tell you with respect to the date 89 he acquired that?

A To the best of my recollection, 1942.

Q When did he tell you he sold it?

A December of 1946.

Q Did he tell you what the gross sales price was?

A To the best of my recollection it was as stated here, $3,300.

Q Did he tell you he sold that property or disposed of it in some fashion?

A To the best of my recollection he must have so advised me or else I would not have entered it as a sale of capital assets.

Q What did he tell you his cost was?
A To the best of my recollection, $5,500.
Q Was there a gain or a loss on that transaction?
A There was a loss of $1,800, but here again the assets had been held over six months so only half of that was taken into account, or $900.
Q So on the two transactions did he have a total gross gain or loss?
A He had a gross gain of $190.72 subject to tax.
90 Q Directing your attention to page 3 of Government's Exhibit No. 1, from whom did you get the information concerning the contributions Mr. Achilli made?
A To the best of my recollection I got it from Mr. Achilli.
Q Do you recall at this time whether or not he gave you any supporting or corroborating documents?
A I don't recall that he ever gave me any corroborating evidence as to contributions.
Q With respect to the item of interest, $342.00, from whom did you get that information?
A To the best of my recollection I got it from Mr. Achilli.
91 Q With respect to taxes that he paid, as shown on Government's Exhibit No. 1, from whom did you get that information?
A To the best of my recollection from Mr. Achilli.
Q What was the total amount of the deductions that you calculated them from the information given you by Mr. Achilli?
A $11,974.98.
Q What do you find Mr. Achilli's gross income for the calendar year 1946 to be?
A What do you mean by gross income?
Q. Adjusted gross income, directing your attention to Item 1.
A Yes. As I previously testified, $23,728.94.
Q From there on the rest was a matter of calculation, was it not?
A Yes, sir.
Q What did you find on the basis of information that you got from Mr. Achilli his tax liability to be for the calendar year 1946?
A $2,780.15.
Q Now, did have any evidence or any documents made

available to you by Mr. Achilli indicating that he had filed declarations of estimated income tax—declarations of
92 income tax returns?

A For estimated income?

Q Yes.

A I note that the return states that there was $2,895.32 paid on the declaration of estimated tax and to the best of my recollection I obtained that information from Mr. Achilli.

Q On that basis what was the amount of income tax liability reported on Government's Exhibit No. 1?

A Well, the tax liability was $2,780.15. His payments on the declaration of estimated tax exceeded that so he had during the year 1946 an overpayment of $115.17.

Q Directing your attention to the signature in the lower right-hand corner of Exhibit 1, whose signature is that, if you know?

A To the best of my recollection, it is Mr. Achilli's.

Q Do you recognize his signature?

A Yes, sir.

Q Is that his signature?

A I am very confident it is, yes.

Q Now, Mr. Brady, I show you Government's Exhibit No. 2. Directing your attention to page 2 of Govern-
93 ment's Exhibit No. 2, Schedule B, "Kind of Property," where did you get the information concerning an oil well, McCumming Oil Company, and the amount of rent or royalty from that source?

A To the best of my recollection I got it from Mr. Achilli.

Q What did he tell you his rent or royalty from that source was?

A Well, to the best of my recollection, for McCumming Oil Company, $121.

Q What was the rent or royalty from the brick building?

A $972.17.

Q Where did you get that information?

A To the best of my recollection I got it from Mr. Achilli.

Q Directing your attention to Column 5 of Schedule B, where did you get the information concerning expenses on those two sources of income?

A To the best of my recollection I got it from Mr. Achilli.

Q What did you find his total income from those two sources to be from the information that was made available to you by Mr. Achilli?

94 A Well, you mean from those two or from the third source listed—from all three listed in Schedule B? There is a third source, a night club.

Q What?

A A night club on which he had expenses but no income during the year. It appears on the third line.

Q Yes.

95 A From all other rental investments and royalties he sustained a loss of $10,740.74.

Q Where did you get the information about—

MR. BATTER: Your Honor, might we have the record show that the witness is not testifying from memory, but has before him the documents and is reading the figures and so forth from the documents?

THE COURT: It may so indicate.

BY MR. RUSSO:

Q The testimony you are giving is your best recollection after you have refreshed your recollection as to Government's Exhibit No. 2; is that correct, Mr. Brady?

A Yes, sir.

Q Where did you get the information in Schedule D with respect to net gain from sale or exchange of capital assets, $400?

A That was from Schedule D, set forth in detail, and I got the information from Mr. Achilli.

Q Where did you get the information contained in Schedule E?

A The income from Highland Motor Sales, the

96 partnership of Sam Achilli and Earl Gromer, I obtained from preparing the partnership income tax return for that partnership and determining the taxable income of Mr. Achilli.

The loss on the joint venture in building a house I obtained on the basis of information from Mr. Achilli, to the best of my recollection.

Q Directing your attention to Schedule E, what was Mr. Achilli's income from Highland Motor Sales in that year?

A $38,974.95.

Q That came from the partnership books and records, did it?

A It came from the tax return which was prepared from the books and records.

Q Directing your attention to Schedule F, where did you get the information as to the kind of property, date of acquisition, cost, and the other information in Schedule F?

A To the best of my recollection I got it from Mr. Achilli.

Q Did he tell you the date of acquisition of the brick building?

97 A April, 1947.

Q What was the cost of that acquisition?

A $20,000.

Q What did he tell you with respect to the night club as to the date of acquisition?

A June, 1947.

Q And his cost of acquisition?

A $86,333.31.

Q What did he tell you with respect to the date of acquisition of the night club equipment?

A June, 1947.

Q And the cost to him?

A $20,239.64.

Q As to the other figures in Schedule F, are they information made available to you by Mr. Achilli or are they computations made by you on the basis of that information?

A They are computations made by me on the basis of information he gave me.

Q Directing your attention to Schedule G, the items of interest, $297.12, insurance, $18.10, water, $24.34, repairs, $18.38, miscellaneous, $.27, insurance, $1,516.64, legal fees, $526.41, miscellaneous, $18.42, taxes, $40.19, and inter-

98 est $477.98, from whom did you get that information that you placed on that return?

A To the best of my recollection, I got it from Mr. Achilli.

Q Directing your attention to the bottom of the page, on page 2, drilling expense, $1,500.00 and the figure, underlined, of $358.21, what was the explanation for that?

A Drilling expense of $1,500 refers to the drilling expense in the McCumming Oil Company investment.

Q That is reported up in Schedule B?

A Yes, sir, in Column 5 of the first line.

99 Now, that $358.21 is the total of the column of figures right above it which were the expenses incident to the ownership of the brick building, and the $2,579.64 is the total of the expenses above that figure which were the expenses applicable to the night club.

Q Directing your attention to the schedule of gains and losses on the next page and to the block headed, "Summary of Capital Gains and Losses," where did you get the information there was a capital gain or loss of $400?

A As to capital loss of $400, to the best of my recollection I got that from Mr. Achilli.

Q Directing your attention to page 3, the information as to contributions, interest, taxes and miscellaneous that are recorded on Government's Exhibit No. 2, where did you get that information?

A To the best of my recollection from Mr. Achilli.

Q Now, directing your attention to Government's Exhibit No. 3,—well, let us go back to Exhibit No. 2 for a moment. The information that is on the first page of Government's Exhibit No. 2 as to his exemptions, from whom did you get that information?

A To the best of my knowledge I got that from
100 Mr. Achilli.

Q Directing your attention to the signature on the bottom of page 1, whose signature is that, if you know?

A To the best of my knowledge it is Mr. Achilli's.

Q Directing your attention to Government's Exhibit No. 3, which purports to be the joint income tax return of Sam Achilli and Ruth Achilli, who supplied you with the information that this was to be a joint return?

A To the best of my recollection I discussed the matter with Mr. Achilli and after getting the information set forth in this return I made alternate computations as to whether it would be less expensive for him to file a joint return with his wife or to file separate returns. We must have concluded on the basis of that—

Q You made a determination, did you not?

A Yes, that would be our customary procedure in that situation.

Q And you determined that a joint return was the best for him to file?

A Yes.

Q Where did you get the information with respect
101 to his exemptions?

A From Mr. Achilli, to the best of my recollection.

102 Q Directing your attention to page 2 of Government's Exhibit No. 1 and to Schedule B, thereof—

MR. BATTER: Is that Exhibit No. 1 or No. 3?

MR. RUSSO: I beg your pardon?

MR. BATTER: Are you referring to Exhibit 3?

MR. RUSSO: Exhibit 3, yes.
MR. BATTER: You said No. 1.
MR. RUSSO: I am sorry.
BY MR. RUSSO:
Q Directing your attention to Schedule B and to the kind of property listed there, night club, brick dwelling and oil well, where did you get the information with respect to the amount of rent and royalty on those properties?
A To the best of my recollection I got it from Mr. Achilli.
Q Where did you get the information relating thereto with respect to the other expenses in connection with those properties?
A To the best of my recollection I got it from Mr. Achilli.
103 Q Where did you get the information on Schedule D with respect to net gains or losses from sales or exchanges of capital assets?
A To the best of my knowledge, I got it from Mr. Achilli; to the best of my recollection.
Q Now, the next item in Schedule D is item 2, net gains or loss from sale or exchange of property other than capital assets, and there is typewritten in there "From partnership return below," $284.48. Where did you get that information?
A To the best of my recollection that indicates that in preparing the partnership income tax return I noted that the partnership had a capital gain and so set forth in the partnership return and then showed here Mr. Achilli's share of the partnership capital gain.
Q Directing your attention to Schedule E, income from partnerships, estates and trusts, and other sources, where did you get the information in Item 1 as to the income from the Highland Motor Sales?
A I prepared the partnership income return for this partnership and there determined the taxable income
104 of Mr. Achilli from the partnership.
Q What did you determine Mr. Achilli's share in the partnership income to be for the year 1948?
A $38,879.26.
Q Directing your attention to the second item, Elgin Acceptance Company, where did you get that information?
A To the best of my recollection I got that information from Mr. Gromer. The Elgin Acceptance Company was a partnership in which, to the best of my recollection and

information, Mrs. Achilli and Mrs. Gromer were partners.

Q Is that Mrs. Ruth Achilli?

A Yes, sir.

Q And Mr. Sam Achilli's wife?

A Yes, sir. Her share of the partnership income, therefore, had to be included in the joint return. I had no knowledge of the maintenance of those books or anything to do with them, but Mr. Gromer was in charge of that and he gave me this net figure, to the best of my recollection, for Mrs. Achilli.

Q What did you find his total income from all
105 sources that we have discussed to be for the year 1948?

A $35,052.24.

Q Directing your attention to Schedule F, the item in Column 1, brick building, as to the cost of that property, from whom did you get that information?

A To the best of my recollection, I got it from Mr. Achilli.

Q What did he tell you it cost him?

A $25,000.

Q Where did you get the cost of the night club?

A To the best of my recollection I got it from Mr. Achilli.

106 Q What was the cost that he gave you, the cost of acquisition of that property?

A $86,333.31.

Q Directing your attention to the next item, night club equipment, where did you get the information as to the acquisition cost of that item?

A To the best of my recollection I got it from Mr. Achilli.

Q What was the cost?

A $10,119.82.

Q The rest of the figures in Schedule F are items of computation; is that correct?

A Yes, sir.

Q Now, directing your attention to the schedule of gains or losses from sales or exchanges of property, and directing your attention to the sale of stock in Red Lion, where did you get the information with respect to that transaction?

A From Mr. Achilli.

Q What did he tell you the date of acquisition was?

A 1945.

Q What did he tell you the date of sale was?

A 1948.

107 Q What did he tell you the gross sales price was?

A $5,894.85.

Q What did he tell you with respect to the sale of equipment in Red Lion?

A The fact that it was acquired in 1947 and sold in 1948 for $11,000.

Q Did he show gains or losses in connection with those transactions?

A Yes, sir.

Q What did he show, and how much?

A A net gain in those two transactions of $3,291.57. Both of the items sold, however, had been held more than six months and only 50 per cent was taxable, for $1,645.78.

Q Directing your attention to page 3 of Government's Exhibit No. 3, who gave the information with respect to contributions made, interest paid, and taxes paid, with respect to the income tax return of Mr. Achilli for the calendar year 1948?

A To the best of my recollection, Mr. Achilli.

MR. RUSSO: Will the Court indulge me for just a moment, please?

THE COURT: Surely.

108 BY MR. RUSSO:

Q Now, Mr. Grady, directing your attention to Government's Exhibit 1 again, and to a supplementary statement that was filed in connection with it, was that prepared by you?

A Yes, sir.

Q At whose request?

A At the request of Mr. Achilli.

Q How does it reflect?

A It reflects the loss that he sustained from a fire in the Red Lion property.

Q When?

A In 1946. As I recall, it was in June of 1946.

Q Where was the property located?

A On Route 25 between Elgin and St. Charles.

Q Where did you get the information that the original purchase price was $16,000?

A To the best of my recollection I got it from Mr. Achilli.

Q Where did you get the information that he added improvements to that property during the year 1946?

A To the best of my recollection I got it from Mr. Achilli.

Q How much did you find the cost of those im-
109 provements was to him from the information he gave you?

A $2,137.40.

Q And the other information with respect to expenses in connection with insurance and so on, where did you get that information?

A Now, you say the other expenses.

Q Well, or deductions.

A The insurance proceeds, to the best of my recollection and information, came from Mr. Achilli.

Q How much proceeds did he get from the insurance?

A $5,000.

Q What did you do in compiling this data, what did you do with the item of insurance proceeds and with respect to the value of the land?

A Well, as this supplementary statement shows, I took his original investment and added his additional investments and subtracted the depreciation, and then I also subtracted what he got from the insurance policy, and the remaining value of the real estate, in order to determine how much he lost as a result of the fire.

110 Q What did you determine he lost?

A On the purchase of the real estate, $10,939.36.

Q Was there any loss of personal property?

A Yes. This statement shows an adding machine, $225.00 and a saxaphone, $156.00.

Q Totalling what?

A $381.00.

Q I believe I forgot to ask you, Mr. Brady, whether or not you prepared Government's Exhibit No. 2, which purports to be his income tax return, the income tax return of Mr. Achilli for the calendar year 1947?

A I did prepare it.

Q At whose request did you prepare it?

A At the request of Mr. Achilli.

Q Now, with respect to Schedule F and the information that he gave you in connection with the acquisition of the night club, did Mr. Achilli give you any corroborating or supporting documents?

MR. BATTER: What Exhibit are we on now?

MR. RUSSO: Exhibit No. 2.

A As to the cost of the night club?

111 BY MR. RUSSO:

Q Yes.

A It is my recollection that that cost was assembled through bills paid from various sources. My recollection isn't completely clear, but I know that our office disbursed certain sums for him and there was a bank loan which was used to disburse other sums and he disbursed some sums from his own account directly and it was from the addition of all those disbursements that we got this figure of $86,333.31.

Q I believe I forgot to ask you in connection with Government's Exhibit No. 3 where you got the information concerning the sale of the Red Lion stock in 1948?

A To the best of my recollection, I got it from Mr. Achilli.

Q Directing your attention to the signature on the bottom of Government's Exhibit No. 3, whose signature—well, there are two signatures. Whose signatures are those?

A To the best of my recollection—the best of my knowledge, they are the signatures of Mr. and Mrs. Achilli, Sam and Ruth Achilli.

112 Q Now, Mr. Brady, I show you Government's Exhibit No. 4 for identification, purporting to be the partnership return of income of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales for the calendar year of 1946. I will ask you if you have ever seen that before?

A Yes, sir.

113 Q Was that prepared by you?

A Yes, sir.

Q At whose request was it prepared?

A As I recall, the request came from Earl Gromer.

Q Who is Earl Gromer?

A He was a partner of mine in the practice of law and the partner of Mr. Achilli in the Highland Motor Sales.

Q Directing your attention to the last page of Government's Exhibit No. 4 for identification, whose signatures appear thereon, if you know?

A The signatures of Earl Gromer and—

MR. BATTER: Just a moment. These documents are not in evidence, your Honor. The Court's ruling has been reserved on them, so I don't think we ought to interrogate extensively on them.

MR. RUSSO: Here is the man who prepared them, if your Honor please.

MR. BATTER: That may well be, but they are not in evidence.

THE COURT: You may proceed.

MR. RUSSO: Go ahead, Mr. Brady.

BY THE WITNESS:

114 . A (Continuing) The signature of Earl Gromer, and the notarization is by Nan Jean Baumann, who was a stenographer in our law office.

BY MR. RUSSO:

Q Will you state for the benefit of the Court and Jury, please, Mr. Brady, how you prepared these returns and what you used in the preparation of them?

A To the best of my recollection, in summary, the books and records of the partnership were brought to my office in January or February of 1947 and I reviewed them and made up the tax return on the basis of the information set forth in the books and records.

Q Now, directing your attention to page 4 of Government's Exhibit No. 4, where did you get the information with respect to the partnership assets as appearing on Government's Exhibit No. 4 for identification?

A To the best of my recollection, from the books and records of the partnership.

Q That is with respect to both the beginning and the ending of that taxable year?

A Yes. The reason I hesitated just now is that at the beginning of the taxable year I would get from the 115 prior year's tax return, but I made out that return, so I got it from both.

Q From the information you secured from the partnership books and records of Mr. Achilli and Mr. Gromer, doing business as Highland Motor Sales, what did you determine Sam Achilli's share in the partnership profits for the calendar year 1946 to be?

A As set forth in this return the amount was $23,375.23.

Q How much did he have in his capital account?

A This return indicates that at the end of the taxable year he had $14,989.73 in his capital account.

Q Now, Mr. Brady, I show you Government's Exhibit No. 5 for identification. It purports to be the partnership return of income of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales, for the calendar year 1946. I will ask you if you have ever seen that before?

A I have.

MR. BATTER: May I have a continuing objection, your Honor?

THE COURT: Yes, it may be so understood.

BY MR. RUSSO:

116 Q Was that prepared by you?

A Yes, sir.

Q At whose request was it prepared?

A To the best of my recollection it was undoubtedly prepared at the request of Earl Gromer.

Q On what basis was it prepared?

A On the basis of the books and records of Highland Motor Sales.

117 Q Now, directing your attention to the signature on the bottom of page 4 of Government's Exhibit No. 5 for identification, whose signature is that, if you know?

A The signature at the right is Earl Gromer's, and it is notarized by Nan Jean Baumann. He signed as a partner. On the left, I signed as the person preparing this return and my signature was notarized by Nan Jean Baumann.

Q On the basis of the books and records what did you find the partnership share of income to Sam Achilli from Highland Motor Sales to be for the calendar year 1947?

A Do you mean Sam Achilli's share of the partnership?

Q Yes.

A Income. As shown in this return, $38,603.36.

Q What was the state of the capital account of Highland Motor Sales?

A At the end of this year, $27,528.60.

Q I believe you said that you prepared this return?

A Yes, sir.

Q Now, I show you Government's Exhibit No. 6
118 for identification, purporting to be the partnership return of income of Highland Motor Sales, and ask you if you have ever seen that before?

A I have.

Q Was that prepared by you?

A Yes, sir.

Q Will you relate the circumstances as to how you prepared it?

A To the best of my recollection it was prepared from the books and records of Highland Motor Sales.

Q At whose request?

A To the best of my recollection it was at the request of Earl Gromer.

Q Mr. Gromer is a partner in Highland Motor Sales, is he not?

A Yes, sir.

Q So is Achilli?

A Yes, sir.

Q Directing your attention to the signature on the bottom of page 4 of Government's Exhibit No. 6 for identification, whose signature is that?

A The signature of Earl Gromer, notarized by Nan Jean Baumann.

Q From the books and records what did you de-
119 termine Sam Achilli's distributive share of the partnership income to be?

A $38,603.36.

Q What was the state of his capital account?

A The state of the capital account at the end of the taxable year wasn't set forth in this return. At the beginning of the year it was $27,528.60.

MR. RUSSO: Now, at this time, if your Honor please, we offer in evidence Government's Exhibits 4, 5 and 6 for identification as Government's Exhibits bearing the same numbers.

MR. BATTER: We object to them, your Honor. They have in no way been connected with or associated with the Defendant.

THE COURT: Well, I will withhold the ruling on that, gentlemen.

MR. BATTER: All right.

MR. RUSSO: I didn't catch your Honor's ruling.

THE COURT: I am withholding ruling on that. He objects that they are not fully connected up.
120 I think this would be a good time to recess gentlemen.

Ladies and gentlemen of the jury, we will now recess until ten o'clock tomorrow morning, and you will return back here at that time, please. Remember the injunction of the Court, that you are not to discuss the case in the interim. That will be all for today. Good night.

MR. BATTER: Your Honor, before we adjourn, may I make one request, that the witness still on the stand to be subjected to cross examination tomorrow, be instructed by the Court in the meantime not to discuss this case with anyone?

THE COURT: Yes. He is so instructed, not to discuss

this case with anyone, and to return here in the morning.

(WHEREUPON the trial of the above-entitled cause was adjourned to Tuesday, April 12, 1955, at ten o'clock a.m.)

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121 THE COURT: Do we have any preliminaries before we call in the jury?

MR. RUSSO: I have none, your Honor.

THE COURT: All right. Call in the jury.

(Whereupon the following further proceedings were had herein, in open Court, in the presence and hearing of 122 the jury:)

THE COURT: You may proceed.

WILLIAM W. BRADY, called as a witness on behalf of the Government herein, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Cont'd) by Mr. Russo.

Q Mr. Brady, are you the same William W. Brady who was sworn and who testified yesterday?

A Yes, sir.

Q You were on the stand at the close of yesterday's session, is that correct?

A Yes, sir.

Q Yesterday I believe you testified, Mr. Brady, that with respect to the preparation by you of the partnership returns of income of Sam Achilli and Earl H. Gromer doing business as Highland Motor Sales, you prepared them for the calendar years 1946, 1947 and 1948, is that correct?

A Yes, sir.

Q I believe that you also testified that you pre- 123 pared those returns, that is, Government's Exhibits 4, 5 and 6 for identification, from the books and records of that company; is that correct?

A Yes, sir.

Q Now, were the partnership books and records of Highland Motor Sales concerning which you testified kept in your possession or under your custody and control?

A No, sir.

Q In those years in whose possession or custody or control were those books and records kept?

A Except for the week or two that they were brought to my office for the purpose of preparing the return, which

would be in January, February or March of each year, they were kept at the office of the Highland Motor Sales Garage at Lake and Wellington Streets in Elgin.

Q Who had possession or custody and control of these books?

MR. BATTER: If you know.

A I think I can only answer it in this way, Mr. Russo: The Highland Motor Sales was a partnership composed of Sam Achilli and Earl Gromer. Sam devoted his full
124 time to the running of the affairs of the garage. Earl Gromer was my law partner and devoted most of his time to the practice of law, and just part time to the affairs of the Highland Motor Sales partnership.

The books were maintained down at the garage where Sam Achilli was full time, was there full time.

BY MR. RUSSO:

Q Then would you say that the books and records were kept under his possession, in his possession and under his custody and control?

A Under the circumstances I have just described, yes.

Q Now, in the course of the preparation of those returns, Government's Exhibits 4, 5 and 6 for identification, did you have access to them for the years 1946, 1947 and 1948?

A Yes. As I have testified, they were brought to my office in the first two or three months of each of the following years for the purpose of preparing a return.

Q Did you during that period have occasion to consult with Sam Achilli with respect to those books and rec-
125 ords?

A Infrequently, yes.

Q At whose request would you consult with him?

A Occasionally I would be asked to come to the garage to answer some question or look into some problems about keeping the books.

Q At whose request would you go?

A I believe either Mr. Gromer would—I know I went down there at a request conveyed to me through Mr. Gromer.

Q Whose request was conveyed to you through Mr. Gromer?

MR. BATTER: If you know.

A It might have—I know this, that on infrequent occasions Sam would ask me—Mr. Achilli would ask me questions. Whether he ever asked me to come down, I do not

know, or whether the bookkeeper would ask that I come down to answer questions, but when I was down there I would converse with both the bookkeeper and Sam, Mr. Achilli.

BY MR. RUSSO:

Q Would you discuss bookkeeping problems or any transactions had by Highland Motor Sales with respect to their being on those books and records with Mr. Achilli?

126 A I have on occasion, yes.

Q Those books and records are the same books and records that were used in the preparation of these returns, is that correct?

A Yes, sir.

127 MR. RUSSO: Now at this time, if your Honor please, we reoffer Government's Exhibits 4, 5 and 6 for identification as Government's Exhibits 4, 5 and 6 in evidence.

MR BATTER: I object, your Honor. They have not been established in any way as the authorship or under the direction of the defendant.

THE COURT: They may be—

MR. BATTER: They seem to be entirely the work of and developed by the witness and the partner, Earl Gromer, and in no way attributed to the defendant.

THE COURT: They may be received subject to the objection.

(The documents previously marked Government's Exhibits 4, 5 and 6 for identification, were thereupon received in evidence as Government's Exhibits 4, 5 and 6, respectively.

BY MR. RUSSO:

Q Mr. Brady, will you refer to Government's Ex-
128 hibit No. 2 in evidence and turn to page 3.

A Yes.

Q Under the item "Miscellaneous" it states, "Expense on oil well—Lichlyter Oil Company, Evansville, Indiana, $4,113.40," and, "Investment on oil well found worthless and abandoned, 1947, McGregor Oil Company, Fairfield, Illinois, $5,000."

Those were taken as deductions, were they not?

A Yes, sir.

Q From whom did you secure the information that was placed in that block?

A To the best of my recollection, from Mr. Achilli.

Q Directing your attention to Government's Exhibit 2, page — Excuse me. Directing your attention to Government's Exhibit 3, page 2, the item of "Brick building, $20,000"—Exhibit 3, I believe, shows it at $25,000, is that correct?

A Yes.

Q Will you refer also to Government's Exhibit 2 on page 2.

A Yes, sir.

Q There I believe it shows that it was $20,000.

A Yes, sir.

129 Q Now, did you discuss with Mr. Achilli the reason for the difference in the two returns?

A I cannot recall any specific discussion.

Q What does Government's Exhibit 3 show with respect to any reason, if you know, that might have been given to you by Mr. Achilli with respect to the additional cost that he took on that building?

A I can testify as to my belief now as to what the facts were, but I do not have a specific recollection.

Q What is your best recollection?

MR. BATTER: I object, your Honor, to the witness testifying to a belief when he has no recollection.

THE COURT: Objection sustained.

BY MR. RUSSO:

Q Did you have Exhibits 2 and 3 before you at the time that you prepared them in Mr. Achilli's presence?

A To the best of my knowledge I would have a blank return for each year before me and go over it with Mr. Achilli, and I would have a copy of the return for the prior year before me.

Q Now, at the time you prepared Exhibit 3 did you have the return for the prior year before you?

A To the best of my recollection I would have.

130 Q Now did you observe at that time that Exhibit 2 showed the cost of that building at $20,000?

A To the best of my recollection I must have so observed.

Q Now in preparing Exhibit 3, did you discuss with Mr. Achilli the reason or the necessity for showing the cost of that building at $25,000?

A To the best of my recollection I must have.

Q But you don't have any recollection at this time as to the reason that he gave you, is that correct?

A Not as to the specific conversation, no.

Q Now directing your attention to Exhibit 1, please, and to the supplemental statement thereon, does the original price of $16,000 that appears on there—that was made in connection with a fire loss, was it not?

A That fact was one of the facts used in determining the fire loss.

Q Now does the original purchase price of $16,000 that appears on there represent only the cost that is applicable to the physical property that was destroyed? Does it include the cost of the land?

A To my recollection it included the cost of the 131 land and the building.

Q Why did it include the cost of the land? Was the land destroyed?

A You will note we deducted the remaining value of the real estate. Now it is my recollection that Mr. Achilli advised me that he paid $16,000 for the land with the building on it, and in determining the fire loss, since there was a complete destruction of the building, I took the $16,000 as part of the investment and then we determined that the remaining land was worth, $2,000, and I subtracted that along with the insurance proceeds to determine how much he had lost as a result of the fire.

There had been no breakdown of the $16,000 when he bought the property, as to how much was land and how much was building, and this seemed the simplest way of going at determining the loss.

Q Directing your attention to Exhibit 3, Schedule D.

A Yes, sir.

Q Does the cost of the Red Lion corporate stock, shown on there as $4,673.18, acquired in 1945, represent an additional amount that was paid by Mr. Achilli at the time of the purchase of the Red Lion enterprise?

132 A That is my recollection.

Q And from whom did you get that information?

A From Mr. Achilli.

Q Do you know, Mr. Brady, the percentage of the Red Lion corporate stock that was transferred in connection with that transaction?

A I have a recollection that—I am sorry, I am not certain. I know that he sold one-half interest in the equipment, and I don't know whether it was a half interest in the stock or the entire interest in the stock.

Q What would be your best recollection at this time?

A I couldn't say. It was at least a half interest, and

it might have been the entire interest. There are various facts that suggest one or the other alternative to me, and I am not sure.

Q To whom was the corporate stock sold, if you know?

A As I recall, it was sold to a man named George Brown at Crystal Lake—No, Mr. Fritzel.

Q George Fritzel, F-r-i-t-z-e-l?

A Fritzel, yes.

Q Now directing your attention to Exhibit 3 on
133 page 2, I believe you testified yesterday, concerning two items, one item of $1,000 and one item of $500 that was claimed as a deduction.

A Yes, sir.

Q Was that amount, the total of that is $1500, is that correct?

A Yes, sir.

Q Was that amount, $1500, included in the $6,662.86 that was claimed as a deduction in that schedule?

A Yes, sir.

Q Now what, if you know, does that $1500 represent?

A It is my recollection it represents investments of Mr. Achilli in oil wells which proved worthless during the year.

Q From whom did you get the information?

A To the best of my recollection from Mr. Achilli.

Q Did you record that information on the return?

A At the bottom of the page I noted the fact that $1,000 was paid to the Harry Evans Oil Company and $500 to Marvin Affeld Oil Company, referring to the Boley lease and the Howell lease.

MR. RUSSO: Your witness, Mr. Batter.

Cross Examination by Mr. Batter.

Q Mr. Brady, you testified yesterday that you were an attorney and a certified public accountant, did you not?

A Yes, sir.

Q In what states do you hold a license as a CPA?

A Illinois.

Q And in what states are you a member of the bar?

A Illinois.

Q How old are you, Mr. Brady?

A Forty years old.

Q You testified yesterday that you are a member of the faculty of Northwestern University and had been so for seventeen years?

A Yes, sir.

Q That means that you were twenty-three years old when you first became a member of the faculty of Northwestern?

A Yes, sir.

Q In stating that you are a member of the faculty of Northwestern, just what were your particular assign-
135 ments on that faculty?

A I have been a lecturer in the School of Commerce since 1938, first teaching accounting and auditing subjects, and thereafter business law subjects, also what we call the CPA Law Review, a review course for students taking the CPA exam.

I have been a member of the law school faculty since 1939. During that period I taught a course in accounting for lawyers, which is a survey course of accounting matters for the law students.

Q Have you also written articles on accounting and the relation of law to accounting?

A Yes, sir, I have.

Q Would you enumerate some of them?

A I wrote an article on the liability of public accountants to their clients in 1937 or '38, which was published in the Illinois Law Review and also in the National Accounting Review—I think that is the name of it. It is a publication of the National Association of Accountants.

I wrote a pamphlet or small book for the Illinois Bar Association on a bookkeeping system for law offices.

I wrote or assisted Mr. Tevan in writing a book en-
136 titled Questions and Answers of the CPA Exam, the Law Exam.

I wrote part of a book for Tevan and Smith, Business Law, dealing with insurance.

I wrote an article last month for the Illinois State Bar magazine on the tax problems of farmers, and other incidental writings over the last fifteen years.

Q As a member of the faculty of Northwestern University, you actually do conduct class lectures, do you not?

A Yes, I go in one afternoon and evening a week during the first semester of the year.

Q How large a body would be represented in these lectures that you give?

A How large a body?

Q Of students, yes.

A Each year?

Q Oh, any time. How big are the classes?

A Oh, anywhere from 40 to 75. I have had them as high as 120 right after the war when we had a lot of GI's returning.

Q Would you say the greater part of your professional practice is accounting or law?

137 A I would say the greater part is law.

Q And was that the case in 1946, '47 and '48?

A Yes.

Q What proportion would you say the accounting forms of your daily endeavors?

A At the present time?

Q An average, at that time.

A Oh, at that time—it might have been anywhere from fifteen to thirty per cent.

Q And the rest of it would be law?

A Law, yes, sir.

Q Now, you testified yesterday with respect to Government Exhibit No. 1, the individual tax return of Mr. Achilli for the year 1946, as follows:

"Q Will you state to the Court and jury, please, the circumstances under which you prepared that return?

"A Well, Mr. Achilli came to my office and said he wanted me to prepare his tax return."

Are we to understand from that testimony that Mr. Achilli came to you just out of a clear sky, unexpected, unannounced, as an absolute stranger, to prepare or

138 to have his tax return prepared by you?

A No, sir, I did not want to give that impression, Mr. Batter.

Q Will you explain the circumstances, then?

A Yes. I returned to Elgin from the Army on January 1st of 1946 and opened my own office for the practice of law and accounting. Two months later I moved my office over into Earl Gromer's Office and we formed a partnership for the practice of law, and I also for the practice of accounting individually.

He told me that he was a partner in Highland Motor Sales, and asked me to prepare the partnership income tax return, and at some point said that Mr. Achilli would be up and would have me prepare his income tax return. I assumed—or I am quite confident that that is why Mr. Achilli came to my office to have his income tax return prepared.

139 Q In other words, his coming to your office had been prearranged probably by Mr. Gromer because

Mr. Gromer advised you that he was coming?

A Yes.

Q Mr. Gromer and Mr. Achilli were partners in the Highland Motor Sales?

A Yes, sir.

Q. And you and Mr. Gromer were partners in the law and accounting business?

A We were partners in the law practice. He was not licensed as a CPA, so he was not a partner of mine in the accounting practice.

Q Did you find and have available to you when you prepared the tax return of Mr. Achilli for the year 1946, a return for the year 1945?

A To the best of my recollection it was undoubtedly available.

Q So that a lot of the preliminary information which you speak of, such as taking out a blank return, discussing it with Mr. Achilli, his name, address, occupation, whether he had any dependents, children or such, was not only known to you but was contained on the return for the prior year, except in so far as there was some change in
140 that respect, and you knew of none, did you?

A Mr. Batter, I didn't know Mr. Achilli, and to the best of my recollection my usual practice would be to take the return and say, "Now you are still living here," or "Do you have any more dependents or any other children?" It would be a rather rapid procedure just to go down and say were there any changes.

Q That is it, and you would have the other return before you.

A Yes, sir.

Q Do you have any distinct and separate recollection of the preparation of that return for 1946 other than what you think your custom would be in such a proceeding?

A May I answer that this way: I prepare a large number of returns each year, and what I have testified to is and was my practice.

I can also remember Mr. Achilli coming to see me about his return and discussing various elements of it. Now that would be the basis of my recollection of the procedure involved.

I do have recollection of his being there, but I wouldn't be able to testify, for example, what day it was or
141 what suit he was wearing, or anything like that. I can

remember his being there on various occasions, discussing these matters and doing the work that I have just testified to.

Q Then the testimony that you gave based on your recollection is based on your recollection of what you normally do in that kind of a situation rather than any distinct recollection of exactly what happened on the occasion, is that correct?

A That is right.

Q So that when you responded to counsel in respect to these various items, "I must have got it from Mr. Achilli," and "I must have got it from Mr. Achilli," or "Mr. Achilli gave it to me," you were not basing that on any exact recollection of what transpired at your meeting with Mr. Achilli, but what you consider must have happened in the light of your experience, is that true?

142 A With respect to most of the items. Now, I can remember some items. This investment in connection with the Lichlyter Oil Company, for example—I remember the peculiar way the name was spelled, and so forth, but yes, in general it would be my recollection that was the procedure.

That would be the only way I would have to get the information, would be from Mr. Achilli. That would be my way of doing it, but I can't remember specific conversations and I certainly could not remember the figures there except for perhaps one or two of them, without looking at the return.

Q Now, you spoke of basing your recollection on your practice. Of course, your practice probably is a lot different now than it was in 1946. At that time you had just come out of the Army, isn't that correct?

A Yes.

Q Do you think your practice in March, 1946, was identical in every respect to what it is now, now that you have had ten years more experience?

A It was March of 1947 when I prepared this return.

143 Q Yes; nine years.

A I have been confused, too. It was a year later that this return was prepared. I would like to think that in the nine years I have perfected or improved my procedure in these cases. I know it takes less time to do the work now.

Basically, though, Mr. Batter, I think the procedure would be the same. Here is a return with a set of blanks to fill

out, and here is an individual who has the information for the blanks, and you just go down step by step.

Q All your testimony with reference to your recollection, which is based on your experience, is really based on your current experience, is it not?

A No. That has always been my practice.

Q I see.

A It has always been my practice.

Q Then it has not varied any since 1947?

A In basic approach it has not varied, no.

Q Let me ask you this: You joined up with Earl Gromer in this business in March, 1946. That was the time the 1945 return was due?

A Yes.

144 Q Did you also prepare that 1945 return for Mr. Achilli?

A I cannot say. I prepared the partnership return. I do not think I prepared the individual return.

I came to Mr. Gromer's office on March 1st and there were only fifteen days left. I think I testified a little while ago that he said Mr. Achilli would be in, but I am not sure that was as to the 1945 return. I did prepare this partnership return in 1945, but I am not sure of the individual. I suspect I did not prepare the individual in 1945.

Q But you do know that you prepared the 1946 return?

A Yes, sir.

Q How do you recall that?

A By some of the items that are shown on there: I believe the fire loss was in 1946, for one thing.

Q Now, the 1946, 1947 and 1948 returns respectively, Government's Exhibits 1, 2 and 3, each provide opposite the signature of the taxpayer a space underneath which it says, "Signature of person other than taxpayer preparing the return."

145 I do not find your signature on either the 1946, 1947 or 1948 returns, Government's Exhibits 1, 2 and 3. Can you explain that?

A Yes. When I returned to Elgin from Army service I started preparing these returns, I was advised by local attorneys in Elgin that it was not customary or desirable to sign those certificates. The advice was incorrect, but I followed it largely during those first two or three years. I have since learned it is incorrect, and do not follow it.

Q You say it was not advisable or desirable. In what respect was it not desirable?

A I find that even today some of the lawyers with whom I discuss it say that they never sign it. They feel they are assuming a certain responsibility for the return that they do not otherwise have.

Q Well, do you consider when you prepared these returns for 1946, 1947 and 1948, that you interrogated the taxpayer sufficiently to be able to make an informed return, or were you just a copier?

A No. I think I interrogated him sufficiently to make a true and correct return.

146 Q So that with respect to the contents of these returns and the deductions taken and the income reported and the necessary documents and vouchers in support of the items, before you went ahead and put them down here, you satisfied yourself that the taxpayer was entitled to what he was doing?

A Yes. Now, let me say this: You mentioned reviewing the various supporting vouchers, and so forth. I discussed these various items with Mr. Achilli as I do with other clients.

Now, we do not consider ourselves, in preparing returns, to have the duty of making a detailed audit of the taxpayer's records. It would be impossible, and too expensive, and so forth.

In other words, if a taxpayer says, "I have invested so much in an oil well that was found worthless, and this is it," or if he says, "I gave the church $200.00," and so forth, we so enter it, if it is true and correct to the best of our knowledge. We do not ask for vouchers or receipts, and so forth.

147 Q You do not ask for them for that purpose, but do you ask him whether he is going to be able to support it, whether he has vouchers for it? Do you suggest to him that as a matter of business caution and as a matter of supporting his return on examination, he should have such vouchers?

A Yes.

Q In other words, I am assuming, if I understand your testimony correctly, that you make every effort to be satisfied that the taxpayer is not asking for things or asking you to commit yourself on things by putting them down, that are not proper, is that correct?

A That is correct.

Q Referring to Exhibit 1, Schedule D, I find two items

of property there, one a brick building, and under the column, "Amount of rent or royalty" it reads, "$175," and underneath that, "$1,000 income."

148 Do you happen to know the location of that brick building?

A This is 1946?

Q Yes.

A No, I do not. I believe that is the brick building he sold in 1946, is it not, Mr. Batter? Does that show on Schedule D?

Q What was sold here was a brick residence.

A Yes. As I recall, that residence was on Liberty Street in Elgin.

Q Yes.

A But I cannot be sure.

Q I also find on there the pool hall. Do you know where that pool hall was?

A I recall it was on North Douglas Avenue in Elgin.

Q That is quite an indefinite expression, "pool hall." Can you tell us something about it?

A Not much more than that. I think they called it a snooker place, or something like that.

Q Was it a store front place with pool tables in it?

A Yes. It was a store that had pool tables in it.

Q Do you recall how many tables?

A I don't think I was ever inside. I remember driv-

149 ing by and seeing it.

Q Was there a second floor to it?

A There was a second floor to the building. I'm pretty sure there was a second floor to the building, yes.

Q Now, then, we have on the return here pool hall equipment at a cost of $2,000 prior to 1942. What inquiries did you make as to the nature of that equipment in order to determine a 10 percent depreciation rate?

A I think, Mr. Batter, that I must have gotten that from the prior year's return, and a ten-year life was apparently used there, and our practice is to continue existing depreciation rates unless we feel that they are quite obviously in error, and I assume that ten years appeared to me to be not obviously in error.

Q Did you have any discussion that you can now recall with Mr. Achilli respecting the rent he received for the pool hall, or what name did you give it? Snooker?

A I think it was a snooker parlor, or something like that.

Q How do you spell that?

150 A I think that is a form of pool; I don't know.
Q How do you spell that?
A Sir?
Q How do you spell it?
A S-n-o-o-k-e-r, as I recall.
Q That was the name on the front of it?
A I think, as I recall, it said "Snooker Parlor" on the front, or something like that.
Q With respect to this item on the return of $1,000 rent, do you recall making any inquiry from him as to the nature of that rent?
A No. I don't recall making any inquiries.
Q Was the rental income here shown the entire income from that source?
A To the best of my recollection it was, except that he sold the equipment and we reported that income on Schedule D.
Q Yes.
A But the rental income, yes; that was the only income, to my knowledge.
Q And the equipment that was sold was the entire equipment, was it not?
A That is my belief. That would show on Schedule D. Does it show a cost of $2,000?
151 Q I think that shows in the succeeding year, 1947.
A No. If you get me 1946 I will show you what happened.
Q All right.
(Mr. Batter handed the witness a document.)
A It is my distinct recollection, Mr. Batter, that he had this pool hall equipment with an original cost of $2,000, $200 depreciation before 1946 and $200 in 1946—
Q Yes.
A (Continuing)—or $400 altogether.
Q Yes.
A On Schedule D I recorded the fact he sold that for $3300, with a cost of $5500.
Now, my recollection is that although he was using $2,000 for the pool hall equipment, there must have been an additional $3500 investment for good will or intangibles or something like that.
In any event, we recorded a gain of $1800 in 1946, of which only one-half was subject to tax. Do you want me to tell you about 1947?
Q We will get to that.

A All right.

152 Q Let's hold this for just a minute. So then during the year 1946, is it correct to state from the return as you prepared it that Mr. Achilli received and reported rental income from the pool hall, and in December, 1946, sold the pool hall equipment on which he recorded a profit?

A Yes, sir.

153 MR. RUSSO: He did not report a profit. If I understand it, he reported income, isn't that correct?

MR. BATTER: A capital gain profit.

THE WITNESS: He reported a profit on the sale of $1,800, and since it was capital assets held over six months only one-half was subject to tax as a capital gain.

BY MR. BATTER:

Q You made reference to this contract sale of the pool hall in the 1947 return, and you were going to explain that further.

MR. RUSSO: Will you keep your voice up, please, Mr. Batter? I cannot hear you.

BY MR. BATTER:

Q You were going to explain this caption in Schedule D of the 1947 return reading, "Contract for sale of pool hall."

A It is my distinct recollection, Mr. Batter, that he sold it for $3,300 in 1946 and that we reported a gain—I am very sorry. That was a loss. That was a loss of $1,800. We reported that loss. He sold it for $3,300.

154 Then in the next year the man who had bought it for $3,300—the amount due from him proved completely uncollectible so that we recorded the loss on the failure to collect the $3,300, or perhaps he paid in $2,500 and the rest was uncollectible.

In fact, we show another $800.00 loss next year due to the failure to collect.

Q But during the year 1946, according to Government's Exhibit No. 1 and the return as you prepared it, Mr. Achilli was a landlord of that pool hall and collected and reported rent, is that correct?

A Yes, sir. I don't think he owned the building. I think he had a lease and then he subleased to someone else and collected on the sublease.

Q In other words, that is probably rental on the equipment?

A Yes. Maybe that was it, yes.

Q But he did report rental income from that pool hall?
A Yes.
Q Now Mr. Brady, you testified yesterday, as I recall, regarding several partnerships. See if I state this cor-
155 rectly: You stated that was a partnership between Mr. Gromer and Mr. Achilli of Highland Motor Sales Company, correct?
A Yes, sir.
Q You stated there was a partnership between Mr. Gromer and yourself for the practice of law and for the practice of accounting by yourself in so far as he was not a CPA, but for the benefit of the partnership, correct?
A We had a law partnership, and I carried on my own accounting practice in conjunction with it, yes.
Q. In conjunction with the law partnership.
A Yes.
Q In addition to that there was a partnership between Mr. Gromer's wife and Mr. Achilli's wife with reference to financing automobiles. You testified to that, did you not?
A I think I said that Mrs. Achilli was a partner, and as I understood it, Mrs. Gromer was also a partner. I do not know that I ever saw any official support of that, but that was just my understanding that the two wives—I know Mrs. Achilli was, because we had to report her income
156 separately.
We had to report her income separately for 1946 and 1947 and bring it into the joint return in 1948.
Q Now, then, you also made the statement on page 111: "It is my recollection that the cost"—that refers to the Red Lion—"was assembled through bills paid from various sources. My recollection isn't completely clear, but I know that our office disbursed certain sums for him and there was a bank loan which was used to disburse other sums and he disbursed some sums from his own account directly, and it was from the addition of all those disbursements that we got this figure of"—and note this: The stenographic report reads "$6,333.31."
Let me ask you this: Is it not a fact that that figure should be $86,333.31?
A Yes, sir.
Q If the Reporter corrects that figure to $86,333.31, it will be in accordance with the testimony and the fact?
A I know it was $80,000.
157 Q I will give you the figure.
A I can't recall it offhand.

Q But it was not $6,000?
A No. That should be $86,333.31.
Q That was on page 111 of the transcript.
A Yes, sir.
Q Now, Mr. Brady, with reference to that night club, is it not a fact that the books and records of that club and the bookkeeping was done through your office?
A Yes, sir.
Q So that you had in your office as part of your accounting practice there, the books and records of the night club.
Now, then, you say:
"It is my recollection that that cost was assembled through bills paid from various sources. My recollection isn't completely clear, but I know that our office disbursed certain sums for him . . ."
Now, you do know that your office disbursed certain sums for him. I wonder whether you could expand a bit on that testimony.
A Yes. The Red Lion was a corporation, and after
158 the fire in June, 1946, it of course did not have any operations, it did not sell meals, liquor, and did not have any expenses to speak of. We did as a bookkeeping service maintain the books of that corporation.
Then when this construction started, it is my recollection that Mr. Achilli advanced certain sums as a loan to the corporation, and the corporation checks were then issued out of his advance in his behalf for this construction.
When I said it was out of our office, Nan Jean Baumann in our office, as I recall, largely kept those checks and kept the checks for signature, and she might have signed them or Mr. Achilli, but it was out of the funds that he had advanced to the corporation. That was part of it.
Q That was part of it?
A Yes.
Q Nan Jean Baumann—was she your secretary or Mr. Gromer's?
A She was largely Mr. Gromer's secretary.
Q What was the name of your secretary?
A Up to June, 1948, it was Dorothy McMahon.
159 Q Dorothy McMahon?
A Yes.
Q But she is no longer with you?
A No.

Q That was up until June, 1948?
A Yes.
Q Now, who was your secretary when the 1948 return was prepared in 1949?
A I think a girl named Charlotte Jewel would have been.
160 Q She is not with you now?
A No.
Q What has become of Dorothy McMahon?
A She lives in Elgin.
Q Is that her married name?
A Her name is Mrs. Leroy Bull.
Q Her name is now Mrs. Leroy Bull?
A Yes.
Q What has become of Miss Jewel?
A Miss Jewel married a year or two ago, I think I saw in the paper, and moved to California.

Might I say, we had two stenographers, and that was largely the way it was. Now with two men and two stenographers, there was an interchange of effort, but that was basically it.

Q You continued your answer then, "And there was a bank loan which was used to displace other sums."

Now tell us about that bank loan.

A It is my recollection that something like $25,000 was borrowed from the First National Bank of Elgin, I believe as a mortgage on the real estate out there, and as I recall, the bank, upon presentation of vouchers and waivers of lien, and so on, would pay construction bills incurred
161 in the construction until the $25,000 was exhausted.

Q So that was actually handled through your office there? I don't mean the negotiation of the loan, but the processing of it.

A As I recall the bills—I am not sure, but the bills might well have been sent to us so that we could see if they were in order, and ask Mr. Achilli if they should be paid, see if there was any duplication with our own payments.

Q That loan was from the First National Bank of Elgin?
A Yes, sir.
Q Was there a loan from the Union National Bank too of $8,000?
A Not to my recollection. Mr. Achilli, I believe I can recall, did borrow money from time to time at the various banks in Elgin. I don't recall that fact, though.

Q Did he also borrow $9,000 from Harold Gromer?

MR. RUSSO: Objection, if your Honor please. That is going beyond the scope of the direction examination.

MR. BATTER: I don't think it is, your Honor.

162 THE COURT: The objection is sustained.

MR. BATTER: I think, your Honor, it is well within the scope of the answer the witness gave yesterday, if I may be indulged to read it to you:

"It is my recollection that that cost—"

and we are talking about this $86,000—

"—was assembled through bills paid from various sources. My recollection isn't completely clear, but I know that our office disbursed certain sums—"

THE COURT: He may answer.

BY THE WITNESS:

A I don't have any recollection of such a loan. The transactions between Mr. Gromer and Mr. Achilli, to my knowledge, were entirely their own personal affair and were never exposed to me.

BY MR. BATTER:

Q In connection with the rebuilding of that property, were you in any way familiar with the open account with the Sun Ray Fixtures Company that was permitted to stand as an open account in the amount of about $10,000?

163 A I have a recollection from Mr. Achilli that he had bought his fixtures from Sun Ray up in Rockford, and that we included as part of the cost of the assets what he had bought there. Now I don't recall whether or not they were paid or on open account or what.

THE COURT: I think, Mr. Batter, we had better take a short recess, and then return to the jury box, Ladies and Gentlemen, please.

(Recess taken.)

THE COURT: Proceed.

BY MR. BATTER:

Q Now, Mr. Brady, respecting the 1948 individual return of Sam Achilli, Government Exhibit No. 3, you testified that that was a joint return of Ruth and Sam Achilli, is that correct?

A Yes, sir.

Q Would you be good enough to tell us the discussion you had with Sam Achilli respecting the advisability or inadvisability of filing a joint return as compared to a separate return?

A Well, to the best of my recollection I had a discussion with Mr. Achilli, as I did with other clients, in
164 1948, pointing out to them that under the new Revenue Code it was usually desirable to file a joint return for the reason that if you filed a joint return and included the income of the husband and wife, the tax was computed by taking the taxable income, dividing it in two, computing the tax on that one-half and then doubling that tax. Since we have a graduated income tax, the tax on two $5,000 incomes is less than a tax on a $10,000 income.

To the best of my recollection I had such a conversation with Mr. Achilli. There were and are certain unusual circumstances when it is still desirable to file a separate return. We may have made some tentative computations to see if that was the case with Mr. Achilli. In any event, we prepared and a joint return was filed.

Q Was 1948 the first year to which the privilege of filing a joint return under the split income provision, as we call it, was available to citizens of Illinois?

A Yes, sir.

Q Did Mr. Achilli approach you on the subject of a joint return, as you recall it, or did you approach him?

165 A I believe that I undoubtedly initiated the discussion.

Q And the making of a joint return with the consequent lessening of tax due to the joint return was perfectly proper and in no way outside the scope of the law, was it?

A Perfectly proper.

MR. BATTER: That will be all. Thank you.

MR. RUSSO: That is all, Mr. Brady. Thank you.

(Witness excused.)

166 KENNETH CARLSON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Will you state your name, please?

A Kenneth Carlson.

Q Where do you live, Mr. Carlson?

A Greeley, Colorado.

Q Do you have a street address?

A 2214 10th Avenue Court.

Q How long have you lived there?

A Almost seven years.

Q Where did you live before that?

A Elgin, Illinois.
Q What is your business or occupation in Greeley?
A Real estate salesman.
Q By whom are you employed?
A West Real Estate Agency.
Q Where is the West Real Estate Agency located?
A Greeley, Colorado.
Q Prior to your employment with the West Real Estate Agency, by whom were you employed?
A Quinlan Motors.
167 Q Where is that located?
A Greeley, Colorado.
Q Prior to your employment with Quinlan Motors at Greeley, Colorado, where were you employed?
A Highland Motor Sales.
Q Where is that located?
A Elgin, Illinois.
Q What is the nature of the business of Highland Motor Sales, Mr. Carlson?
A New and used car sales and services.
Q How long were you employed there?
A Just a little bit over two years.
Q Over what period of time?
A From January of 1946 until about the first of May, 1948.
Q In what capacity were you employed?
A Bookkeeper.
Q Other than your duties as a bookkeeper, did you have any other duties?
A No.
Q In connection with your employment as a bookkeeper, what were your duties?
A Pay the bills, received money from the cash register and recorded the sales slips, recorded the paidouts,
168 took in money on charge accounts when they were paid, made deposits in the bank of the money from the cash register—just general office work.
Q Did you make any financial statements of the business from time to time?
A Yes.
Q Was there a certain procedure that you followed in connection with the making of those financial statements?
A Yes. We had regular Chrysler Corporation accounting system.
Q What was that system, Mr. Carlson?

A It was a double entry system.

Q In keeping those books, did you follow the outline of procedure or the procedure that was recommended by Chrysler Motors?

A Yes, we had a regular manual to follow.

Q I believe you said you made financial statements in connection with your duties.

A That is right.

Q After you made them, did you ever have occasion to discuss that financial statements with anyone?

A No.

169 Q Did you discuss them with any of the partners?

A No.

Q What did you do with them after you made them?

A Filed them. We had to send one copy to Chrysler's head office, and one to the regional office, and we filed one copy for ourselves, that is in the office there.

Q What were the books and records that were kept by Highland Motor Sales?

A Well, the Chrysler accounting system.

Q Describe the books that were in that system.

A Well, we had a journal where we posted from the slips from the cash register and the slips from the garage in regard to charge accounts for the repair work, and at the end of each day we would post from the journal to the accounts receivable ledger for people who owed us money. Then as we made purchases on the purchase record we would post to the purchase record book to have a record of what we owed each vendor at the end of each month. Then at the end of the month we would post the totals to a ledger.

Q Who were the partners in Highland Motor Sales?

A Mr. Gromer and Mr. Achilli.

170 Q Who was the managing or the operating partner of Highland Motor Sales?

A Mr. Achilli run the garage.

Q Do you see Mr. Achilli in the court room?

A Yes.

Q Will you point him out, please?

A Right over there.

MR. RUSSO: May the record show the witness has identified the defendant Sam Achilli.

THE COURT: It may so indicate.

BY MR. RUSSO:

Q. Will you tell us, please, to what other books, if any, the journal entries were posted?

A Well, I don't quite understand. I think that is what I explained. The journal entries were posted to the accounts receivable, accounts payable, and the ledger.

Q Where did you get the information that you posted to the journal and to the accounts payable ledger and to the accounts receivable ledger?

A Well, we had cash slips that came off the cash register which recorded anything brought into the register or paid out, and we had shop work order slips that we posted in—those that were not paid were posted for accounts
171 receivable.

Q Will you describe for the Court and Jury, please, the cash register and its method of operation in so far as the making of work order slips or sales slips and things of that nature is concerned?

A Well, the cash register was a drawer for the money, and on top it had a roll, not a roll of paper, but a pad of paper stacked up, and it rolled through the machine and you could write the ticket on the top, the party's name, address, the date, and the nature of the purchase or sale. Then as you turned the crank that ticket came out in duplicate, and one copy went to the customer and one went in the drawer as a record of the money going in or out of the register.

Q And did the slip also indicate or reflect the amount of money in connection with the purchase or the sale, the amount received?

A Yes.

Q Was that also reflected on the ticket?

A Yes.

Q Was the cash in the drawer always required to correspond with the slips that came out of the cash register?
172 A Yes.

Q After the transaction was recorded, what did you do with these slips and the money?

A Well, the slips, the information from the slips was posted in the book.

Q That is the journal?

A The journal, in the cash received section of the journal. Then we stamped the slips with a stamp where we had a place to mark down what sheet in the book they were posted to. Then the slips were filed and the money each

day, according to the total of the cash received column, less the payouts for any incidentals, such as soap, sweeping compound or parts, something like that, was deposited in the bank.

173 Q As a bookkeeper, was it your interest in those sales tickets to see that the amounts reflected on them corresponded to the amounts of money in the cash register?

A Well, as I said, when I checked those tickets in the morning, I knew each day how much money was in the register previously; and each day the money, the amount on the slips, should correspond with the extra money in the drawer.

Q Did you ever find that you had more money in the drawer or less money in the drawer than the amounts that were reflected on the slips?

A Yes.

Q To what extent?

A Minimum.

Q What do you mean by "minimum"?

A Well, the usual amount you will get in any cash register where there's several people making change, and so forth.

Q Would it be as high as $5.00?

A Sometimes; it could be.

Q Would it be more than $5.00?

A Not very often.

Q And would it be less than $5.00?

174 A It could be. Sometimes it was actually perfect.

Q What was the most that you can recall, the most money, that you had in excess of the slips that you had in the drawer?

A That I couldn't really say, because as I said, I worked in another garage for five years out in Colorado and I know even there we had a lot of errors in the cash register which we would try to correct each morning and try to find out—maybe somebody put money in the drawer and forgot to make out a ticket for it.

I have seen times when people paid on their account and people forgot it.

Q Let's confine your testimony to Highland Motor Sales.

A All right.

Q Did you ever find as much as $10.00, more or less, in the drawer?

A Well, as I say, I couldn't actually remember if that was Highland Motor Sales or out in Colorado.

Q You do not have any recollection of having $10.00 more in the drawer than was reflected by the tickets?

175 A Well, as I say, I don't have any recollection of any particular time, but any cash drawer that is worked like that will vary.

Q But you said that the difference was usually minimum?

A That is right.

Q Were the books and records of Highland Motor Sales ever audited, in so far as you know?

A As far as I know they were taken to the office of Gromer & Brady, and when they came back they were all capped off.

Q When would they be taken to the offices of Gromer & Brady?

A Well, for an audit like that and a cap-off, it would be the end of the year.

Q Who took them to the offices of Gromer & Brady?

A Well, it seems to me there was times when I took them up, and there was times when Mr. Gromer took them up.

Q Now, is there to your knowledge any money—or rather, was there to your knowledge any money ever received by Highland Motor Sales on any transactions that was not reflected on the cash tickets as they were written up on the cash register?

176 A No.

Q Now, if there was the receipt of any money on any transaction that was not recorded on any of those slips, would such money be reflected in your cash receipts journal?

A No.

Q Do you know Constantine Cirrincione?

A Yes.

Q Who is he?

A He works at the garage.

Q What was his capacity there at the time you were employed there as a bookkeeper?

A He was a mechanic.

Q Was he employed—

A That is, when I first started there.

Q Was he employed there when you first were employed by Highland Motor Sales?

A Yes.

Q Was he there when you left Highland Motor Sales?

A Yes.

Q Now, you say when you first went there he was a mechanic. What was his capacity at the time you left?

177 A Well, I don't know. He was selling cars, but I don't know what his capacity was.

Q He was acting as a salesman?

A That is right.

Q Now, when sales of automobiles were made, Mr. Carlson, who would record those sales or transactions on the slips, on the cash register?

A Whoever made the sale.

Q Did you ever make any sales?

A No, not of cars.

Q Not of cars?

A No.

Q Did you ever write up any sales slips involving the sales of cars?

A Yes.

Q At whose direction?

A Well, as I say, if I happened to be right at the cash register and wasn't busy at something else and somebody came there with a deal, I would.

Q Who were the persons who were making sales or making deals at Highland Motor Sales?

A Well, it was either Eddie Hood or Mr. Achilli or Constantine Cirrincione.

Q Who was Eddie Hood?

178 A He was the fellow that worked there as a salesman.

Q How long was he there?

A Oh, he was there when I first went there, and I would say he was there about—maybe in the neighborhood of eight months.

Q Now, generally what kind of transactions did you record on the cash register and on the sales slips?

A Well, if people came in to pay the money that they owed on their account I would take it in, and if there was a cash purchase of—oh, supposing a mechanic had done some work on a car and the party came in to pay for it as he took the car out, or something like that.

Q Now, is it true that generally the person who conducted the sale, or the salesman who made the sale of the automobile to a customer, was the one who wrote up the sales ticket for that transaction?

A That's right.

Q Mr. Carlson, were all the cash receipts that were put into the cash register posted to the journal?

179 A Yes.

Q So far as you know?

A Yes.

Q Now, were all the journal entries reflecting income posted to the ledger?

A Yes; it had to be, to keep it in balance.

Q Now, were the journals and ledgers that were maintained by Highland Motor Sales, the books and records that were used in the preparation of the partnership returns of income?

A Will you repeat that question?

Q Were the books and records, the journals and ledgers that were maintained by Highland Motor Sales, the same books and records that were used in the preparation of the partnership return of income at the end of each year?

A Maybe I don't follow you, but there was just one set of books, but I mean, the books that I kept the records in is what went to Mr. Brady's office, if that is what you mean.

Q For the purpose of preparing the partnership returns of income?

A Yes.

Q They were the same books?

180 A Yes.

MR. RUSSO: Your witness.

Cross Examination by Mr. Batter.

Q Mr. Carlson, if I understand your testimony correctly, you entered the employ of the Highland Motor Sales in January, 1946?

A That is right.

Q What were you hired to do?

A To keep the books.

Q As a bookkeeper?

A Yes.

Q Who hired you?

A Mr. Gromer.

Q Is that Mr. Earl Gromer?

A Yes.

Q The partner in the business?

A Yes.

Q Did he interview you for the job?
A Well, I don't know if you would call it an interview, but I had known him for quite a few years, and he told me that he was in partnership in that garage. I didn't know it.

I happened to be working in another place where—
181 it was after the war, and that job was going to dwindle down, I thought, and Mr. Gromer approached me to take over this job in Highland Motor Sales because he told me he was a partner there and he had been keeping the books and he was too busy himself to keep it up, and he wanted someone else to do it.

Q Prior to the time of your being hired as bookkeeper at the Highland Motor Sales Company, did you or did you not know Sam Achilli?
A No, I didn't.
Q But you did know Earl Gromer for a long period of time before that?
A Yes.
Q And he hired you to keep the books because he was too busy to keep them?
A Yes.
MR. RUSSO: That has been asked and answered, your Honor.
BY MR. BATTER:
Q What was your practice in keeping those books in respect to reporting to your employers regarding that?

A Well, I kept them up the way they should be,
182 according to the Chrysler system. We had a manual to go by.
Q Did Mr. Gromer spend any time around your office?
A Yes.
Q How long?
A You mean each day, or length of time?
Q What?
A Do you mean each day, or length of time?
Q Whichever it is. Did he appear each day?
A Well, when I went to work there he used to come down there every morning, early in the morning. It was a new type of work for me and I wasn't thoroughly acquainted with it, and he was helping me with the books and telling me how he wanted them kept, that is, showing me how they should be kept according to the Chrysler Manual.
Q And you kept them that way, as he instructed you?
A That is right.

Q Now, then, on these daily visits to your office, what ould Mr. Gromer do in so far as communications with you?

By that I mean this: He was not giving you new 3 instructions every day. What was he doing each day?

A Well, he was down there every morning to kind look things over at the garage, to see how things were ing. He seemed to have an interest in it, and he checked see how I was doing, I suppose, and he would be around ere in the morning, as I say, and sometimes for an hour two or maybe three.

Q Did you report to him on such occasions the previs day's or previous week's business?

A Well, he went over the books with me and looked at e books and seen the entries and how much business was ng on, and so forth, if that's what you mean.

Q Yes. Who did you consider your direct supervisor ile you were employed as bookkeeper at the Highland otor Sales Company?

A Well, I was more or less on my own, but inasmuch Mr. Gromer hired me there, I suppose he was.

Q Did Sam Achilli pay much of any attention to the oks?

A No. He spent most of his time selling cars and 4 promoting business.

MR. BATTER: That is all.

Redirect Examination by Mr. Russo.

Q Mr. Carlson, under questioning from Mr. Batter you id that the visits from Mr. Gromer to the garage at ghland Motor Sales were daily, is that correct?

A Yes. I would say for about the first year or so.

Q That would be for the year 1946?

A Yes.

Q And he would be in there daily from an hour to ree hours a day?

A Yes.

Q Now, after 1946 did his visits become less regular?

A Yes, because I was more acquainted with what I was ing, I guess.

Q How often then would he make visits to the office?

A Well, as a rule he was there pretty near every Saturday afternoon, and he would drop in periodically in the morning or whenever he happened to be in the neighborhood. Sometimes he would be down there the first thing in the morning.

Q Did Mr. Gromer, so far as you know, ever make any sales of automobiles to customers of Highland Motor Sales?

A Not to my knowledge.

Q That was done by Mr. Achilli and Mr. Cirrincione, and for the period of time you were there, for about ten months by Eddie Hood?

A That is right.

Q Now, those books and records were accessible to Mr. Achilli, weren't they?

A Yes.

Q You received no orders from Mr. Gromer or anyone else that those books were not to be made available to Mr. Achilli, did you?

A No.

Q And whenever Mr. Achilli wanted to examine those books he did so, did he not?

A He could have.

Q Do you know whether he ever did or not?

A Well, as I say, he didn't pay too much attention to them.

Q Did you ever have occasion to discuss any entries
186 in those books with Mr. Achilli on any transaction that was recorded therein?

A No.

HAROLD R. HUBBE, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is Harold R. Hubbe?

A Yes.

Q H-u-b-b-e?

A That's right.

Q Where do you live, Mr. Hubbe?

A 124 South Commonwealth Avenue, Elgin, Illinois.

Q What is your business or occupation?

A I am an engineer for the Elgin National Watch Company.

Q How long have you been employed by the Elgin Watch Company?

187 A Since 1943.

Q Do you know the Defendant, Sam Achilli?

A Yes, sir.

Q Do you see him in the Court Room?

A Yes, sir.
Q Will you point him out, please?
A Over at the far table there. (Indicating.)
Q The third man at the end of the table?
A Yes, sir.

MR. RUSSO: May the record show, your Honor, that this witness identified the Defendant, Sam Achilli?

THE COURT: It may so show.

BY MR. RUSSO:

Q Are you familiar with or acquainted with an automobile sales company known as Highland Motor Sales?
A Yes, sir.
Q Where is that company located?
A Oh, on Wellington, and I believe Lake Street in Elgin, Illinois.
Q Now, directing your attention to about March 9th, 1948, did you have any transaction at Highland Motor Sales Company?

188 A Yes, sir.
Q With whom did you have any transaction?
A Well, I bought a car there and dealt with Sam and Cons.

MR. BATTER: I ask that that be stricken as not responsive. He was simply asked with whom he had the transaction.

MR. RUSSO: It certainly is responsive, your Honor.

MR. BATTER: If your Honor please, he was simply asked with whom he had a transaction. He was not asked what the transaction was.

THE COURT: It may be stricken.

BY MR RUSSO:

Q Did you have a transaction with Highland Motor Sales Company, Mr. Hubbe?
A What was that question, now?
Q Did you have a transaction at Highland Motor Sales?
A Yes, sir.
Q What was the nature of the transaction?

MR. BATTER: I object, your Honor. I object to
189 any testimony whatsoever, from this or any other witness, with respect to the transactions with the Highland Motor Sales Company as in no wise and no manner fitting into the form of proof with respect to the net worth method, that the prosecution is required to pursue.

THE COURT: He may answer.

BY MR. RUSSO:

Q What was the nature of the transaction that you had there, Mr. Hubbe?

A I bought an automobile from them.

Q From whom did you deal in connection with the purchase of that car?

A Sam Achilli and Cons.

Q What kind of a car was it that you purchased?

A 1948 Plymouth club coupe.

Q With whom did you discuss price?

A Both Sam and Cons.

Q Who set the price, if you recall?

A That I don't recall.

Q Did you trade in a car towards the purchase of that automobile, that 1948 Plymouth club coupe?

190 A No, I didn't.

Q What was the price which you paid for the 1948 Plymouth Club coupe?

A $2,050.

Q How was that payment made?

A Well, on the day that I made the deal I gave them a check for $200.00 and—

Q You say "they." To whom did you give the check?

A Well, Sam and Cons. They were both there, and I just laid the check on the table. Who picked it up, I don't know.

Q What happened thereafter?

A Well, that was marked as a deposit for the car, at least that was my understanding, and then the remaining amount of money was paid in cash.

Q Was there a reason why the remainder of the purchase price was paid in cash, Mr. Hubbe?

A Well, they asked for a cash payment.

Q Did you attempt to make payment in any other fashion.

A No, I didn't.

Q To whom did you pay that money, the $1,850?

A To Cons.

Q Where did you make payment?

191 A At his home.

Q If I understand your testimony correctly, now, you paid $200.00 in the form of a check at Highland Motor Sales, in the office?

A Yes.

Q Is that correct?

A Yes.
Q To whom was that check made payable?
A It was made payable to cash.
Q And the remainder you delivered to Mr. Cirrincione at his home?
A Yes.
Q What was the reason for delivering the money at his home?
A Well, when the car had arrived he called me and told me he would bring it along home with him tonight and I could stop over there and pick it up, so it was all right with me, and that's what happened.
MR. RUSSO: Your witness.

192 *Cross Examination by Mr. Batter.*

Q Mr. Hubbe, do you have your $200 check?
A No, I don't.
Q What has happened to it?
A Well, it was lost, evidently.
Q On what do you base your recollection that the price was $2,050?
A I just remember that.
Q How do you remember it was exactly that sum?
A Well, it was just the first car I ever bought, and it is just something that I recall.
Q What did that $2,050 include?
A It was the sale price of the car.
Q And any accessories with it, a license?
A No.
Q You just bought the car stripped for $2,050?
A Oh, it had a heater on it.
Q What else did you have on it?
A I think whatever they consider a standard accessory group from the factory, something such as that, but—
Q Well, you recall this is your first car. Did it have windshield wipers?
193 A Oh, yes, that is standard accessory group from the factory in my estimation.
Q What else would be included in the standard accessory group?
A Well, wheel rings, spare tire, bumpers in those days —I think some of the cars didn't even have bumpers on.
Q But you had all of that?
A Oh yes.

Q And a radio?
A No radio.
Q What type car was it?
A Club coupe.
Q You say that Mr. Cons called you up. Where, at your place of work?
A No, at my home.
Q Did you have the $1850 in cash to pay at that time, or did you have to go and get it?
A Oh, I had to go and get it. I didn't carry it around with me all the time.
Q Where did you go to get it?
A Oh, I got part of it from the watch company credit union where I had an account, I cashed some bonds I had, and also drew out some cash from a bank account I
194 had.
Q You did all of that in one day?
A Oh yes.
Q You were able to sell the bonds and cash them in on the same day?
A Government bonds, yes, yes.
Q Did you have money left over after paying the $1850, or did you just realize $1850?
A Well, I do not recall. I mean, I didn't cash any more bonds than what I needed. I might have went over it by a ten spot or something like that, but I didn't get double the amount or anything.
Q But you can't recall how much you were short or how much you were over. Did you have some money in your pocket so that you didn't have to cash any of the $1850?
A Oh, yes, I suppose. Usually you have a couple of dollars in your pocket.
Q Did you cash in $1850 worth of assets or more?
A Possibly less considering I probably had a couple of dollars in my pocket at the time.
Q How much less, do you think?
A Oh, probably not more than $25 less.
Q Then after you paid Mr. Cons the $1850 at his
195 home, how much money did you have left?
A I don't remember.
Q In other words, you can't remember anything except the $1850 fee, is that correct?
A Well, usually if you go and buy something you know the price that you are paying for the item.
Q And what was the state license fee on that car at that time?

A $10.50, I believe.
Q Was that included in the purchase price of $2,050?
A No.
Q In other words, after you paid him $2,050 in these installments, then you had to spend another $10.50 for state license fee?
A Yes.
Q Did you take out any insurance on the car?
A Yes, I believe I did.
Q How much did that cost you?
A Oh, approximately $20.
Q Approximately $20. Well, then, you must have had more than a couple of dollars in your pocket before you started cashing in things in order to get license tags and insurance, didn't you?
A Well, the exact amount I don't recall, but I don't
196 believe I bought the insurance on the same day I got the car.
Q Do you have your bank book showing the withdrawal of any funds at the time that you paid for this car?
A No, I don't.
Q Do you have the receipt from the bank or a broker for the Government bonds that you sold?
A No.
Q Do you have your pass book with the credit union showing how much you drew out of there at the time?
A No, I am not a member of that credit union any more.
Q In fact, outside of your recollection, there just isn't anything at all that you can show that you paid $2,050 for that car, is that correct?
A That is correct.
Q All right. Now let's exhaust that recollection a little bit. When after March, 1948, did you first have occasion to have your recollection as to that price refreshed?
A I would say sometime in 1950.
Q What was the occasion in 1950?
A Government personnel called me down to ask if I had purchased a car from Highland Motor Sales.
197 MR. RUSSO: Will you keep your voice up, please, so the last gentleman over here may hear you too?
THE WITNESS: All right.
BY MR. BATTER:
Q How did they call you downtown, by letter or by a telephone communication?
A I believe it was by letter.

Q Do you have that letter?
A No, I don't.
Q What did that letter state? Was it a form letter?
A I don't recall. It just mentioned that I should appear in the Elgin Tower Building on a certain floor at a certain time, and that was it. The exact contents of the letter I don't recall. It seems to me that it was no more than about a paragraph in length.
Q And who did you see then when you called at the Government office?
A I haven't the slightest idea.
Q You don't recall the man's name?
A No, sir.
Q Did you know it at the time?
A No, sir. I was probably introduced to him or else
198 he made himself known, but I do not know him.
Q Do you see him in this court room?
A I do not know.
Q One of these two men at that table?
A I do not know.
Q You don't have any recollection as to whether they are the men or not?
A No, sir.
Q Now then, at that meeting in 1950, were you told that the price was $2,050, or did you recall distinctly at that time that that was the price?
A I recalled it was the price.
Q You did recall that?
A Yes.
Q And it was not suggested to you?
A No.
Q Now then, when since 1950 have you again had occasion to have your recollection refreshed as to that price?
A Oh, last year sometime.
Q And what was that occasion?
A Once again Government, this time attorneys—
Q This time what?
A This time attorneys, I believe.
199 Q Go on. Tell me about that conversation.
A Well, they more or less asked me the same questions then as I just answered before this Court.
Q Well, will you briefly review that? Give me the substance exactly of what was asked you.
A. Well, if I had purchased a car from Highland Motor Sales, if I knew of Highland Motor Sales, and what did I

pay for the car, and that was about the extent of the conversation.

Q And that figure of $2,050 was your own suggestion?

A Well, at the second—

Q You were not prompted?

A I believe it was at my own suggestion, but I believe at this time they also had in writing a note from the previous time they had seen me in 1950.

Q In other words, last year you had no recollection of it until they reminded you of the note made in 1950?

A No, sir.

Q What do I understand then?

A You understand that I still recalled in my own mind the price.

Q What was the occasion of the note made in 1950 200 then?

A Probably just to keep their memory fresh.

Q What was that?

A Probably just for their memory.

Q What contact did you have with those notes—

MR. RUSSO: Your Honor, I object to any further interrogation along this line. It is entirely beyond the scope of direct examination.

THE COURT: Sustained.

MR. BATTER: If the Court please, this entire evidence and testimony that is now being adduced is directed to the defendant's motion to suppress this type of evidence. As we have already shown here, this evidence was adduced and procured by the Government by getting these from the books—

THE COURT: I sustained the objection on the ground that he has already answered the question. Proceed.

BY MR. BATTER:

Q Have you bought any more from anywhere since 1948?

201 A Yes.

MR. RUSSO: I object, if your Honor please.

THE COURT: Objection sustained.

MR. BATTER: Your Honor, I am testing the witness' memory directed to his ability to tell me the price of cars. I think I am entitled to test it.

MR. RUSSO: He has exhausted his recollection about the transaction concerning which this jury is interested and concerning which he has testified.

THE COURT: Proceed.

MR. BATTER: May I ask that question?

THE COURT: I don't believe that is relevant here, Mr. Batter.

MR. BATTER: I am testing the man's memory. I think that is proper.

THE COURT: Well, he may answer. I don't believe it is material, though.

THE WITNESS: The question again was what now?

BY MR. BATTER:

Q Have you bought any more cars since that purchase in 1948?

202 A Yes.

Q When?

A 1949, 1952, and again this year.

Q In 1949 when you purchased a car, how much did you pay for it?

MR. RUSSO: I object. That is incompetent, your Honor, and entirely foreign to and beyond the scope of the direct examination.

MR. BATTER: I don't think so.

THE COURT: The objection is sustained.

BY MR. BATTER:

Q When you bought a car in 1952, how much did you pay for it?

MR. RUSSO: The same objection, if your Honor please.

THE COURT: The objection is sustained.

MR. BATTER: Your Honor, I think I am entitled to test the witness' memory.

THE COURT: Well, I think you have done that quite at length now. Well, he may answer.

THE WITNESS: The question again was—?

BY MR. BATTER:

Q When you bought a car in 1952, how much did

203 you pay for it?

A $2140?

Q $2,140 exactly?

A Yes, within a few cents.

Q What were the few cents?

A I don't recall.

Q But you do recall that back in 1948 you paid exactly $2150?

A Yes.

MR. RUSSO: He has answered that question time and time again.

THE COURT: Yes, the objection is sustained. Proceed.

BY MR. BATTER:

When you bought your car in 1949, how much did you pay for it?

A $1976, and a few cents. Just exactly, I don't know, but the first transaction was even figures, and I could remember it.

MR. BATTER: That is all.

MR. RUSSO: No further questions. Thank you.

THE COURT: That will be all.

204-205

206 AUSTIN A. MITCHELL, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Will you state your name, please?
A Austin A. Mitchell.
Q Where do you live, Mr. Mitchell?
A Elgin, Illinois.
Q Do you have a street address?
A Route 1, Box 310-B.
Q What is your business?
A Insurance and real estate.
Q Do you have an office?
A Yes, Elgin, at 115 East Highland.
Q That is Elgin, Illinois?
A Yes, sir.
Q How long have you been in that business?
A About fifteen years.
Q Do you know the Defendant Sam Achilli?
A Yes, sir.
Q Do you see him in the Court Room?
A Yes, sir.

207 Q Will you point him out, please?
A The third man over there.
Q The third man at the defense counsel's table?
A Yes, sir.

MR. RUSSO: May the record show the witness has identified the Defendant?

THE COURT: It may so indicate.

BY MR. RUSSO:

Q Are you acquainted with an automobile sales company called the Highland Motor Sales?

A Yes, sir.
Q Where is that company located?
A Elgin, Illinois, on Lake Street.
Q Directing your attention to on or about April 9, 1948, did you have a transaction at Highland Motor Sales?
A Yes, sir.
Q What was the nature of that transaction?
A I purchased a Plymouth club coupe, a gray one.
A A Plymouth club coupe?
A Yes, sir, new.
Q New?
A Yes, sir.
Q What year model was that?
208 A 1948.
Q With whom did you have your transaction?
A With a party named Cons. I can't pronounce his name.
209 Q Would that be Constantine Cirrincione?
A Yes, sir.
Q Did you have a conversation with him as to the price of the car?
A Yes.
Q What price did you pay for it?
A $2,200.
Q $2,200?
A Yes, sir.
Q Now, how was payment for that car made?
A Cash.
Q To whom did you deliver the cash?
A Cons Cirrone.
Q Mr. Cirrincione?
A Yes, sir.
Q At the time you purchased the car were you given a bill of sale?
A No; just the title.
Q Just the application for title?
A Yes, sir.
Q Now, at the time that you first had your conversation with Mr. Cirrincione, how did you attempt to make payment?
A With a check to the Highland Motor Sales.
210 Q Had you had the check made out at the time you offered it?
A No.
Q You offered to give him a check and he refused to accept it, is that correct?

A Yes, sir.

Q And subsequently you secured the money and delivered it to him in person?

A I went to the bank and got cash.

MR. RUSSO: Thank you. Your witness.

Cross Examination by Mr. Batter.

Q Did I understand you to say you paid Mr. Cirrincione $2,200 in cash for the car?

A Yes, sir.

Q Did you pay it to him all at one time?

A Yes, sir.

Q Was that the complete payment for the car or was there a deposit that preceded it?

A No, sir. That was the complete payment. I received delivery of the car.

Q Where was this payment made?

A At the Highland Motor Sales, to Mr. Cons.

Q What?

211 A Mr. Cissarone, or however you pronounce it.

Q Where?

A At the Highland Motor Sales.

Q Did you get a receipt at that time?

A No, sir. I got title to the car.

Q You got title to the car?

A Yes.

Q What did the $2,200 cover in the way of—in addition to the basic car?

A Well, there was a heater; that was about all. There wasn't a lot of extras on it.

Q No radio?

A No, sir; there was no radio.

Q No seat covers?

A Yes, sir. I believe there were seat covers.

Q Windshield wipers?

A Yes, sir. The extras like oil filter, and so forth, everything that goes with a car, was already on it. It was complete. It was a custom. It wasn't a standard; it was a custom.

Q Yes.

A It was complete.

Q And that came to exactly $2,200?

A Yes, sir.

212 Q No more and no less?

A No, sir.

Q Are you accustomed to paying out sums of that kind without getting a receipt for it?

A Well, this was the way I handled it: I went to the bank and drew a check for cash and put on there what the amount was for. That's the only way I do it.

If anybody wants cash, I go to the bank and write a check for it and state what it is for and then deposit it that way. At my office I do the same.

Q That does not give you a receipt for the cash, does it?

A No, but I had title to the car. That is what I was interested in.

Q You had title to the car. How would you be satisfied that there was not a further balance due on it?

A It states on the title—

Q What?

A It states on the title if there's any lien against it.

Q Couldn't there be a balance without there being
213 a lien?

MR. RUSSO: I object, if your Honor please. That calls for a legal conclusion.

THE COURT: Objection sustained.

BY MR. BATTER:

Q We are to understand that you just paid out $2,200—

MR. RUSSO: I object, if your Honor please. That is repetitious.

THE COURT: Let him answer.

MR. BATTER: I did not even finish the question. I have no further questions, your Honor.

MR. RUSSO: Thank you, sir.

(Witness excused.)

LEONARD E. STUDT, called as a witness herein on behalf of The Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is Leonard E. Studt, S-t-u-d-t?

214 A That's correct.

Q Where do you live?

A Elgin, Illinois.

Q What address?

A 470 Sunset Drive.
Q What is your business, sir?
A I am a chief inspector at Shake-Proof.
Q How long have you been with Shake-Proof?
A Fifteen years.
Q Are you acquainted with an automobile sales company in Elgin, Illinois, called Highland Motor Sales?
A Yes.
Q Directing your attention to on or about May 3rd, 1947, did you have any transaction there?
A Yes.
Q With whom did you have your transaction?
A Cons Saransion.
Q Is that Cirrincione?
A Cirrincione, yes.
Q What was the nature of the transaction you had, Mr. Studt?
A I purchased an automobile from him.
Q What kind of an automobile was that?
215 A 1940 Chrysler New Yorker.
Q Was that a four-door sedan?
A A four-door sedan.
Q Was it new or used?
A Used.
Q Was there a trade-in involved in that transaction?
A No.
Q What was the purchase price of that car?
A $1050.
Q $1050?
A Yes.
Q How was payment for the car made by you?
A I gave him a check—or cash, when I took the car, in the amount of $550, and then I gave him a check a week later for $509, which covered the car and the license fee.
Q To whom was the check made payable?
A Highland Motors.
Q To whom did you deliver the money?
A Cons Cirrincione.
Q To whom did you deliver the check?
A Cons.
Q Now, during the time that you were negotiating
216 for this car did you have a conversation with anyone else other than Mr. Cirrincione?
A The only other one that entered was Mr. Achilli. He walked up to the car and Cons told him I had offered $1050

for the car and he told him, "Well, go ahead and make the deal."

Q Do you see Mr. Achilli in the Court Room?
A I do.
Q Will you point him out, please.
A Right over there (indicating).

MR. RUSSO: May the record show that the witness has identified the Defendant, Sam Achilli.

THE COURT: It may so indicate.

MR. RUSSO: Your witness.

Cross Examination by Mr. Batter.

Q Do you have that check, Mr. Studt?
A No, I don't.
Q What has happened to it?
A Thrown away.
Q To whom was that check made payable?
A Highland Motors.
Q How do you know that?
217 A Well, its the only one I—
Q Sir?
A I can assume that it was made to them.
Q Are you assuming?
A No. That was who I dealt with. That was the company, and it was made out to the company I bought the car from. The company was Highland Motors.
Q And in view of the fact you bought the car from Highland Motors, you assume you made the check out to Highland Motors?
A I made the check to Highland Motors.
Q When you paid the $500 in cash—
A The $550 cash, I paid.
Q $550.00. Excuse me.
A I paid it and I picked the car up a week before I gave them the check.
Q Then you got title to the car and took the car away before you made the final payment?
A I didn't receive the title, although they gave me a 30-day extension to pay the balance of $500, and I paid that the next week, the following week.

218 LEONARD J. CARDELLA, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q What is your name, please?
A Leonard J. Cardella.
Q How do you spell your last name?
A C-a-r-d-e-l-l-a.
Q Where do you live?
A 5925 North Merrimac, Chicago.
Q Chicago, Illinois?
A Yes, sir, Illinois.
Q What is your business, please?
A Salesman.
Q For whom?
A For Trim-A-Seal of Illinois.
Q That is spelled T-r-i-m-A-S-e-a-l?
A Yes.
Q Where is that located?
219 A 4723 Crawford Avenue, Chicago.
Q How long have you been employed by Trim-A-Seal Company?
A About fifteen or sixteen months.
Q Were you engaged in any business in 1947?
A Yes, I was.
Q What was the name of the business in which you were engaged?
A North American Motors.
Q Where was that located?
A 2532 North Cicero Avenue, Chicago, Illinois.
Q Now, was North American Motors an individual proprietorship, a partnership or a corporation?
A Partnership.
220 Q How long did that partnership last?
A Around a year and a half.
Q Who comprised the partners?
A There was Albert Papandrea, Domonic Vassallo, and myself.
Q Will you spell Mr. Vassallo's name?
A V-a-s-s-a-l-l-o.
Q And Mr. Papandrea?
A P-a-p-a-n-d-r-e-a.
Q What was the nature of the business of North American Motors?

A Selling new and used cars.
Q Were you also buying new and used cars?
A Yes, sir, buying and selling.
Q You were engaged in the business of buying and selling new and used cars?
A Right.
Q What was your capacity in the partnership?
A Partner and bookkeeper.
Q Do you know the defendant, Sam Achilli?
A Yes, sir.
Q Do you see him in the court room?
A Yes, sir.
Q Will you point him out, please?
221 A Right there, the man on the right (indicating).
Q Pointing to the last man at the end of defense counsel's table?
A That is right.
MR. RUSSO: May the record show the witness has identified the defendant Sam Achilli.
THE COURT: It may so show.
BY MR. RUSSO:
Q How long have you known Mr. Achilli?
A Since 1947.
Q In your capacity as partner and bookkeeper of North American Motors, Mr. Cardella, were you acquainted with the books and records of that company?
A Yes, sir.
Q Were the books and records of North American Motors kept under your supervision and custody?
A Yes, sir.
Q Were the books and records of North American Motors kept in the regular course of business?
A Yes, sir.
Q And was it the regular course of business to keep such books and records?
A Yes, sir.
222 Q Directing your attention, Mr. Cardella, to the year 1947, did North American Motors purchase any automobiles from Sam Achilli?
A Yes—
MR. BATTER: I object, your Honor. I think the books and records are the best evidence. The witness testified there were books and records, and he kept them. I think they are the best evidence as to what business may have been transacted with Highland Motor Sales.

MR. RUSSO: If your Honor please, I think the objection is premature. I am laying a foundation at this time.

MR. BATTER: What was the question, please?

(Question read.)

MR. BATTER: I think the books are the best evidence, your Honor.

THE COURT: He may answer.

BY MR. RUSSO:

Q Will you answer the question, please?

A We purchased them from Highland Motor Sales.

Q Under what name was Sam Achilli doing business, if you know?

223 A Highland Motor Sales.

Q Mr. Cardella, were you served with a subpoena duces tecum to bring with you the books and records of North American Motors?

A Yes, sir.

Q Did you bring those books and records with you?

A No, sir.

Q Why not?

A Well, I have moved three times, and then I had some over by my mother's, and they was damaged by the flood.

Q Did you make a search for them?

A Yes.

Q Were you able to locate them?

A No, sir.

Q Now did you at any time ever make those books and records available to a representative of the Government, the books and records that were called for by the subpoena duces tecum?

A Yes, sir.

Q Were the originals of those books and records ever returned to you?

A Yes, they were.

Q And you say now that you have lost them and

224 you can't locate them although you have made a search for them, is that correct?

A Yes, sir.

MR. BATTER: I object, your Honor, to the witness being permitted to scrutinize these documents, which apparently in each case are two documents in one, and are not originals but are photostats of something or other.

MR. RUSSO: In the first place, your Honor, no questions have been asked of this witness concerning those documents.

In the second place, I have laid the foundation for their introduction.

THE COURT: You may proceed.

MR. RUSSO: I will ask the reporter to mark these documents as Government Exhibits 10 through 23 for identification.

(The documents were thereupon marked Government Exhibits 10 through 23, respectively, for identification.)

BY MR. RUSSO:

Q Mr. Cardella, I hand you Government Exhibit
225 No. 10 for identification, purporting to be a check of North American Motors No. 146—

MR. BATTER: Your Honor, I object to counsel reading into the record the contents of that document, and I object to the use of that document because it has not been proven. We don't know who made that photostat. We don't know what it is a photostat of.

MR. RUSSO: The question is directed to laying the foundation for the introduction of the photostat, if your Honor please.

THE COURT: You may proceed.

MR. BATTER: But he is reading the entire contents of it into the record.

BY MR. RUSSO:

Q Directing your attention, Mr. Cardella, to Government Exhibit No. 10 for identification, purporting to be a check of North American Motors No. 146, drawn on the Northwest National Bank of Chicago, Illinois, dated June 23, 1947, to the order of cash in the sum of $2,100, and directing your attention to the same exhibit which pur-
ports to be a photostatic copy of a card, an inventory
226 card, I will ask you first if you have ever seen the original of that check before.

A Yes, I have.

Q Now directing your attention to that portion of the exhibit which purports to be the front and back of the check, is that a correct and true copy of the original?

A Yes, it is.

Q Now directing your attention to the front of the check and to the signature in the lower left-hand corner thereof, whose signature is that?

A That is mine.

Q Directing your attention to the endorsement on the back of that check, whose endorsement is that?

A That is mine.

Q Was your signature placed on Government Exhibit No. 10 for identification on or about the date the check bears?

A Yes, it was.

Q And for what purpose was that check issued?

A To purchase—

MR. BATTER: Just a moment. May I see that?

Your Honor, I object to the introduction of evidence
227 by the use of this check. It is in no way binding upon the defendant. It is not his check, not signed by him. The witness says it is a check he made out to his own order and cashed at the bank.

MR. RUSSO: Of course it isn't the defendant's check. This witness is testifying about his own books and records, if your Honor please.

MR. BATTER: It is in no way connected up with this case, your Honor.

MR. RUSSO: I haven't finished examining him. You interrupted me in the middle of the examination.

THE COURT: You may proceed.

BY THE WITNESS:

A It was made out to purchase a 1947 Plymouth—

BY MR. RUSSO:

Q Just answer this question. For what purpose was the check drawn?

A To purchase a car.

MR. BATTER: To what?

MR. RUSSO: "To purchase a car."

228 BY MR. RUSSO:

Q Now directing your attention to that portion of Government Exhibit 10—I think I have asked you that question about the endorsement on the back, have I?

A Yes, sir.

Q Did you get cash for that check?

A Yes, I did.

Q What did you do with the cash?

A I would give the cash to my partner, Mr. Papandrea.

Q How much cash did you get?

A $2100.

MR. BATTER: That is objected to, your Honor. That has nothing to do with this case, his cashing a check and giving the money to his partner.

MR. RUSSO: In the first place, if your Honor please, he is testifying about a procedure in connection with his own business, and in the second place, I haven't finished

my examination to determine whether or not it is connected with the defendant.

THE COURT: You may proceed.

229 BY MR. RUSSO:

Q What did you do with the $2100?

A I gave it to Mr. Papandrea.

Q I believe you testified that Mr. Papandrea was one of your partners, is that correct?

A That is right.

Q Now for what purpose did you give the cash to Mr. Papandrea?

A To purchase a 1947 Plymouth.

Q From whom was he to purchase that 1947 Plymouth?

A From Highland Motor Sales.

Q Now after you gave Mr. Papandrea the $2100, what if anything happened?

A He would leave the lot and come back later with an automobile, a 1947 Plymouth, with the same motor number that is on the check.

Q Now after he came back with that 1947—What kind of 1947 Plymouth was that?

A A club coupe.

Q After he came back with that 1947 Plymouth club coupe, what if anything did you do?

A I would get the application for title and fill out the name that Mr. Papandrea had given to Mr.—I don't know if he give it to Mr. Sam Achilli or who he gave it to—

230 but I would get the application for title, make out an inventory card stating what we had purchased the car for, what motor number and how much we paid for the car.

Q Now is the photostatic copy of the inventory card as it is represented on Government Exhibit 10 the inventory card that you made at or about that time?

A Yes, it is.

Q Directing your attention to the second line of the inventory card, there is a question:

"Bought from?"

Now, who does that purport to reflect that the car was bought from?

A Well, on our inventory records we could not—

Q Answer the question. Who does it purport to represent that you bought the car from?

A From Michael Nemeth, Jr.

Q Did you buy that car from Michael Nemeth, Jr.?

A Well, all I can say is this is what I received from my partner.

Q Yes.

A When he came with the car.

Q Why was the name Michael Nemeth, Jr. placed
231 on the inventory card instead of Highland Motor Sales?

A Because that is what would be shown on the title when it would be sent to Springfield.

Q In other words, when the title was issued by Highland Motor Sales, the transaction purported to reflect that the car was bought by you from Nemeth rather than Highland Motor Sales, is that correct?

A That is right.

Q Now what was the amount that was paid by North American Motors for that 1947 Plymouth Club Coupe?

A We paid $2,000. We had drawn to cash a check for $2100. The car did not come with a radio, and that is why the $100 difference, which I have marked down on the inventory card, which is crossed out, if you notice that.

Q So according to your records, you paid $2,000 for that automobile?

A Yes, sir.

Q To save time, Mr. Cardella, I show you Government Exhibits Nos. 11 through 23, inclusive.

MR. BATTER: Your Honor, may I have a continuing objection to this whole line of testimony?

THE COURT: Yes, it may be so understood.

232 BY MR. RUSSO:

Q I ask you to examine those, Mr. Cardella, and then state whether or not they are true and correct photostatic copies of all the documents they purport to represent.

A Yes, they are.

Q Now, Mr. Cardella, directing your attention to that portion of Government's Exhibit No. 11 for identification purporting to be the front and back of a check of North American Motors drawn on the Northwest National Bank, Check No. 163 dated July 5th, 1947, payable to the order of cash in the sum of $2,025, and then directing your attention to the signature in the lower right-hand corner of that check, I will ask you whose signature that is?

A That's mine.

Q Directing your attention to the signature on the back purporting to be an endorsement, whose endorsement is that?

A That's mine.

Q Was your signature on the front of the check and

the endorsement on the back of the check placed on there on or about the date the check bears, July 5th, 1947?

233 A Yes, sir.

Q Now, for what purpose was that check issued?

A To purchase a 1947 Plymouth from Highland Motor Sales.

Q Did you secure the cash on that check?

A Yes, sir.

Q What did you do with the cash?

A I gave the cash to my partner, Mr. Papandrea.

Q How much cash did you get?

A $2,025.

Q For what purpose did you give the cash to Mr. Papandrea?

A To purchase a '47 Plymouth from Highland Motor Sales.

Q Now, after you delivered that cash to Mr. Papandrea what if anything happened?

A Well, I would give him the cash and then he would leave and come back with a '47 Plymouth from Highland Motor Sales. I would make out the inventory card when he came back with the car.

Q On that occasion what make and model of car did he come back with?

A '47 Plymouth business coupe.

234 Q After Mr. Papandrea came back with the car what if anything did you do?

A I would take the serial numbers and motor numbers from the application of title and make out an inventory card.

Q Now, directing your attention to that portion of Government's Exhibit No. 11 purporting to be an inventory card, is that the inventory card you refer to?

A Yes, sir.

Q What does the inventory card reflect was the amount paid for that 1947 Plymouth club coupe?

A That was a business coupe.

Q All right.

A That was $1900.

Q $1900. Now, directing your attention again to the portion of the Exhibit that purports to be the inventory card, and specifically directing your attention to the second line, from whom does that inventory card reflect that the car was purchased?

A Vincent Giovenco.

Q Did you purchase that car from Mr. Giovenco?
A No, we didn't.
Q Who did you purchase it from?
235 A Highland Motor Sales.
Q Do you know the reason why Mr. Giovenco's name appears there as the purchaser rather than North American Motor Sales?
A We would have to get the title in Mr. Giovenco's name to sell the car.
MR. BATTER: Your Honor, I move to strike the witness' entire testimony. We find him here testifying from photostats that purport to be copies of documents. We find them in no way connected at all with the Defendant.
We find checks here that he draws and cashes and then turns over to his partner who then in turn comes back with some car at a cost of lesser amount than shown by these checks. Then we find inventory cards that show these cars were purchased from specific people, not from the Defendant or from the Defendant's company.
I have been very tolerant and have tried to wait to see if this thing would be tied up, but it seems to me that we are cluttering up this record with a lot of material that has no bearing on this case, and I move to strike it.
236 MR. RUSSO: If your Honor please, the witness is testifying to the procedure that was followed in his company in the making of purchases of automobiles. I think Mr. Batter's objection is premature because we will connect up—
THE COURT: You may proceed.
MR. RUSSO: (Continuing)—the objections he is interposing by the following witness.
THE COURT: You may proceed.
MR. BATTER: I further object to it on the ground the witness is testifying from records that admittedly are false.
MR. RUSSO: And we are going to show they are false because your client made them false.
THE COURT: You may proceed, counsel.
MR. BATTER: Can I correct that statement?
BY MR. BATTER:
Q These are records of your company, are they not?
237 A Yes, sir.
Q Did my client ever make any records for your company?
A (No answer.)

MR. RUSSO: If your Honor please, I am on direct examination.

MR. BATTER: I think counsel ought to withdraw his remark.

THE COURT: We will strike that remark and proceed with the examination, please.

BY MR. RUSSO:

Q Now, directing your attention to Government's Exhibit No. 12 for identification and to that portion of the exhibit that purports to be a check of North American Motors, drawn on the Northwest National Bank, No. 227 dated August 11th, 1947, payable to the order of cash in the sum of $4,105 and to the signature in the lower left-hand corner of that check, whose signature is that?

A That's mine.

Q Directing your attention to the endorsement on the back of that check, whose signature is that?

238 A Mine.

Q Was your signature and endorsement placed on Government's Exhibit 12 for identification on or about the date that the check bears?

A Yes, sir.

Q For what purpose was that check issued?

A To purchase some automobiles from Highland Motor Sales.

Q Did you get cash for that check?

A Yes, sir.

Q How much money did you get?

A $4,150.

Q What did you do with the money?

A Gave it to Mr. Papandrea.

Q For what purpose did you give it to Mr. Papandrea?

A To purchase some automobiles, from Highland Motor Sales.

Q After you gave that money to Mr. Papandrea what if anything happened?

A I would give him the cash and then he would come back with an automobile.

Q Did he come back with an automobile on that occasion?

239 A Just one.

Q What kind of an automobile did he come back with?

A '47 Plymouth four-door.

Q After Mr. Papandrea brought that car back, what if anything did you do?

A I would make out an inventory card from the application of title.

Q Directing your attention to the lower part of Government's Exhibit No. 12, is that the inventory card that you refer to?

A That's right.

Q I believe you testified he only purchased one car on that occasion?

A That's right.

Q That was a '47 Plymouth four-door?

A That's right.

Q Directing your attention to that portion of the exhibit that purports to be the inventory card, what does that reflect was the amount that was paid for that car?

A $2,075.

Q Now, what disposition was made, Mr. Cardella, if you know, with respect to the difference between the
240 amount of the check, $4,150, and the amount that was paid for the car, $2,075?

A There was only one car purchased, and the balance would be brought into the bank, deposited.

Q Redeposited in your own bank account?

A That is correct.

Q Now, directing your attention to that portion of the Exhibit that purports to be the inventory card, what is the name of the person that that inventory card reflects you purchased the car from?

A Edward Priebe.

Q Who supplied the name?

A Mr. Papandrea.

Q Now, directing your attention to Government's Exhibit No. 13 for identification, which purports to be the front and back of a check, a check of North American Motors drawn on the Northwestern National Bank, No. 268 dated August 30th, 1947, payable to cash in the sum of $2,200, and directing your attention to the signature in the lower right-hand corner of that check, whose signature is that?

A That's mine.

241 Q Directing your attention to the endorsement on the back of that check, whose signature is that?

A That's mine.

Q Were the signatures on that check placed there on or about the date the document bears, August 30th, 1947?
A Yes, they were.
Q For what purpose was that check drawn?
A To purchase a car from Highland Motors Sales.
Q After you drew that check did you secure the cash?
A Yes, I did.
Q After you secured the cash what did you do with the money?
A Gave it to Mr. Papandrea.
Q How much money did you give him?
A $2,200.
Q For what purpose did you give that money to Mr. Papandrea?
A To purchase a '47 Plymouth from Highland Motor Sales.
Q After you gave that money to Mr. Papandrea what if anything happened?
A He would leave the lot and come back with a
242 '47 Plymouth four-door.
Q After Mr. Papandrea brought back that 1947 Plymouth four-door, what did you do?
A Well, the inventory card was made by my other partner, Mr. Vassallo.
Q Directing your attention to the lower portion of Government's Exhibit No. 13, is that the inventory card that you refer to?
A That is correct.
Q Now, what does the inventory card reflect was paid for that car?
A $2,125.
Q Now, directing your attention to the second line of the inventory card, from whom does that reflect the car was purchased?
A William Nebraske.
Q Who supplied you with that name?
A I received that—well, this, Mr. Vassallo received from the application of title.
Q That was taken from the application of title?
A Yes.
Q I hand you Government's Exhibit 14 for identification purporting to be a check of North American Motors drawn on the Northwest National Bank, Check No. 286,
243 dated September 5th, 1947, payable to the order of cash in the amount of $2,125, and directing your attention

to the signature in the lower right-hand corner, whose signature is that?

A That's mine.

Q Directing your attention to the endorsement on the back of the check, whose signature is that?

A That's mine.

Q Were those signatures put on that check on or about the date the document bears?

A Yes, sir.

Q September 5th, 1947?

A Yes, sir.

Q After you drew that check did you secure the cash for it?

A Yes, sir.

Q How much cash did you get?

A $2,125.

Q What did you do with the money?

A Gave it to Mr. Papandrea.

Q For what purpose did you give it to Mr. Papandrea, give the money to Mr. Papandrea?

A To purchase a '47 Plymouth.

Q From whom?

244 A From Highland Motor Sales.

Q After you gave the money to Mr. Papandrea what if anything happened?

A He would come back with a '47 Plymouth and I would make out an inventory card from the application of title.

Q Do you say you made that inventory card?

A Yes, I did.

Q Is that portion of Government's Exhibit 14 that purports to be an inventory card, the inventory card to which you refer?

A Right, yes, sir.

Q Now, what does Government's Exhibit 14 for identification reflect was the amount that was paid for that car?

A $2,125.

Q What kind of a car was it?

A '47 Plymouth four-door.

Q Now, each of these inventory cards correctly reflect the serial number and engine number of all the cars concerning which you have testified, is that correct?

A Yes, sir.

Q Now, directing your attention to the second line 245 of the inventory card, what does that reflect the name

to be of the person from whom you purchased that car?
A Giammarrusco.
MR. RUSSO: That question was directed to Government's Exhibit 14 for identification, if I said 13, Mr. Reporter.
BY MR. RUSSO:
Q Does Government's Exhibit 14 for identification correctly reflect the engine and motor number of the car that was purchased?
A Yes, sir.
Q Now, I hand you Government's Exhibit 15 for identification which purports to be a check of North American Motors drawn on the Northwest National Bank bearing No. 312 dated September 13th, 1947, payable to the order of cash in the amount of $2,125, and directing your attention to the signature in the lower right-hand corner, whose signature is that?
A That's mine.
Q Directing your attention to the signature on the back, whose signature is that?
A That's mine.
246 Q After you drew that check, did you secure the cash for it?
A Yes, sir.
Q After you got the cash—how much cash did you get?
A $2,125.
Q What did you do with the cash?
A Gave it to my partner, Mr. Papandrea.
Q After you gave the cash to Mr. Papandrea, what if anything happened?
A Purchased the car from Highland Motor Sales.
Q Did he bring back a car to North American Motors?
A That's right.
Q What kind of a car did he bring back?
A '47 Plymouth four-door.
Q After he brought that car back what if anything did you do?
A Make out an inventory card from the application of title.
Q Directing your attention to the lower portion of Government's Exhibit No. 15, is that the inventory card to which you refer?
A Yes, sir.
247 Q Does it correctly reflect the engine and motor number of the car?

A Yes, sir.
Q Does it correctly reflect the amount that was paid for the car?
A Yes, sir.
Q What name does it reflect as the person from whom it was purchased?
A Patrick McInerney.
Q By whom if anyone were you instructed to put that name on there?
A From the application of title.
Q From the application of title?
A Yes, sir.
Q I have just handed you Government Exhibit No. 16 for identification, purporting to be a check of North American Motors, drawn on the Northwest National Bank, Check No. 401, dated October 7, 1947, payable to the order of Cash, and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that?
A That is mine.
Q Directing your attention to the endorsement on the back of that check, whose signature is that?
248 A That is mine.
Q Were your signatures placed on that document on or about the date the document bears?
A Yes, sir.
Q Did you secure the cash for that check after you drew it?
A Yes, sir.
Q How much cash did you draw?
A. $2100.
Q What if anything did you do with the money?
A Gave it to my partner, Mr. Papandrea.
Q For what purpose?
A Purchase of 1947 Plymouth from Highland Motor Sales.
Q Did you give him the money?
A Yes, sir.
Q After you gave it to him, what if anything happened? What did he do?
A He would leave the lot and come back with the 1947 Plymouth four-door.
Q What kind of car did he come back with on that occasion?
A 1947 Plymouth four-door.
Q After he brought the car back, what if anything
249 did you do?

A Well, this was made by Mr. Vassallo, the inventory card made from the application of title.

Q And that was made by Mr. Vassallo?

A Yes, sir.

Q And he is one of the partners, I believe you testified?

A Yes, sir.

Q Do you recognize his handwriting?

A Yes, sir.

Q And the inventory card is in his handwriting?

A Yes, sir.

Q Was the same procedure followed there with respect to securing the serial number and the motor number of the car and recording it on the inventory card?

A Yes, sir.

Q And what does the inventory card reflect was the amount paid for the car?

A $2100.

Q And what does it reflect as to the name of the person from whom you bought it?

A From Louis Amedi.

Q I have just handed you Government Exhibit No. 250 17 for identification, Mr. Cardella, and directing your attention to that portion of it purporting to be a check of North American Motors, drawn on the Northwest National Bank, Check No. 441, dated October 16, 1947, payable to the order of Cash in the amount of $2100, and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that?

A Mr. Vassallo's, my other partner.

Q And you are familiar with his signature?

A Yes, sir.

Q And you state that that is his signature?

A Yes, that is.

Q Directing your attention to the endorsement on the back of that check, whose endorsement is that?

A Mr. Vassallo's.

Q Was cash secured for that check?

A Yes, sir.

Q For what purpose?

A To purchase a 1947 Plymouth.

Q Do you know to whom the cash was delivered?

A Well, I gave it to—well, he probably gave it to Mr.

Papandrea.

251 Q For what purpose?

A To purchase a 1947 Plymouth four-door.

Q From whom?

A Highland Motor Sales.

Q After Mr. Papandrea received the money, what if anything happened?

A I made out an inventory card from the application of title.

Q And is the information on that card with respect to the engine and serial number of the car correctly reflected on Government Exhibit 17?

A Yes, sir.

Q What does it reflect with respect to the amount that was paid for that car?

A $2100.

Q And what does it reflect as to the name of the person from whom the car was bought?

A From Fred Sifferman.

Q Directing your attention to Government Exhibit No. 18, which I have just handed you, which purports to be a check of North American Motors drawn on the Northwest National Bank, Check No. 479, dated October 28, 1947, payable to the order of Cash, and directing your attention

252 to the signature in the lower right-hand corner thereof, whose signature is that?

A My partner, Mr. Vassallo.

Q Directing your attention to the endorsement on the back of that check, whose signature is that?

A That is mine.

Q Were those signatures placed on Government Exhibit No. 18 on or about the date the document bears?

A Yes, sir.

Q Did you secure cash for that check?

A Yes, sir.

Q What did you do with the cash?

A Gave it to my partner, Mr. Papandrea.

Q How much cash did you give him?

A $2110.

Q After you gave that cash to Mr. Papandrea—what did you give him the cash for?

A To purchase a 1947 Plymouth four-door.

Q From whom?

A From Highland Motor Sales.

Q And after you gave him that cash, what if anything happened?

A He would come back with a 1947 Plymouth four-253 door.

Q After he brought the car back, what if anything did you do?

A I would make out an inventory card from the application of title.

Q Directing your attention to that portion of Government Exhibit No. 18 that purports to be the inventory card, is that the inventory card that you make reference to?

A Yes, sir.

Q Does it correctly reflect the engine and serial and motor number of the car?

A Yes, sir.

Q What does it show as to the amount of money that was paid for that car?

A $2110.

Q And what does it show with reference to the person from whom that car was bought?

A Henry Huberty.

Q I have just handed you Government Exhibit No. 19 for identification, purporting to be a check from North American Motors, drawn on the Northwest National Bank, Check No. 496, dated November 3, 1947, payable to the order of cash in the amount of $2,035. Directing your 254 attention to the signature on the lower right-hand corner thereof, whose signature is that?

A That is mine.

Q Directing your attention to the endorsement on the back thereof, whose signature is that?

A That is mine.

Q Were those signatures placed on there on or about the date the check bears?

A Yes, sir.

Q Did you secure cash for that check?

A Yes, sir.

Q How much cash did you secure?

A $2,035.

Q What if anything did you do with the cash?

A Gave it to my partner, Mr. Papandrea.

Q For what purpose did you give him that money?

A To purchase a 1947 Plymouth four-door.

Q From whom?

A From Highland Motor Sales.

Q After you gave him that money, what if anything happened?

A Mr. Papandrea would come with a 1947 Plymouth, four-door.

255 Q And after Mr. Papandrea brought that car back, what if anything did you do?

A I would make out an inventory card from the application of title.

Q Directing your attention to the lower portion of Government Exhibit No. 19, is that the inventory card that you refer to?

A Yes.

Q Directing your attention to the engine and serial number reflected on the inventory card, do they correctly and truly reflect the numbers on the bill of sale, or whatever it was that you got?

A Application of title.

Q Application of title?

A Yes.

Q They do?

A Yes.

Q What does it reflect as to the amount of money paid for that car?

A $2,025.

Q What does it reflect as to the name of the individual from whom the car was bought?

A Frank Pueliese.

THE COURT: We will take a short recess at this
256 time, please.

The witness will remain in the witness chair, please.

(Recess taken.)

257 THE COURT: You may proceed.

BY MR. RUSSO:

Q Mr. Cardella, I have just handed you Government's Exhibit 20 for identification purporting to be a photostatic copy of a check of North American Motors drawn on the Northwest National Bank dated December 1st, 1947, Check No. 591 in the amount of $2,035.

Directing your attention to the signature in the lower right-hand corner, I will ask you whose signature that is, if you know.

A It's my partner's, Mr. Papandrea.

Q Directing your attention to the endorsement on the

back of the check, whose endorsement is that, if you know?

A That's the other partner, Mr. Vassallo.

Q After that check was drawn, was cash secured from the bank?

A Yes, it was.

Q What was done with the cash?

A It shows here that we purchased a '47 Plymouth club coupe.

Q From whom does it appear that you purchased that coupe?

258 A Highland Motor Sales.

Q In whose name other than Highland Motor Sales is it reflected that the car was purchased from?

A Leonard Cardella.

Q Who is Leonard Cardella whose name is on there?

A My name.

Q That is your own name?

A Yes, sir.

Q Did you sell to North American Motors an automobile, Mr. Cardella, the automobile that is reflected on the inventory card?

A No. That name was given by one of my partners.

Q Given to whom?

A To Highland Motor Sales.

Q What kind of a car was purchased in that transaction?

A '47 Plymouth club coupe.

Q And is the information reflected on the inventory card with respect to motor number and engine number the correct data in that connection?

A Yes, sir.

Q What is the price that is reflected on the inventory card?

A $2,035.

259 Q That is the amount that is shown on the check, is it not?

A Yes, sir.

Q Directing your attention to Government's Exhibit No. 21 for identification, which purports to be a check of North American Motors drawn on the Northwest National Bank in the amount of $4,020, Check No. 598 dated December 2, 1947, and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that?

A That's mine.

Q Directing your attention to the endorsement on the back of the check, whose signature is that?
A That's mine.
Q Did you secure cash for that check?
A Yes, sir.
Q How much money did you secure?
A $4,020.
Q What did you do with the money?
A Gave it to Mr. Papandrea.
Q For what purpose did you give it to Mr. Papandrea?
260 A To purchase some cars from Highland Motor Sales.
Q After you gave the money to Mr. Papandrea what if anything happened?
A He only came back with one automobile.
Q What kind of an automobile did he come back with?
A '47 Plymouth.
Q After he came back with the car, what if anything did you do?
A I made out an inventory card from the bill of sale, the application of title.
Q Does the inventory card correctly reflect the engine number and motor number of that car?
A Yes, sir.
Q Who does that reflect the car was purchased from?
A Joe Przybyla.
Q Is there anything else on there that reflects a different purchaser, or a different source from which you purchased the car?
A Next to it there is the name "Sam Achilli" on the inventory.
Q That is on the inventory card?
261 A Yes.
Q Who put that information on there?
A Mine.
Q You did?
A Yes.
Q What does the inventory card reflect was the amount that was paid for that car?
A $2,010.
Q Now, what if anything, if you know, was done with the difference between the amount that you delivered to Mr. Papandrea, $4,020, and the amount that was paid for the car, $2,010?

A It would be redeposited in our bank.
Q Was it brought back by Mr. Papandrea?
A Yes.
Q And redeposited in your account?
A Yes.
Q I have just handed you Government's Exhibit 23 for identification consisting of two pages. Directing your attention to the first page thereof, to what purports to be a photostatic copy of a check of North American Motors drawn on the Northwest National Bank, Check No. 667 dated December 19th, 1947, payable to the order of cash in the amount of $4,030, and directing your attention
262 to the signature in the lower right-hand corner thereof, whose signature is that?
A That's mine.
Q Directing your attention to the signature on the back of that check, whose signature is that?
A That's my partner's, Mr. Vassallo's.
Q Was cash secured for that check?
A Yes, sir.
Q What if anything was done with the cash?
A Two cars were purchased.
Q What was done with the cash?
A Well, that was Mr. Vassallo that got the cash in that instance.
Q What did he do with it?
A Probably gave it to Mr. Papandrea.
Q For what purpose?
A It shows that we purchased some cars from Sam Achilli.
Q How many carts did you purchase?
A Two cars.
Q Would you describe the two cars that you purchased?
263 A There was a '47 Plymouth club coupe and a '47 Plymouth four-door.
Q What was the amount that was paid for the first of the two cars that you described?
A $2,015.
Q What was paid for the second of the two cars you described?
A $2,015.
Q Now, after Mr. Papandrea came back with those two cars, what if anything did you do?

A Made out an inventory card.
Q For each of the two cars?
A Yes.
Q And they are the two inventory cards that are part of Government's Exhibit 22?
A Yes, sir.
Q Is the data reflected on those two inventory cards with respect to the engine number and motor number of the car and the description of the car true and correct?
A Yes, sir.
Q Now, what does the first of those two inventory cards reflect as to the person or source from which you purchased the car?
264 A Bought from Albert Kroll.
Q Is there anything else on there that reflects the correct source from which the car was purchased?
A On the side there is "Sam Achilli, Elgin, Illinois."
Q Directing your attention to the second of the two inventory cards concerning which you have testified, what does it reflect as to the source from which the car was purchased?
A Herbert Carlson.
Q Is there anything else on that inventory card that reflects the true source from which the car was purchased?
A Sam Achilli, Elgin, Illinois.
Q I believe you testified as to the amount that your records disclose was paid for each car, $2,015?
A Yes, sir.
Q I now hand you Government's Exhibit 23 for identification which purports to be a photostatic copy of a check from North American Motors, Check No. 678, dated December 22nd, 1947, payable to the order of cash in the amount of $2,015.
Directing your attention to the signature in the lower
265 right-hand corner thereof, whose signature is that?
A My partner's, Mr. Vassallo's.
Q Directing your attention to the endorsement on the back thereof, whose signature is that?
A My partner's, Mr. Vassallo.
Q Do you know whether or not in the usual procedure in the operation of your business, Mr. Vassallo secured the money that was—for which that check was drawn?
A Yes.
Q What if anything did you do with that money?

A They purchased a '47 Plymouth four-door from Highland Motor Sales.

Q Who purchased that car?

A Mr. Vassallo and probably Mr. Papandrea.

Q After the car was brought back to your place of business, what if anything was done?

A An inventory card was made by Mr. Vassallo.

Q Is the inventory card that is part of Government's Exhibit No. 23, the inventory card to which you refer.

A Yes, sir.

Q What does it reflect with respect to the amount
266 of money that was paid for that car?

A $2,015.

267 Q Does it correctly reflect the engine and motor number of the car?

A Yes, sir.

Q And what does it reflect with respect to the source from which the car was purchased?

A From R. Hindsley.

Q Is there anything else on there to indicate the true source from which the car was purchased?

A To the right of the name "Hindsley" is marked "Highland," which would stand for Highland Motor Sales.

MR. RUSSO: Will you indulge me just a moment, please?

BY MR. RUSSO:

Q Directing your attention to Government Exhibit No. 11 for identification, Mr. Cardella, will you please state whose endorsement appears on the back of that check?

A That is my name.

Q Directing your attention to Government Exhibit No. 20, would you state, please, when the inventory card was prepared?

A December 2, 1947.

Q And who prepared it?

268 A Part of it I prepared and the other part, I think it looks like Mr. Vassallo—or Mr. Papandrea.

Q Directing your attention to Government Exhibit No. 23 for identification, merely to correct the record, what is the date of the check?

A December 22, 1947.

(Mr. Russo handed a group of documents to Mr. Batter.)

MR. BATTER: Why did you hand me these?

MR. RUSSO: I am going to offer them in evidence.

At this time, may it please the Court, the Government offers in evidence Government Exhibits No. 10 through 23, inclusive, now marked for identification as Government's Exhibits 10 through 23, in evidence.

MR. BATTER: I would like to take them singly, your Honor, and ask the witness some questions respecting them as the basis for an objection.

THE COURT: All right.

269 *Cross Examination by Mr. Batter.*

Q Mr. Cardella, directing your attention to Government Exhibit No. 10 for identification, when was this notation put on the check, "Purchase '47 Ply."—then some hieroglyphics—"P15 397973."

MR. RUSSO: Will you make your questions loud enough so the last juror down here can hear you, Mr. Batter? I couldn't even hear it.

BY THE WITNESS:

A That was made June the 23d, 1947.

BY MR BATTER:

Q Was that notation put on that check before you went to the bank to cash the check?

A It must have been.

Q Was that notation put on that check?

A Yes, sir.

Q Before you went to the bank to cash the check?

A Yes, sir.

Q Now between the upper part of this sheet I find a white line, and through the middle of the sheet I find another white line. Is the lower portion of that sheet a separate record?

270 A Yes, this is a separate record.

Q Speak up, please.

A Yes, it is a separate record.

Q That is, the two upper parts are the front and back of the check?

A Yes, sir.

Q And this is entirely a separate record?

A Yes, sir.

Q Now on this lower section marked Car No. 34 it reads: "Bought from Michael Nemeth, Jr." Is that correct?

A Yes, sir.

Q Is that who the car was bought from?

A That was taken off from an application of title.
Q Is that who the car was bought from?
A No, sir.
MR. BATTER: Your Honor, I object to Government Exhibit No. 10 for identification being admitted into evidence. On its face the witness admits it is a false record, and the testimony respecting it is hearsay.
With respect to this check he testified that after he cashed it, he turned it over to his partner, and that
271 his partner did certain things with it.
THE COURT: I think we will withhold our ruling on the admission at the present time. I think we will do that as far as all the rest of them are concerned.
MR. BATTER: Then I needn't interrogate. We will just withhold the ruling on all of them?
THE COURT: Yes.
MR. BATTER: All right, your Honor.
MR. RUSSO: I have no further direct.
BY MR. BATTER:
Q Mr. Cardella, in your testimony respecting these various cars, your purported inventory record shows them to have been purchased from various and sundry persons other than Highland Motor Sales.
Did I understand you correctly to say that the name appearing there that you testified to is in fact not the name of the person from whom it was bought?
A That is correct, sir.
Q Why does that name appear at all?
A In our police record we have to show what is
272 the name on the title that we have purchased the car from.
Q In other words, when you bought the car, included in the application for title was the name that you testified to?
A Well, Michael Nemeth, whatever it is.
Q What is that?
A That would be the name that my partner would give to Mr. Sam Achilli. That is how I understand it.
Q So that these names are not the doings of Mr. Achilli or the Highland Motor Sales Company, but of your partner?
A Yes, sir.
Q And then you testified that with respect to car No. 11725815, motor number P15-397973, your records show the car to have been bought from Michael Nemeth, Jr., is that correct?

A Yes, sir.
Q What did you d with that car?
MR. RUSSO: I object, if your Honor please. It is beyond the scope of the direct examination and it is irrelevant, incompetent and immaterial what he did with the
273 car after he bought it anyhow.
MR. BATTER: Not at all, your Honor. Here we have a title made out to a particular person, certificate of origin attached to it, and for him to dispose of that title he is either going to have to forge that name or have a real person by that name who will transfer it for him.
I think in view of the falsity of the record, I have a right to explore a bit the witness' method of doing things.
THE COURT: The objection is sustained.
BY MR. BATTER:
Q Did you take title of that car in the name of Michael Nemeth, Jr.?
A I did not.
Q What did you do with the application of title that you received?
A I would send that to Springfield and get a title.
Q Then the title was issued in the name of Michael Nemeth, Jr.?
A That is right.
Q Then what did you do with that title?
A When I would sell the car, I would have to give
274 the title to the person that bought the automobile.
Q Did Michael Nemeth, Jr. sign that title for you at the time you sold it?
MR. RUSSO: I object, if your Honor please.
THE COURT: Objection sustained.
MR. BATTER: I think, your Honor, this goes to the veracity of the witness and the probative value of the entire set of documents.
No further cross.
MR. RUSSO: Thank you.

275 ALBERT PAPANDREA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Will you state your full name, please?
A Albert Papandrea.

Q Will you spell your last name?
A P-a-p-a-n-d-r-e-a.
Q Mr. Papandrea, will you keep your voice up so the last juror over here in the far left-half corner can hear you as well as I.
What is your address, please?
A 2218 North 72d Court, Elmwood Park, Illinois.
Q What is your business or occupation?
A Used car dealer.
Q What is the name under which you are operating?
A National Motors Company.
Q Where is that located?
A 2622 North Cicero Avenue in Chicago, Illinois.
Q How long have you been operating there?
A About six years.
Q What business were you in, in 1947?
A Used cars, new and used cars.
276 Q You were dealing in new and used cars?
A Yes.
Q And what was the name of the business that you operated?
A North American Motors.
Q Prior to the time that you were operating North American Motors, were you in business prior to that time?
A Yes.
Q Under what name?
A Andrea Auto Sales.
Q Where was that business located?
A At 2532 North Cicero Avenue in Chicago.
Q How long were you there?
A All told about three years.
Q What was the address at which you were operating North American Motors?
A At 2532 North Cicero Avenue in Chicago.
Q Is North American Motors, or was North American Motors an individual proprietorship, a partnership or corporation?
A A partnership.
Q Who were the members of that partnership?
A Dominick J. Vassallo, Leonard J. Cardella, and
277 myself.
Q And what was your capacity in the partnership?
A I was the buyer.
Q Do you know the defendant, Sam Achilli?

A Yes, I do.
Q Do you see him in the court room?
A Yes, I do.
Q Will you point him out, please?
A The man there, the third man there on the right (indicating).
MR. RUSSO: May the record show, your Honor, that this witness has identified the defendant, Sam Achilli?
THE COURT: It may so show.
BY MR. RUSSO:
Q When did you first meet Mr. Achilli, Mr. Papandrea?
A In the early part of 1947.
Q What were the circumstances under which you met him?
A I don't recall that, the specific instance.
Q Do you know what business Sam Achilli was engaged in in 1947?
A Yes, I do.
278 Q What business was he engaged in?
A He was a franchised Chrysler-Plymouth dealer in Elgin, Illinois.
Q And under what name was he operating there?
A Highland Motor Sales.
Q In connection with your business, did you ever have any transactions with Sam Achilli?
A Yes, I did.
Q What was the nature of those transactions?
A Purchasing new cars.
Q How many cars did you buy from him altogether?
A There were approximately sixteen.
Q Do you recall the method or manner by which you negotiated the purchase of the first car from Mr. Achilli?
A I don't recall.
Q What procedure did you follow in buying cars from Mr. Achilli?
A We would call up on the telephone and try to consummate the deal on the telephone, and then drive out there and pick up the car and pay for it.
Q When you called on the telephone, to whom would you talk?
A Either Mr. Achilli or Mr. Constantine Cirrincione.
279 Q Before you went up there to make your purchase, did you negotiate a deal for a particular car?

A Yes, the deal was more or less set on the telephone before we went out to Elgin.

Q As a result of the conversations that you had with either Mr. Achilli or Mr. Cirrincione, did you make a commitment to buy a car from him?

A Yes, I did.

Q After you made your commitment over the telephone with either Mr. Achilli or Mr. Cirrincione, what if anything did you do or what would happen?

A Well, Mr. Cardella would issue a check for the amount, and he would go and cash the check and get the cash, and then he would give me the cash to go out to Elgin and buy the car.

Q Would you go to Elgin and buy the car?

A Yes.

Q Would you bring it back?

A Yes, I would bring it back and give Mr. Cardella the motor and serial numbers on the car and the amount paid, and we would make up an inventory card from that.

Q Now at the time that you made each purchase, whom would you pay?

280 A Either one, either Mr. Achilli or Mr. Cirrincione.

Q Now at the time that you made the purchase, what if anything did you receive in addition to the car?

A We received a license and title application.

281 Q At the time you received the title and license application from Sam Achilli, what name would be placed on that license and title application?

A Well, it would be a name which we originated—

MR. BATTER: Speak louder, please.

THE WITNESS: It would be a name which we would originate, or the name of a friend of ours that would act as the purchaser of the automobile.

BY MR. BATTER:

Q By "we" you mean whom?

A I didn't hear you. Will you read that back?

MR. BATTER: Will you read the question, please?

Q (Read by the Reporter.)

A Either myself or one of my partners.

BY MR. RUSSO:

Q Now, why was it necessary, Mr. Papandrea, for you to supply a name for the license and title application of a car that you bought from Highland Motor Sales?

MR. BATTER: I object to that, your Honor.
282 THE COURT: He may answer.
THE WITNESS: Would you repeat the question, please?
MR. RUSSO: Read the question, please, Mr. Reporter.
Q (Read by the Reporter.)
A As a used car dealer we weren't—it would be in jeopardy on Mr. Achilli's part to sell a used car dealer a new automobile, and in that respect we had to supply an individual name for each purchase.
BY MR. RUSSO:
Q Now, let me see if I understand your testimony, Mr. Papandrea. You and your partners were used car dealers, is that correct?
A That is right.
Q You as used car dealers could not buy a car from Sam Achilli and Highland Motor Sales, is that correct?
A That is correct.
Q Without jeopardizing the franchise that Mr. Achilli had from Chrysler-Plymouth?
A That's right.
Q And in order for you purchase a car from him it was necessary for you to give him a different name
283 other than North American Motors as the person who purchased the car?
A That's correct.
MR. BATTER: Your Honor, I object to counsel testifying. That is what he is doing, asking leading questions like that. I ask that it be stricken.
THE COURT: I think that is correct. I think that question has previously been answered anyway. The last answer may be stricken.
Proceed.
MR. BATTER: And the question?
THE COURT: Yes.
BY MR. RUSSO:
Q Did you have any conversation with Mr. Achilli at or about the time that you purchased the first cars from him as to the necessity for following that procedure?
A Yes.
Q What is your best recollection of what Mr. Achilli told you to do in that connection?
A We would have to supply the name of an individual

as a purchaser in order to buy these automobiles.

284 Q Will you state whether or not he told you that unless you supplied those names he would not sell you the cars?

A That's true.

Q Were you, as North American Motors, ever given a bill of sale for any of the cars that you purchased from him?

A None that I can recall.

Q Then is it true that the only thing that you received from him in addition to the car is the license and title application?

A That is correct.

Q Now, at the time you made these purchases of automobiles from Highland Motor Sales and Mr. Achilli, were you familiar with the approximate factory list prices of the cars you bought from him?

A Yes, I was.

Q Now, were the prices that you paid him the factory list prices?

A No, they weren't.

Q Was the price that you paid more or less than the factory list price?

285 A It was more than the factory list price.

Q Approximately how much more?

A About $600.00.

Q Then is it true that for each car that you purchased from him you paid him approximately $600.00 above the list price?

A That is true.

Q I believe you testified about sixteen cars?

A That's correct.

Q So that for those sixteen cars, if you paid an average of $600.00 in excess of the factory list price, you paid a total of $9,600?

MR. BATTER: I object, your Honor, to counsel testifying.

MR. RUSSO: I am asking a question.

THE WITNESS: It would add up to approximately that.

MR. BATTER: That is very leading, your Honor.

THE COURT: Let the witness do the testifying, please.

THE WITNESS: Whatever the amount would be, it would total up to approximately that.

286 BY MR. RUSSO:

Q Will you take a piece of paper, and a pencil,

Mr. Papandrea, and calculate what sixteen times $600 amounts to?

A That would be approximately $9,600.

Q Would it be approximately or would it be actually?

A Actually.

Q Now, did you ever have a conversation with Mr. Achilli as to why you were required to pay $600 in excess of the factory list price?

A Not exactly. That was the market price on the automobiles at that time.

Q What was the market price?

A About $600 over the factory list price.

Q Was that the market price or was it the black market price?

A That was the black market price.

Q I believe you testified that each and every time you brought those cars back you gave the information to your partner and it was recorded on the inventory card?

A That's right.

Q Now, Mr. Papandrea, I show you Government's
287 Exhibit 10 for identification. I direct your attention to that portion of the Exhibit which purports to be a check.

A Yes.

Q I will ask you if you ever received the money on that check?

A Yes, I did.

Q From whom did you receive it?

A From Mr. Cardella.

Q After you received the money from Mr. Cardella, what did you do?

A I took the money out to Elgin and bought a Plymouth that is stated here on the file card.

Q Directing your attention to the photostatic copy of a check bearing No. 146 dated June 23rd, 1947, in the amount of $2,100, how much money did Mr. Papandrea give you?

A Mr. Cardella?

Q Mr. Cardella. I am sorry.

A He gave me $2,100 in cash.

Q In cash?

A Yes.

Q What did you do with the money?

A I went out to Elgin and picked up this specified
288 1947 Plymouth.

Q What was the serial number and motor number of that car?

A It is stated right here on the—

MR. BATTER: Can we have the record show that the witness is testifying from documents not in evidence and that he has no independent recollection of these transactions but is simply reading from such documents?

THE COURT: It may so indicate.

Proceed.

BY MR. RUSSO:

Q How much did you pay for that car?

A $2,000.

Q After you came back with the car what if anything did you do, when you returned to Chicago?

A I would give Mr. Cardella the motor and serial number of the automobile and the license and title application.

Q Where would that information be placed?

A On the index card, here on the—

Q The inventory card?

A Inventory card.

289 Q Is the car that you purchased on the occasion of June 23, 1947, correctly described in the inventory card?

A Yes, it is.

Q With respect to the price that you paid, is that correctly reflected?

A Yes.

Q And the serial and motor number?

A That is right.

Q It also reflects that the car was purchased from Michael Nemeth, Jr. Will you explain why the card reflects the car as having been purchased from Michael Nemeth, Jr., when, as you have testified, the car was purchased from Highland Motor Sales and Mr. Sam Achilli?

A Well, as I stated before, we had to supply the name of an individual for every car that we purchased, not being able to show North American Motors as the purchaser at that time.

Q Directing your attention to Government's Exhibit 11, did you receive the money indicated on Government's Exhibit 11 from Check No. 163?

A Yes, I did.

Q From whom did you receive the money?

290 A Mr. Cardella.

Q What did you do with it?

A I went out to Elgin and purchased a car from the Highland Motor Sales.

Q On what date?

A That would be 6-18-47.

Q What did you pay for the car?

A $1,900.

Q Who did you pay?

A Either Mr. Achilli or Mr. Cirrincione.

Q After coming back, what if anything did you do at Chicago?

A I would follow the same procedure, and give Mr. Cardella the motor and serial numbers and the amount paid for the automobile.

Q Is the information on the inventory card shown on Government's Exhibit 12—or rather, Government's Exhibit 11—true and correct with respect to engine number, motor number and price paid?

A That's right.

Q Did you supply the name "Vincent Giovenco" for the license and title application?

A Yes, I did.

291 Q Directing your attention to Government's Exhibit 12 for identification and the check thereon, did you receive the cash that was gotten by means of that check?

A Yes, sir, I did.

Q From whom?

A Mr. Cardella.

Q After you received the cash what did you do?

A I drove out to Elgin and picked up a 1947 Plymouth.

Q What did you pay for it?

A $2,075.

Q Whom did you pay?

A Either Mr. Achilli or Mr. Cirrincione.

Q After you got the car back to Chicago, what if anything did you do?

A I would turn over the information, the motor and serial number and so forth, to Mr. Cardella.

Q What does it reflect that you paid for the car?

A $2,075.

Q Are the license and the engine and motor numbers reflected on the inventory card true and correct?

292 A Yes.

Q Directing your attention to Government's Exhibit No. 13 for identification and to Check No. 268 dated

August 30th, 1947, in the amount of $2,200, did you receive the cash from that check?

A Yes, I did.

Q From whom did you receive it?

A Mr. Cardella.

Q After you received that money, what did you do?

A I drove out to Elgin and picked up a 1947 Plymouth here as shown on this card.

Q And the information reflected on the inventory card is true?

A That is correct.

Q What name is reflected on there from the license and title application?

A William Nebraske.

Q Who supplied that name?

A Either myself or one of the partners.

Q Now, with respect to Government's Exhibits 10 through 13, did you make arrangements over the telephone with anyone before you went out there to purchase that car?

293 A Yes, I did.

Q With whom did you make arrangements or have a telephone conversation?

A Either Mr. Achilli or Mr. Cirrincione.

Q Now, directing your attention to Government's Exhibit 14 and to the check thereon, did you receive the proceeds of that check?

A Yes, I did.

Q On or about the date that the check bears?

A Yes.

Q From whom?

A Mr. Cardella.

Q After you received the money from Mr. Cardella, what did you do?

A I drove out to Elgin and picked up this 1947 Plymouth.

Q Had you had any conversation with anyone previous to that time concerning that car?

A Yes.

Q What did you pay for the car?

A $2,125.

Q Whom did you pay?

A Either Mr. Achilli or Mr. Cirrincione.

Q After you got back to Chicago what if anything
294 did you do?

A I would turn over the information to Mr. Cardella, the motor and serial number, and so forth.

Q Where would he put it?

A He would put it on this inventory card.

Q Is the inventory card reflected on Government's Exhibit 14 for identification the inventory card you refer to?

A Yes.

Q And is the information that was given on the application for title and license the same information that is reflected on the inventory card?

A Yes, it would be.

Q I hand you Government's Exhibit No. 15 and direct your attention to that portion of the Exhibit which purports to be a check.

A Yes.

Q I will ask you if you received the proceeds of that check?

A Yes, I did.

Q On or about the date the check bears, September 13, 1947?

A Yes.

295 Q How much money did you receive?

A $2,125.

Q Who did you get the money from?

A Mr. Cardella.

Q What did you do with the money after you got it?

A I drove out to Elgin, Illinois, and picked up a 1947 Plymouth.

Q Had you had a conversation with anyone prior to going out to Elgin concerning that car?

A Yes, I did.

Q With whom?

A With Mr. Achilli or Mr. Cirrincione.

Q After you got out to Elgin, to whom did you deliver the money?

A To either Mr. Achilli or Mr. Cirrincione.

Q After you got back to Chicago with the car, what if anything did you do?

A I would turn over the information to Mr. Cardella as to the motor and serial number and the amount paid for the car.

Q Mr. Papandrea, will you examine Government's Exhibits 16, 17, 18, 19, 20, 21, 22 and 23 and state whether

the procedure that you have described with respect to Exhibits 10 through 15 inclusive, was followed in connec-
296 tion with the transactions reflected on Government's Exhibits 16 through 23, inclusive?

A Yes. The same procedure was followed in every case.

Q The information reflected on the inventory cards—does that truly and correctly reflect the information that was supplied to you together with the application for title and license?

A Yes.

Q And in each instance did you supply a different name for the application of title and license?

A That is correct.

Q And in each case you did it at whose request?

A Mr. Achilli's request.

MR. RUSSO: Now, if your Honor please, at this time we re-offer Government's Exhibits 10 through 23 for identification, as Government's Exhibits in evidence.

MR. BATTER: May I ask the witness some questions before we do that?

THE COURT: Yes.

297 BY MR BATTER:

Q In your duties as buyer for the North American Motors, did you ever purchase new cars from any other concern other than Highland Motor Sales?

MR. BATTER: Your Honor, I object to the introduction of any of these Exhibits. The witness has just testified he bought cars from others.

These documents show a purchase in each case and there is nothing on these documents to indicate that they were purchased from Highland Motor Sales. All the witness' testimony and the testimony of the preceding witness has been based not on any recollection of what was done, but on reading from these documents. They have not been tied to this Defendant in any way at all.

THE COURT: They may be received in evidence.

(The documents previously marked Government's Exhibits 10 to 23, both inclusive for identification were
298 thereupon received in evidence as Government's Exhibits 10 to 23 both inclusive.)

MR. BATTER: Are you through?

MR. RUSSO: He is your witness. You have him on cross examination.

MR. BATTER: All right.

Cross Examination by Mr. Batter.

Q Now, Mr. Papandrione—
MR. RUSSO: His name is "Papandrea."
MR. BATTER: What?
MR. RUSSO: "Papandrea."
BY MR. BATTER:
Q Mr. Papandrea, I show you Government's Exhibit No. 10 and ask you to look at it.
A Yes.
Q What is there on that document that shows that that purchase was made from Highland Motor Sales?
A Can I see that again, please?
Q Yes.
A There is nothing on this document that would prove that this car was purchased from Highland Motor Sales except that the name of this person here (indicating) 299 should correspond with the books at the Highland Motor Sales, that the car was purchased there.
Q You do not know that at all, do you?
A Yes. It should.
Q You do not know that at all. You have not seen the books of Highland Motor Sales, have you?
A No, sir.
Q Then what is there about this document that makes you say that when your partner, Cardella, cashes a check for $2,100, endorses it and draws out $2,100 and then you come back with a car and he makes out an inventory card on it purportedly purchased from Michael Nemeth, Jr.—what is there about that that makes you say that that car was purchased from Highland Motor Sales?
A Well, I picked the car up there, and I should know where it came from.
Q How do you know now that you picked that car up at Highland Motor Sales? You purchased cars from other people, you testified.
A That's true. There's no other way I know, other than my own memory.
Q Do you have an independent memory of purchas- 300 ing a car from Highland Motor Sales which you have listed in the name of Michael Nemeth, Jr.?
A I don't recall.
Q You have no independent memory?
A No.
Q I am going to hand you Government's Exhibit No. 11 and ask you to look at that to refresh your memory.

A Yes.

Q Now, Government's Exhibit No. 11 on what you call the inventory card shows the purchase of a car from Vincent Giovenco, and the check on the same sheet is for $2,025 signed by your partner, Cardella, and cashed by him. Now, I ask you: What is there on that Exhibit that definitely recalls to you that you purchased this car from the Highland Motor Sales?

A Nothing other than my own memory.

Q What is there on this document that will refresh your memory that you purchased this car from the Highland Motor Sales?

A Nothing.

301 Q Now I hand you Government Exhibit No. 12 and ask you to look at that.

A Nothing.

Q Government Exhibit No. 12 purports to be an inventory card of a purchase of a car from Edward Priebe, and included in this photostat is a check for $4150, signed by your partner, Cardella, and cashed by him.

Now what is there on this exhibit that will refresh your memory that you purchased this car from the Highland Motor Sales?

A Nothing.

Q Now I show you Government Exhibit No. 13 and ask you to look at that.

Government Exhibit No. 13 shows the purchase of a car from William R. Nebraske, and on the same sheet there is a photostat of a check for $2200, signed by your partner, Cardella, and endorsed by him and cashed by him.

What is there about this document that will refresh your recollection that you purchased this car from the Highland Motor Sales Company?

A Nothing.

Q I now ask you to look at Government Exhibit

302 No. 14.

Government Exhibit No. 14 on the inventory card section appears to show a purchase from Dominic Giammarrusco. The check is for $2,125, signed by your partner, Cardella, and endorsed by him.

What is there about that document that refreshes your recollection that this car was purchased from Highland Motor Sales?

A Nothing.

Q I now show you Government Exhibit No. 15 and ask you to look at that to refresh your recollection.

Government Exhibit No. 15 appears on the inventory section to show a purchase from Patrick McInerny, the check is in the amount of $2,125, and signed by Mr. Cardella and endorsed by him.

What is there on that document to refresh your recollection that that car was purchased from Highland Motor Sales?

A Nothing.

Q I now show you Government Exhibit No. 15, and ask you to look at that.

Government Exhibit No. 16 on the inventory section 303 appears to show a purchase from Louis Amedi, and the check amounts to $2100, signed by Mr. Cardella and endorsed by Mr. Cardella.

What is there about that document that refreshes your recollection that that car was purchased from the Highland Motor Sales Company?

A Nothing.

Q I now show you Government Exhibit No. 17.

Government Exhibit No. 17 on the inventory section shows a purchase from Fred Sifferman, the check in the amount of $2,100, signed by your partner, Cardella, and endorsed by him.

What is there about that document that refreshes your recollection that that car was purchased from the Highland Motor Sales Company?

A Nothing.

Q I now show you Government Exhibit No. 18.

Government Exhibit No. 18 has the inventory section marked "Bought from Henry Huberty," I think it is. The check is for $2,110, signed by Mr. Vassallo, endorsed by Mr. Cardella.

What is there about that document that refreshes your recollection that that car was purchased from the Highland Motor Sales Company?

304 A It says "Elgin" right next to the name.

Q It says "Bought from Henry Huberty, Elgin"?

A No, that is Chicago, Illinois, but there is a little "Elgin" right next to the name.

Q Is there more than one Plymouth dealer in Elgin?

A I believe there is, yes.

Q Then what is there about this document that refreshes

your recollection that this was bought from Highland Motor Sales?

A Highland Motor Sales was the only dealer we were buying new Plymouths from in Elgin at the time.

Q Now with respect to Government Exhibit No. 18 about which I have just inquired, can you tell from that exhibit, or is your memory refreshed in any manner as to whom you paid that money and how much you paid?

A Either Mr. Cirrincione or Mr. Achilli.

Q You have no independent recollection of which of the two you paid, have you?

A No, not on specific transactions.

Q Now with respect to Government Exhibit No. 19, I ask you to look at that and refresh your recollection.

305 Government Exhibit No. 19 shows a purchase from Frank Pugliese, Elgin.

Is there anything on that document other than the word "Elgin" that refreshes your recollection that this car was purchased from the Highland Motor Sales Company?

A Yes.

Q What else?

A Mr. Frank Pugliese. I supplied that name myself.

Q You supplied that name?

A Yes.

Q But does this refresh your recollection that you supplied that name to—

A That is right, yes, sir.

Q Now with respect to this, is there anything on this document that will refresh your recollection as to whom you paid the money for that car?

A No.

Q You didn't perchance buy this car from Frank Pugliese, who in turn had bought it from Highland Motor Sales at the regular price?

A There is no Frank Pugliese. That is my mother's maiden name, so there is no such character.

306 Q No such character as Frank Pugliese?

A No, sir.

Q But you received title in the name of Frank Pugliese, didn't you?

A That is right.

Q This document also shows that the car was sold to Yarland Sales & Service.

MR. RUSSO: I object to any questions about the sale of the car, if your Honor please.

MR. BATTER: It is right on the document. He has introduced it.

MR. RUSSO: Only with respect to the purchase of the car.

MR. BATTER: There is no limitation on the introduction. The document was introduced in evidence.

THE COURT: He may answer.

THE WITNESS: What was the question?

(Question read.)

BY THE WITNESS:

A That is correct.

BY MR. BATTER:

Q How did you transfer title to Yarland Sales & 307 Service?

A I don't understand that. How we—?

Q You had title in the name of Frank Pugliese?

A Yes.

Q How did you transfer title to the buyer, Yarland Sales & Service?

A To Yarland Sales & Service from North American Motors.

Q Who signed the application for transfer?

A That I don't know.

Q Didn't it require the signature of Frank Pugliese?

A That is correct.

Q Who signed Frank Pugliese's name?

A I don't recall at the time.

Q Those applications had to be notarized, did they not?

A That is correct.

Q Who notarized that false application?

A That I couldn't answer.

THE COURT: I think this would be a good time to recess.

We will now recess, ladies and gentlemen, and return back here tomorrow morning at ten o'clock, please. That will be all for the day. Goodnight.

308 MR. BATTER: Your Honor, would you caution the witness not to discuss the case with anybody?

THE COURT: Yes. The witness is instructed not to discuss this case with anyone in the meantime.

(Whereupon an adjournment herein was taken until the hour of 10:00 o'clock a.m. of the following day, Wednesday, April 13, 1955.)

309 • • •

Wednesday, April 13, 1955,
10:00 o'clock a.m.

• • •

Mr. Batter: Your Honor, I have a motion which I wish to make to the Court outside of the presence of the jury, of course, and I am wondering whether or not you pre-
310 fer to hear it in chambers. I see a lot of people in the Court Room.

The Court: All right.

Mr. Batter: I do not know whether they are witnesses or what they are.

The Court: We will go in chambers.

(Whereupon the following further proceedings were had herein, outside of the presence and hearing of the jury, in chambers, to-wit:)

Mr. Batter: If the Court please, I now make a motion for the withdrawal of a juror and the declaration of a mistrial.

If your Honor please, I base that upon the happenings of yesterday. About 25 per cent of the time we spent in Court, and the condition of the record so far, has been devoted to the testimony of the North American Motors, and finally over my objections the Exhibits were admitted into evidence.

Now, my cross examination develops the fact that the witness was very definitely a party to, if not the in-
311 stigator and proponent of false testimony and perjury in so far as notarizing transfers of applications are concerned.

Let me read just a couple of paragraphs from the record. On page 305 I asked this question of Mr. Papandrea:

"Q. You didn't perchance buy this car from Frank Pugliese, who in turn had bought it from Highland Motor Sales at the regular price?

"A. There is no Frank Pugliese. That is my mother's maiden name, so there is no such character.

"Q. No such character as Frank Pugliese?

"A. No, sir.

"Q. But you received title in the name of Frank Pugliese, didn't you?

"A. That is right."

Then we go on to where obviously perjury was committed in getting the transfer there.

Now, then, reverting back to page 236 of the record, counsel for the prosecution, after I had objected, and
312 made this statement, "I further object to it on the ground the witness is testifying from records that admittedly are false"— Mr. Russo then made this statement:

"And we are going to show they are false because your client made them false."

That is on page 236 of the record. That had reference to the furnishing of names.

Now, the witness testified very definitely that he furnished the names, not Highland Motor Sales, and I think we are in a position, your Honor, in view of the present condition of the record, with over 25 per cent of the time so far devoted to this subject and the remark of counsel, that it cannot help but prejudice and inflame the jury, and I think we have no alternative except to declare a mistrial and withdraw a juror.

Before the Court ru[illegible] I would like to go further and suggest this to the [illegible]urt: If the Court should hold my
313 way, as I think it must, I would like the Court then to hold off until Monday morning the setting of a date for a new trial with the admonition to Government counsel that he search his conscience in the meantime and determine whether he can conscientiously, under his oath as a prosecutor, continue with this case, or whether he should nolle pross it.

I have in mind there several factors. So far Mr. Achilli has not been tied up with this record at all. Mr. Brady testified that he prepared the returns. They bear Mr. Earl Gromer's signature, not the witness'. (defendants) Mr. Carlson testified he was the bookkeeper and that to the extent that he was under anyone's direction it was Mr. Earl Gromer's, that Earl Gromer hired him and that he had known Earl Gromer before then and Earl Gromer got him the job, and that Mr. Achilli had nothing to do with the books and records, he was the garageman, salesman and garageman, and the only other person through
314 whom they could possibly connect Mr. Achilli with this state of the record, assuming their proposition is sound, would be Mr. Earl Gromer, which would be either in conflict then with the testimony of Mr. Brady and with Mr. Carlson, or it would be further confirmation of it—

The other witnesses that have been adduced have given the most flimsy evidence, cash paid to Mr. Cirrincione at his home, nothing to the Defendant, and we ought to avoid this case becoming a persecution instead of a prosecution.

It is fast getting to the point of being a persecution, and I therefore move that the Court declare the withdrawal of a juror and a mistrial and wait until Monday in the fond hope that the prosecutor—and understand this: I hold nothing against Mr. Russo for the remark that he did make, because I believe that he probably believed he was telling the truth, until subsequently the witnesses adduced the testimony that they furnished these title names, but
315 nevertheless it does have its effect on the jury and it is important in this respect: I do not have the cases before me at the moment, but I remember reading a number of cases, including Supreme Court cases, where the Court had held that the jury holds the prosecutor in extremely high regard, as it should, and as I do, and that remarks made by the prosecutor are particularly damaging if they are improper remarks.

Now, this remark was not improper when made, perhaps, but became improper in the light of subsequent testimony.

Beyond that, we have this whole situation as to whether the case should proceed at all, so therefore I move for the withdrawal of a juror and the declaration of a mistrial.

316 Mr. Russo: I don't think it requires too much argument, if your Honor please.

What counsel for the defendant is asking the Court to do is to rule upon the weight and credibility of the testimony of Mr. Papandrea. That is a question for the jury in this case.

He is asking the Court too to rule upon conflicts of testimony, which is also within the province of the jury and goes to the weight and credibility of the evidence and not to its admissibility.

With respect to improper remark of counsel, I think the Court cured any error there by ordering it stricken.

I don't think there is any merit to counsel's motion.

The Court: The motion will be denied, gentlemen.

* * *

222a And afterwards, to wit, on the 13th day of April, 1955 being one of the days of the regular April term

of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch District Judge, appears the following entry, to wit:

223a IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the defendant by his counsel enters his motion for withdrawal of juror and to have mistrial declared and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that said motion be and the same is hereby denied and now comes also the Jury and the Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause and the trial proceeds and during the hearing of further evidence for the Government the hour of adjournment having arrived it is

Further Ordered that the Jury and Alternate Jurors be permitted to separate and that this cause be and the same is hereby adjourned until April 14, 1955

317 ALBERT PAPANDREA, heretofore called as a witness on behalf of the Government, and having been heretofore first duly sworn, resumed the stand and testified as follows:

Cross Examination (Ctd.) by Mr. Batter.

Q Mr. Papandrea, this morning when I entered this building, I saw you get on the elevator at the second floor, get off at the fourth floor, and hold conversation with Mr. Russo in the lobby of the fourth floor.

Did you discuss this case with him?

A No, sir.

Q What did you discuss?

A I told him I thought I was going to be late, and that was the extent of the conversation.

Q And you went up to the fourth floor to tell him that?

A I was supposed to sign in. I didn't have a chance to sign in.

MR. RUSSO: If your Honor please, the question directed to this witness attempts to impugn my integrity, and I will

pursue the matter further. I resent the implication and the insinuation.

318 When did I first see you this morning Mr. Papandrea?

MR. BATTER: I have made no effort to impugn.

MR. RUSSO: The question did.

MR. BATTER: I only asked the witness what he did.

MR. RUSSO: I resent the implication that I would violate an order and an injunction entered by this Court to refrain from talking to this witness until this morning.

MR. BATTER: There has been no such implication.

THE COURT: We will let the matter rest there, gentlemen. There will be no implication.

BY MR. BATTER:

Q Mr. Papandrea, I show you Government Exhibit 21 and ask you to refresh your recollection from that exhibit.

Government Exhibit No. 21 purports to have as part of it an inventory card showing the purchase of a car from Joe Brzybyla. Following that it states: "Sam Achilli." The check is signed by Mr. Cardella, in the amount of

319 $4,020, endorsed by Mr. Cardella.

Who is Joe Brzybyla?

A That is my brother-in-law's brother.

Q Then you furnished that name?

A Yes, I did.

Q Did you buy the car from Highland Motors or from your brother-in-law?

A I bought it from Highland Motors.

Q I ask you to look at Government Exhibit No. 22 and refresh your recollection from that.

Government Exhibit No. 22 has two inventory cards attached to it, one indicating a purchase from Albert E. Crowe, and after that, in apparently other handwriting, is the name Sam Achilli, Elgin, Illinois. The other is Herbert J. Carlson, and after that there appears the notation Sam Achilli, Elgin. The check is in the amount of $4,030, signed by Mr. Cardella and endorsed by Mr. Vassallo, your other partner.

Who is Albert E. Crowe?

A A friend of mine.

Q Who is Herbert J. Carlson?

A Also a friend.

Q Did you buy these two cars from them?

A No, I did not.

320. Q What consideration if any was made to Mr. Crowe or to Mr. Carlson to lend their name to this type of transaction?

A None whatsoever.

Q What explanation did you make to them as to why you were taking title in their name?

A I just asked if I could use their name in order to buy the new car.

Q And then they signed the application of transfer?

A That is right.

Q Now I hand you Government Exhibit No. 23 and ask you to refresh your recollection of that transaction.

The inventory card on Government Exhibit No. 23 shows the purchase of a car from R. Hindsley, and then to the right appears the word "Highland." The check is in the amount of $2,015, signed by Mr. Vassallo and endorsed by him.

Did you purchase that car from Mr. Hindsley?

A No, sir.

Q Who is Mr. Hindsley?

A I don't know.

Q Did you furnish that name?

A No, I did not.

321 Q Who did?

A I don't know. Probably one of my other partners.

MR. BATTER: Now, your Honor, I move that there be stricken from the record and the jury be asked to disregard all testimony regarding Government Exhibits Nos. 10, 11, 12, 13, 14, 15, 16 and 17.

This group of exhibits are the ones where the witness has testified that he is unable to refresh his recollection from these that they involved a purchase from the Highland Motor Car Company.

I will deal with the other exhibits when we have a ruling on these.

THE COURT: The motion will be denied.

MR. BATTER: Now I move the Court to strike from the record all testimony regarding and the jury be instructed to disregard such testimony with reference to Government Exhibits 18, 19, 20, 21, 22 and 23 on the ground that they are admittedly untrue records, involving falsity, and are absolutely unreliable.

THE COURT: The motion will be denied.

322 MR. BATTER: No further cross.

Redirect Examination by Mr. Russo.

Q Mr. Papandrea, concerning all the cars that you have testified about, is there any doubt in your mind whatsoever that you purchased those cars from Highland Motor Sales?

A No.

Q Is there any doubt in your mind that you purchased those cars from Highland Motor Sales on or about the dates reflected on the Government exhibits concerning which you have been interrogated?

A No, there is no doubt.

Q And is it true, Mr. Papandrea, that you were required to furnish different names to Highland Motor Sales before you would be permitted to purchase a car from them?

A That is true.

MR. BATTER: I object to the form of the question, your Honor. Counsel says he was required to furnish. I don't think that that has been the testimony.

MR. RUSSO: I am asking him now.

323 THE COURT: It may stand. Proceed.

THE WITNESS: Yes, that is true. I had to furnish the names in order to purchase the cars.

MR. RUSSO: Thank you. That is all.

Recross Examination by Mr. Batter.

Q Mr. Papandrea, you say there is no doubt in your mind that you purchased the cars from Highland Motor Sales. On what do you base that statement?

A You mean about purchasing the cars, the amounts of the automobiles?

Q Yes.

A Well—

Q In other words, do you have a distinct, independent recollection, independent of the exhibits?

MR. RUSSO: Let him answer the first question. You are asking him two.

MR. BATTER: I will ask the questions.

MR. RUSSO: Ask them one at a time.

BY MR. BATTER:

Q Do you have a distinct and separate recollection of the purchase of each of these cars from Highland Mo-

324 tor Sales Company independent of the Government exhibits?

A No, I don't.

MR. BATTER: That is all.

325 *Redirect Examination by Mr. Russo.*

Q With respect to the information contained on those Exhibits, is all the information contained thereon true and correct with the exception of the name that is shown on there as the source of the purchase?

A Yes, that is true and correct.

MR. RUSSO: That is all.

Recross Examination by Mr. Batter.

Q How do you know that? You didn't maintain those records, did you?

A No, but I have faith in my partners.

Q By the way, where are those records?

A I don't know. I left them at North American Motors when I moved out.

Q You didn't take the records with you?

A No.

Q What happened to North American Motors when you moved out?

A They were still in business.

Q To the best of your knowledge, then, the records were there then and available?

326 A That is right.

Q When was this?

A In July of 1948.

Q You have made no effort to look for those records recently, have you?

A No, I have not.

MR. BATTER: That is all.

MR. RUSSO: Thank you.

(Witness excused.)

WILLIAM SCALISE, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Is your name William Scalise?

A Yes, sir.

Q Is that spelled S-c-a-l-i-s-e?

A Yes, sir.

Q Where do you live?

A 312 West 42nd Place.

Q What is your business or occupation?
A I have a liquor store; self-employed.
327 Q Where is that located, please?
A 4252 Wentworth.
Q How long have you been engaged in that business?
A Oh, about ten years.
Q Mr. Scalise, are you familiar with an automobile sales company named Highland Motor Sales?
A Yes, sir.
Q Directing your attention to on or about the 24th of December, 1946, did you on or about that date have a transaction with Highland Motor Sales?
A Yes.
Q And with whom did you deal there?
A With Sam Achilli.
THE COURT: Will you speak up, please, so everyone may hear you.
THE WITNESS: Sam Achilli.
BY MR. RUSSO:
Q What was the nature of that transaction?
A I bought a new car.
Q What kind of car did you buy?
A Plymouth.
Q Was it a coupe, sedan, or what?
A Four-door.
328 Q A four-door sedan?
A Yes.
Q How much did you pay for that car?
A $1,900.
Q How did you pay for it?
A Cash.
Q To whom did you make payment?
A Sam Achilli.
Q Do you see Sam Achilli in the court room?
A Yes, sir.
Q Will you point him out, please?
A The fellow on the right-hand side (indicating.)
Q The last man at the end of Defense counsel table?
A Yes.
Q Is he the same man to whom you paid that $1,900 cash?
A Yes, sir.
MR. RUSSO: Your witness.

Cross Examination by Mr. Batter.

Q What did you say your occupation was?
A I have a tavern.
Q You have a tavern?
329 A No, a liquor store now.
Q Back in 1946 it was a tavern?
A Yes.
Q And you owned that place?
A Yes, I owned the tavern.
Q And you keep regular books of account for your business?
A Where?
Q Always, sir.
A Oh, yes.
Q Do you have any evidence in the form of check or cash or book entries?
A No, I haven't.
Q What has happened? Why not?
A What, for the car?
Q Yes.
A Well, I had a receipt, but I haven't got it now.
Q Do you have a book entry showing the payment for the car?
A No.
Q Why shouldn't that appear upon your books?
MR. RUSSO: I object to that, if your Honor please.
330 THE COURT: He may answer it.
THE WITNESS: What did you say?
MR. BATTER: You may answer.
THE WITNESS: What?
BY MR. BATTER:
Q Why shouldn't that record of the purchase of the car appear upon your books?
A Well, it was my own money.
Q It was your own business, too.
A Yes.
Q But do you disburse $1,900 without showing it on your books?
A Yes.
Q You do?
A (No response.)
MR. BATTER: That is all.
MR. RUSSO: No further questions.

HOMER CATT, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

331 *Direct Examination by Mr. Russo.*

Q Will you state your name, please, sir?
A Homer Catt.
Q Where do you live, Mr. Catt?
A 414 Villa Street in Elgin, Illinois.
Q What is your business or occupation?
A I am a field engineer with the State Highway Department.
Q How long have you been engaged in that business?
A About 35 years, sir.
332 Q Mr. Catt, directing your attention to on or about June 6th—strike that question.
Are you acquainted with an automobile sales company named Highland Motor Sales?
A Yes, sir.
Q Where is that company located?
A In Elgin, Illinois.
Q Did you ever have any transactions with that company?
A Yes, sir.
Q Directing your attention to June 14th, 1948, did you have a transaction with that company on that date, on or about that date?
A Yes, sir.
Q What was the nature of the transaction?
A I bought a Plymouth automobile.
Q With whom at Highland Motor Sales did you deal?
A Well, we call him Cons.
Q Would that be Constantine Cirrincione?
A I understand it is, sir.
Q In connection with that transaction did you trade in a car?
A No, sir.
Q How was that transaction made?
333 A At the time of delivery I paid him $1,500 cash and the rest was by monthly payments.
Q What was the deferred balance that was financed?
A About $950.00, I think it was, sir.
Q At the time of that transaction did you receive anything from Highland Motor Sales?

A Yes, sir.

MR. RUSSO: Mr. Reporter, will you mark this as Government's Exhibit 24 for identification, please.

(The document was thereupon marked Government's Exhibit 24, for identification.)

MR. BATTER: May I see it?

MR. RUSSO: I want to identify it first.

MR. BATTER: It has been marked. I would like to see it.

MR. RUSSO: It has only been marked by the Reporter, if the Court please. I am entitled—

MR. BATTER: I would like to see it before the witness sees it, your Honor.

THE COURT: You may show it to counsel.

(Mr. Russo handed Mr. Batter Government's Exhibit
334 24 for identification, after which Mr. Batter handed Government's Exhibit 24 for identification back to Mr. Russo.)

BY MR. RUSSO:

Q Mr. Catt, I hand you Government's Exhibit 24 for identification, and ask you if that is the sales slip to which you have referred.

A Yes, sir; that is it.

Q Now, will you examine Government's Exhibit 24 for identification and then state the year, the make, and the model of the car, the type of car that you purchased from Highland Motor Sales?

A It was in June, 1948, and I bought a Plymouth De-Luxe Sedan, four-door.

Q What was the motor number?

A Well, I wouldn't know, only what appears on this (indicating).

Q On the slip?

A On the slip.

Q Now, I believe you testified that you paid $1,500 cash?

A Yes.

Q I believe you testified you financed $950.00. Will
335 you examine that and refresh your recollection as to the amount that you financed?

A $930.00.

Q Now, to whom did you pay the $1,500 in cash?

A To this Mr. Cons.

Q Mr. Cons?

A Yes.

Q I ask you to examine Government's Exhibit 24 for

identification and state whether or not it truly and correctly reflects the amount that you paid for that car?

A (No answer.)

Q What does it reflect that the total cash delivered price of the automobile was?

A Well, about $2430, I think it is.

Q That is what you paid, I believe. I am asking you to examine Government's Exhibit 24 for identification and state what it reflects that you pafd ior it.

A $1,632.

Q Does it reflect that you paid any amount for taxes?

A $32.00.

Q And what does it reflect the total cash delivered
336 price to be?

A $1,632.

Q Now, did you trade in a car?

A No, sir.

Q Directing your attention to a block on Government's Exhibit 24 for identification headed, "Record of trade-in," does that indicate that you traded in a car?

A I would say yes.

Q Does it indicate that you were given an allowance on a trade-in?

A This shows $702.

Q Did you trade in a car?

A No, sir.

Q Were you given an allowance of $702?

A No, sir.

Q Directing your attention to the signature on the bottom of the page, Government's Exhibit 24 for identification, whose signature is that?

A That's my signature, sir.

Q When was that signature put on there? At or about the time that ticket was made out?

A Yes, sir.

Q Directing your attention to the signature in the
337 lower left-hand corner thereof, whose signature is that if you know?

A It's Mr. Cons', that I referred to.

Q That was put on there in your presence, was it?

A Yes, sir.

Q Then is the total cash price that you paid for that car the total of the sum of $1,500 that you paid in cash and the sum of $930 that you financed?

A Yes, sir.

Q And is that total $2,430?
A Yes, sir.
MR. RUSSO: If your Honor please, at this time I offer in evidence Government's Exhibit 24 for identification as Government's Exhibit 24 in evidence.
MR. BATTER: No objection.
THE COURT: It may be received.
(The document previously marked Government's Exhibit 24 for identification was thereupon received in evidence as Government's Exhibit 24.)
MR. RUSSO: Your witness.

338 *Cross Examination by Mr. Batter.*

Q How old are you, Mr. Catt?
A 64, sir.
Q 64. Then in 1948 you were 57, is that correct, seven years ago?
A In June that year I was 57.
Q I ask that because it states on here that you certify you are over twenty-one.
Now, Mr. Catt, this document shows that the cost of the car was $1632 which was liquidated by a credit for trade-in of $702, with a balance due of $930 to be paid in six installments, and you signed that.
A Yes, sir. I signed that slip which you have.
Q You knew it was false when you signed it?
MR. RUSSO: I object to that question, if your Honor please. It impugns the veracity of this witness. There has nothing been shown yet that there is anything false about that statement.
THE COURT: Objection sustained.
BY MR. BATTER:
Q Did you give a trade-in when you bought that
339 car?
A No, sir.
Q What did you give?
A $1,500 cash.
Q Do you have any evidence of the $1,500 in cash?
A Just a statement from my bank wherein I withdrew approximately that amount about the time of this transaction.
(The witness handed a document to Mr. Batter.)
Q Now, this statement states that you withdrew $1650, is that correct?

A Yes, sir. That is what I withdrew.
Q And of that $1650 you paid $1500?
A $1500 cash, yes, sir.
Q Now, then, this bill of sale is not in conformity with the facts as you testified to them, is it?
A I don't quite understand you, sir.
Q This bill of sale of $1632 reflected by a trade-in of $702 and a balance to be financed of $930 is not in accordance with the facts as you have testified to them, is it?
A Well, there was no trade-in. There was no trade-in credit of any kind. I paid $1500 cash to this Mr. Cons
340 when I took delivery of the automobile.
Q And you do not find that in any manner reflected on this sales slip, do you?
A I don't see anything to that effect there, sir.
Q What you do see on this sales slip is in conflict with the testimony you have just given, isn't it?
A I would say so, yes, sir.
Q Therefore it is false, isn't it?
A Well, that isn't what actually happened, if that is what you refer to, sir.
Q Yes. Will you tell us why you signed this false statement?
A Well, I had to sign something before I took delivery of the automobile.
Q Did you get a receipt for that $1,500?
A That's all I got from Highland Motor Company. (Indicating.)
Q That is all that you got?
A Yes.
Q And in this connection you dealt with Mr. Cons or Mr. Sirrone, is it.
MR. RUSSO: Cirrincione.
MR. BATTER: Cirrincione.
341 A Yes, sir.
MR. BATTER: That is all.

Redirect Examination by Mr. Russo.

Q You did not prepare this, did you, Mr. Catt?
A No, sir.
Q You only signed it in order to get an automobile?
A That's right.
Q And you did not care what was on here, as long as you got your automobile after you had paid $2430 to High-

land Motor Sales, is that correct, or whatever it was that you paid?

A I got that receipt at the time I gave Mr. Cons $1,500, as I remember. I'm not too sure of that.

Q And the balance of $930 was financed?

A That's right, sir.

Q And you did not care what was on here as long as you got your automobile—

A No.

Q (Continuing)—and you weren't called upon to pay any more than you had paid?

A No, sir.

MR. RUSSO: That is all.

342 *Recross Examination by Mr. Batter.*

Q Are you in the habit of signing false statements?

A I don't recall—

MR. RUSSO: I object to the question, if your Honor please. That does not purport to be a false statement signed by him. It only purports to be his signature on there for a car that he purchased.

THE COURT: Objection sustained.

BY MR. BATTER:

Q Why did you sign that statement?

A In order to get delivery of the car, sir.

Q Would you sign anything in order to get delivery of a car?

MR. RUSSO: I object, if the Court please.

MR. BATTER: I think I have a right to interrogate the man's sanctity of his signature, how lightly he regards it or how well he regards it.

MR. RUSSO: The man answered why he signed that thing.

343 THE COURT: Objection sustained.

MR. BATTER: Your Honor, may I show this Exhibit to the jury?

THE COURT: Yes.

(Mr. Batter thereupon handed Government's Exhibit 24 to the jury.)

* * *

344-347

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HANS MOELLER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is Hans Moeller?
A Yes.
Q That is spelled Hans, H-a-n-s?
A That is right.
Q And Moeller, M-o-e-l-l-e-r?
A That is right.
Q Where do you live, Mr. Moeller?
A Elgin, Route 3.
Q What is your business?
349 A Farmer.
Q Mr. Moeller, are you acquainted with an automobile company known as Highland Motors?
A I am.
Q Where is that company located?
A In Elgin, on Wellington Avenue.
Q Directing your attention to on or about July 29, 1948, did you have a transaction with that company at or about that time?
A I did.
Q With whom did you deal?
A With Cons, the salesman.
Q What was the nature of that transaction?
A I bought a car.
Q What kind of car was it that you bought?
A A 1948 Plymouth, a new one.
Q What did you pay for that car?
A $2400.
Q How did you make payment?
A With two cashier's checks.
Q Do you recall to whom you made payment?
A I handed the checks to the salesman.

MR. RUSSO: I will ask that these documents be marked Government Exhibits 25 and 26 for identification.

350 (The documents were thereupon marked Government Exhibits 25 and 26, respectively, for identification.)

BY MR. RUSSO:

Q Mr. Moeller, I hand you Government Exhibit No. 25 for identification, purporting to be a photostatic copy—

MR. BATTER: May I see it?

THE COURT: Proceed.

BY MR. RUSSO:

Q (Continuing)—purporting to be a photostatic copy of a check of the First National Bank of Elgin, dated July 29, 1949, No. 130552, payable to the order of Hans Moeller, in the sum of $1500.

Did you ever see the original of that check?

A Yes.

Q Is Government Exhibit No. 25 a true and correct copy of the check?

A Yes.

Q Now directing your attention to what purports to be the back of that check, I will ask you to examine it and state whether or not you endorsed it.

A I did.

351 Q Does it bear your endorsement?

A Yes.

Q Was that endorsement put on there on or about the date the check bears; July 29, 1948?

A It was.

Q Now whom did you deliver the original to?

A To the salesman at H nland Motor Sales.

Q In addition to Governm.ent Exhibit 25, did you also deliver another check?

A I did.

Q I show you Government Exhibit No. 26 for identification, purporting to be a check of the Elgin National Watch Employees Credit Union, drawn on the First National Bank of Elgin, Illinois, Check No. 7577, payable to the order of Louise D. Moeller, in the amount of $900.

I will ask you if you have ever seen the original of that check?

A I did.

Q What were the circumstances under which you saw the original?

A I had the two checks. I handed them to the salesman.

Q Is Government Exhibit No. 26 for identification 352 a true and correct copy of the original?

A It is.

Q I ask you to look at the back of the check and state whose endorsement that bears.

A That is the endorsement of my sister. She endorsed it and handed it to me.

Q Where did she hand it to you?

A She handed it to me before I went down and bought this car.

Q And after she handed it to you, what if anything did you do with it?

A I took the two checks and handed them to the salesman in payment of the car.

Q And the amount of $1500 on Government Exhibit No. 25 and the amount of $900 on Government Exhibit No. 26 for identification, one for $1500 and the other for $900, represents the total amount of the money you paid for that

A It does.

Q Now at the time that this transaction took place, were you given any receipt or bills of sale in connection with the purchase of that car?

A Well, I was given a receipt but I can't seem to find the thing. I never kept it that long.

353 Q Do you know Sam Achilli, Mr. Moeller?

A I do.

Q Was he present at the time, or at any time during the course of this transaction?

A He was.

Q Did he participate in the transaction with you?

A He O.K.'d it.

MR. RUSSO: At this time, if your Honor please, the Government offers in evidence Government Exhibits 25 and 26 marked for identification as Government Exhibits in evidence.

MR. BATTER: I object, your Honor, to the admission of either of these, and also move to have stricken all of the witness' testimony respecting it.

They are photostats. The absence of the originals has not been explained. It is secondary evidence, inadmissible at this time.

THE COURT: They may be received subject to the objection.

(The documents previously marked, respectively, Government Exhibits 25 and 26 for identification, were
354 thereupon received in evidence as Government Exhibits 25 and 26, respectively.)

BY MR. RUSSO:

Q One more question, Mr. Moeller. Do you see Sam Achilli in the court room?

A I do.

Q Will you point him out, please?

A Sitting over on the side there, in the gray suit.

Q The last man at the defense counsel table?
A The last man.
MR. RUSSO: May the record show that the witness has identified the defendant, Sam Achilli?
THE COURT: It may so indicate.
MR. RUSSO: Thank you, Mr. Moeller. That will be all.
MR. BATTER: Wait a minute. Not so fast.
Mr. RUSSO: I am sorry.

355 *Cross Examination by Mr. Batter.*

Q Mr. Moeller, I hand you Government Exhibits Nos. 25 and 26, and ask you where the originals of those documents are.
A Well, on 25, it is in the First National Bank of Elgin, and the other one is in the Credit Union at Elgin.
Q Have you endeavored to procure them to bring them here instead of these checks?
A I have. They don't let them out.
Q They were not subpoenaed, were they?
A Not that I know of. I don't know. I went to get these. They wouldn't let the originals out. I have see the originals.
Q You have seen the originals of these two documents?
A One, not the other one.
Q Which one?
A The one from the First National Bank.
Q But you have not seen the original of the Credit Union check?
A I saw it at the time of the deal, but not since.
MR. BATTER: Your Honor, I again move that
356 these two checks be stricken from the record. The witness has seen the original evidence and the original evidence is the only evidence admissible in the absence of an explanation of unavailability.
THE COURT: The motion will be denied.
BY MR. BATTER:
Q Now, Mr. Moeller, you testified that you are a farmer, is that correct?
A Yes.
Q What were you in 1948 when you bought this car?
A A laborer.
Q A laborer?
A That is right.
Q Now this Exhibit No. 25 for $1500 bears the endorsement of the Highland Motor Sales Company, whereas Ex-

hibit No. 26 for $900 bears no signature beyond that of your sister and yourself. What did you do with that check?

A I handed it to the salesman at Highland Motor Sales, both of them.

Q You didn't cash that check?

A I did not cash that check.

357 Q Did you get a bill of sale from the Highland Motor Sales for that car?

A We got a bill of sale but we can't find it.

Q Have you looked for it?

A Yes.

MR. BATTER: Without losing much time, your Honor, I would like the jury to see these two checks, and see that one of them bears no endorsement at all for the purpose of connecting with this case.

THE COURT: Let's withhold that and we will let them see it later during a recess—

MR. BATTER: All right; fine.

THE COURT: —to save time.

MR. BATTER: Fine. No further questions.

MR. RUSSO: Thank you, sir.

(Witness excused.)

358 ARVID SUNDQUIST, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Will you state your name, and spell it, please, for the Reporter?

A Arvid Sundquist, A-r-v-i-d S-u-n-d-q-u-i-s-t.

Q Where do you live, Mr. Sundquist?

A Route 2, Dundee, Illinois.

Q What is your business?

A Tool and die.

Q I beg your pardon?

A Tool and die work.

Q What is that located?

A 617 North State Street.

Q Are you in business for yourself or employed by someone?

A In business for myself.

Q Does your business have a name?

A Yes; Reliance Tool & Die Works.
Q Were you in the same business on or about November 30th, 1948?
359 A Yes.
Q Were you acquainted with an automobile sales company called Highland Motor Sales?
A Yes, I am.
Q Where is that company located?
A Well, I believe it is on Lake Street,—it is on the corner of Lake and Wellington, I believe.
Q In what city?
A Elgin.
Q Now, directing your attention to on or about November 30th, 1948, did you have any transactions with Highland Motor Sales?
A Yes.
Q What was the nature of that transaction?
A Well, I bought a 1948 Plymouth club coupe.
Q From whom did you buy it?
A From—
Q With whom did you deal?
A Sam; Sam Achilli.
Q Do you see Sam Achilli in the Court Room?
A Yes. He's seated over here (indicating).
Q How much money did you pay for the car?
A Well, I believe I have an invoice here. I would like to refresh my memory, if I may.
360 MR. RUSSO: Will you mark this as Government's Exhibit 27 for identification, please, Mr. Reporter.
(The document was thereupon marked Government's Exhibit 27, for identification.)
BY MR. RUSSO:
Q Mr. Sundquist, I hand you Government's Exhibit 27 for identification and ask you if that is the invoice you referred to?
A Yes, it is.
Q Will you examine it, please, and then tell us how much you paid for the car and how you made payment?
A Well, the delivered price is $1,938 and I made a down payment of $650 and paid the balance in monthly installments.
Q Now, in addition to that $650.00, did you make any additional down payment?
A Yes. I made a cash payment amounting to $227.
Q That is a total down payment of $877, is that correct?

A That is right.

361 Q What did you do about the balance?

A Well, the balance was financed through Highland —what is the name of that place? I believe I have it here. Elgin Acceptance Company.

Q What was the deferred amount that was financed?

A Well, the difference between the amount I paid down and—let's see. I have the figures here.

Q Will you examine Government's Exhibit 27 for identification, and state whether or not it indicates the amount, the balance that was being financed?

A Yes. The balance was $1278,

Q $1278?

A Right.

Q So that the total price of the car to you without finance charges was $2,155, is that correct?

A That is right.

Q Now, directing your attention to the line at the bottom of the page entitled, "Buyer's signature" whose signature is that?

A My signature.

Q Did you place your signature on there on or about the date that the document bears, November 30th, 1.48?

A That is right.

362 Q Directing your attention to the signature in the lower left-hand corner of Government's Exhibit 27 for identification, whose signature is that?

A Well, I can't read this writing, I'm afraid.

Q Was it placed on there in your presence?

A Yes.

Q Is he one of the persons with whom you dealt at Highland Motor Sales in connection with the purchase of the car you testified about?

A That's right.

Q To whom did you pay that $227 that you paid in cash?

A Mr. Achilli.

Q Is that amount reflected on Government's Exhibit 27 for identification?

A Yes. I just made a pencil notation.

Q Who did?

A I did.

Q When did you make that notation on there?

A At the time I purchased it.

Q But it was not reflected on there at the time the

ticket was delivered to you by the person from whom you bought the car?

A That's right.

363 Q What was the purpose for your putting that notation on there?

A Well, I just wanted it for my personal records.

(Mr. Russo handed Government's Exhibit 27 for identification to Mr. Batter.)

MR. BATTER: No objection.

THE COURT: It may be received.

(The document previously marked Government's Exhibit No. 27 for identification was thereupon received in evidence as Government's Exhibit 27.)

BY MR. BATTER:

Q Mr. Sundquist—

MR. RUSSO: Just a minute, please, Mr. Batter. For the purpose of the record only, I would like to have the record show that the Government offered Exhibit 27 in evidence.

THE COURT: The record may so show, and it is received.

Cross Examination by Mr. Batter.

Q Mr. Sundquist, Government counsel directed your

364 attention to a pencil notation on there amounting to $227; is that correct?

MR. RUSSO: That statement is not correct, your Honor. I did not do any such thing. The witness directed my attention to it.

BY MR. BATTER:

Q Well, then, you directed Government's counsel's attention to a figure on there of $227, which I understand is your own notation, is that correct?

A That's right.

Q What other notation did you make on there, if that is your writing, respecting the $227?

A How do you want me to answer that, sir?

Q Whatever you see there.

A Well, I made a notation of $227 which I have already explained.

Q And what did you write alongside of it?

A Well, "Accessories."

Q "Accessories"?

A That is right.

Q That is right. Now, that $227 was for accessories, was it not?

A Cash payment for the same.

365 Q You did not get any separate bill for that, or did you?

A No, I didn't.

Q Now, you testified on the prior trial of this case and at that time you testified that the—

MR. RUSSO: If your Honor please, I object to the reference to anything happening prior to the date of this trial.

THE COURT: Objection sustained.

BY MR. BATTER:

Q Now, did the accessories amounting to $227 include a radio, seat covers, and a window washer?

A Well, I assume they did. I wasn't given a detailed statement at all on the cost or the amount of extras on the car.

Q Have you at any time, anywhere, made the following statement:

"... The added amount was to cover, I believe, the radio, the seat covers, and window—I believe there was a window washer on the automobile."

Do you recall ever making such a statement?

366 A Would you repeat the question, please?

Q Did you make this statement:

"The added amount was to cover, I believe, the radio, the seat covers, and window—I believe there was a window washer on the automobile"?

A Yes. That is true. They were on the automobile.

Q Your statement is "the added amount . . ."

MR. RUSSO: I object to his arguing with the witness, your Honor.

THE COURT: Objection sustained.

BY MR. BATTER:

Q Does the $227 cover those accessories?

A Well, supposedly. All I have is just the man's word for it. After all, I don't have a detailed statement showing the amount of the extras there were on the automobile at the time of purchase.

Q But you were willing to pay $227—

A That's right.

Q —for those extras?

A That's right.

Q Is this very faint writing on Government's Exhibit 27 opposite the figure of $227, reading "Accessories"

367 in your writing?

A Yes. I have already verified that, sir.

MR. BATTER: That is all—one more question.

BY MR. BATTER:

Q Did you make this transaction with Mr. Achilli or Mr. Cirrincione?

A Mr. Achilli.

Q Let me direct your attention, to refresh your memory, to the signature on this sales receipt (indicating).

A Yes, sir.

Q Do you recall the circumstances under which Mr. Cirrincione's name was put on there?

A Well, I think Sam handed it to him for his signature instead of putting his own on the invoice.

Q You say you think. Do you have any distinct recollection of that happening at the time?

A Yes. I believe I do.

Q Let's see how distinct that is. Where was this?

A At the Highland Motor Sales.

Q Where at the Highland Motor Sales?

368 A In the office.

Q In the office. Who was in that office?

A Well, I spoke to Mr. Achilli myself personally, and as I recall it he came into the office also when the transaction was taking place.

Q Who is "he"?

A Cirrincione, or whatever his name is.

Q He came into the office?

A Yes.

Q Then he made out the sales slip?

A Yes.

Q By that time had you purchased the accessories or were they purchased later?

A No. They were purchased first.

Q They were purchased first?

A Yes.

Q Did you direct his attention to the omission of the accessories from this sales slip when he gave it to you?

A Yes, I did.

Q What did he say?

A Well, he said he didn't choose to show it on the sales slip.

Q But that was Mr. Cirrincione talking?

369 A No. That was Mr. Achilli.

Q That was Mr. Achilli talking?

A Yes.

Q What did Mr. Cirrincione say when Mr. Achilli said that?
A He didn't say anything.
Q What?
A He didn't say anything to me.
Q He didn't say anything to you?
A No.
MR. BATTER: That is all.
MR. RUSSO: Thank you, Mr. Sundquist.
THE WITNESS: You're welcome.
(Witness excused.)

JOHN B. JONES, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is John B. Jones?
A Yes, sir.
Q What is your address, Mr. Jones?
370 A Veterans Administration, Downey, Illinois.
Q What is your business or occupation?
A Nurse's Aid.
Q Where?
A Downey Hospital.
Q In Downey?
A Yes.
Q How long have you been there?
A Nine years.
Q Mr. Jones, are you acquainted with an automobile company called Highland Motor Sales?
A Once, in 1948.
Q Do you know where that company is located?
A In Elgin.
Q Directing your attention to on or about April 17th, 1948, did you have a transaction at Highland Motor Sales?
A Yes, sir.
Q What was the nature of that transaction?
A Sir?
Q What was the nature of that transaction?
A Highland Motor Sales.
Q What did you do there?
A I bought an automobile.
371 Q What kind of an automobile?
A Plymouth; 1948 Plymouth club coupe.

Q Was that new or used?
A New.
Q With whom did you deal?
A Sam Achilli.
Q Do you see Mr. Achilli in the Court Room?
A I wouldn't recognize him.
Q How much did you pay for the car?
A To the best of my knowledge around twenty-three, twenty-two and-a-half or twenty-three hundred.
Q How did you make payment?
A Well, I paid fifteen dollars down in cash.
Q Fifteen dollars?
A Yes—fifteen hundred.
Q Fifteen?
A Fifteen hundred cash.
Q Fifteen hundred cash?
A Yes, sir..
Q How did you pay the remainder?
A $700.00.
Q $700.00?
A Yes.
372 Q How did you pay it?
A Paid it all in cash.
Q All in cash?
A Yes, sir.
Q So that you paid $2200 for the car?
A That is right.
Q To whom did you deliver the cash?
A Sam Achilli.
Q Did you have any conversation with Sam Achilli at the time that you purchased the car?
A On that day, the same day.
Q On that day?
A Yes, sir.
Q What was that conversation?
A I went in there to buy an automobile off of him and he said he didn't have any on the floor right then but he would get one that evening—that was along about noon—so that evening I went back and he had the car on the floor.
Q Did you have any conversation with him concerning the price of that car at that time?
A On that day.
373 Q Sir?
A On that day, yes.
Q What was that conversation?

A Oh, about the automobile, buying a car.
Q Can you tell us what he said and what you said?
A Not offhand, no, sir.
Q Was there any conversation between you and him as to the amount that you paid for the car?
A Not any more than what I told.
Q You paid $2200 for it?
A That is right.
Q $1500—
A Cash, and $7 financed.
Q $7 or $700?
A $700, yes, sir.
Q Now was there some conversation about financing it then?
A Yes, sir. I told him I would pay him off the next day, and he went ahead and financed it, so I went to the finance office and paid it off.
Q At the time that you first discussed the price with Mr. Achilli, was it your intention to finance that car or any part of it?
A Yes, sir.
Q It was?
374 A Yes, sir.
Q And when did you pay off the finance company?
A Well, it was some bank—I forget now what. The Union National Bank, I believe it was.
Q Was it within a day or two after you bought the car?
A The next day after I bought the car.
MR. RUSSQ: Your witness.

Cross Examination by Mr. Batter.

Q Did you get a sales slip on that car?
A I had one but I must have destroyed it.
Q You don't have one now?
A No, sir, no paper of no kind on that.
Q Do I understand you to say that you paid $1500 in cash that evening and took the car?
A Yes, sir.
Q So that you took the car before you made full payment for it, is that correct?
A I took the car and financed $700.
Q And financed $700, for the full payment?
A Yes, sir, and I paid the financing.
Q Then afterward you paid the finance company
375 off?
A (No answer.)

SAM MORTELLARO, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q What is your name, please?
A Sam Mortellaro.
Q How is that spelled, please?
A M-o-r-t-e-l-l-a-r-o.
Q Where do you live, Mr. Mortellaro?
A 74 Harding, Elgin.
Q What is your business?
A Salesman.
Q For what concern?
A Valley Liquors, Aurora, Illinois.
Q How long have you been engaged in that business?
A About seven years.
Q Do you know of an automobile sales company called Highland Motor Sales?
A I do.
376 Q Where is that company located?
A In Elgin.
Q Have you ever had any business transactions with that company?
A Yes, I have.
Q Directing your attention to on or about November 27, 1947, did you have a transaction there on that date?
A I bought a 1947 Plymouth club coupe.
Q Was that new or used?
A New.
Q With whom did you deal?
A With Mr. Achilli and Mr. Constantine.
Q Is that Mr. Cirrincione, Constantine Cirrincione?
A That is right.
Q What was the price that you paid for that car?
A $2,537.
Q How did you make payment?
A I traded my 1941 Chevrolet two-door. I got $630, I believe, for that.
Q What kind of car did you trade in?
A 1941 Chevrolet.
Q '41 Chevrolet two-door?

A Yes.
377 Q How much were you allowed on that?
A Around $630, I believe it was.
Q Yes? Did you make any cash payment?
A Yes, $1,000.
Q What happened as to the balance between $1630 and $2537?
A I financed the balance with the Elgin Acceptance Corporation.
Q To whom did you deliver the $1,000 cash?
A Well, the transaction was done in the office, and I laid the money on the desk. It was still there after I left.
Q Who was present at the time that you laid the money on the desk?
A Both Mr. Achilli and Mr. Cirrincione.
Q Do you see Mr. Achilli in the court room?
A Yes.
Q Will you point him out, please?
A The gentleman over there with the glasses, the dark-haired boy.
Q The third man sitting at defense counsel's table?
A Right.
Q And he was present in the office at the time you made the payment?
378 A Yes, sir.

MR. RUSSO: I would like to have the record show, your Honor, that this witness identified the defendant, Sam Achilli.

THE COURT: It may so disclose.

MR. RUSSO: Your witness, Mr. Batter.

Cross Examination.

MR. BATTER: Miss Reporter, will you give me the witness' name, please?

THE COURT REPORTER: Mr. Mortellaro, M-o-r-t-e-l-l-a-r-o.

BY MR. BATTER:

Q The first name is Sam?
A That is right.
Q Mr. Mortellaro, did I understand you to say you were in the liquor business?
A Yes, sir.
Q In business for yourself?
A No, I am a salesman for the company.
Q A salesman for the company?

A Yes, sir.
Q Did you receive a sales slip when you purchased this car from Highland Motor Sales?
379 A Yes.
Q Do you have it?
A No, I don't.
Q What has become of it?
A Well, I destroyed it, I suppose.
Q When did you last see it?
A It has been quite a while ago.
Q How long ago?
A Oh, about six years ago.
Q That would be 1949, and this car was purchased when?
A 1947.
Q Two years after it was purchased, was it?
A Possibly.
Q What was the occasion of your seeing it at that time?
A Oh, I wouldn't say that I did see it. I say I might have had it for a couple of years, but since then I have never seen it.
Q What did you do, throw it away?
A I suppose.
Q Don't you know what you did with it?
A No, I don't.
Q But you don't have it?
380 A No, sir.
Q What brings to your mind as a distinct recollection the price you paid for that car?
A Well, I remember approximately what I paid for it.
Q Then the total figure of $2537 is an approximation, is that it?
A That is what I paid for it.
Q Is that the exact figure or an approximation?
A No, that is the exact figure.
Q You can recall that now, nine years later?
A Yes.
Q Now when you purchased that car for $2537 did that include the finance charges?
A I don't think so. It couldn't have—
Q Did it include the insurance?
A I had my own insurance.
Q You had your own insurance, but didn't the finance company have insurance on it too?
A Yes.
Q Did the price of $2537 include the insurance?

A I believe so.
Q Did it include the license tags?
A No, I bought my own.
381 Q Did it include a radio?
A Radio, yes, sir.
Q Did it include a heater?
A Yes, sir.
Q Did it include seat covers?
A Yes, sir.
Q Did it include any other extras?
A White wall tires, wheel rings.
Q White wall tires and wheel rings?
A That is right.
Q Windshield wiper?
A Yes, sir.
Q Any other accessories?
A A spare tire.
Q Spare tire?
A Yes, sir.
Q But you are not sure whether it included the finance charges?
A I don't remember, sir.
Q You don't remember?
A No, sir.
Q But you do remember the figure of $2537?
A I am pretty sure about that.
Q Are you sure, or pretty sure?
382 A I am pretty sure.
MR. BATTER: That is all.
MR. RUSSO: Thank you, Mr. Mortellaro.
(Witness excused.)

HERBERT CHRISTIANSEN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Will you state your name, please?
A Herbert Christiansen.
Q Will you keep your voice up so the last juror way down here in the left-hand corner can hear you too. What is your address, please?
A Ontarioville, Illinois.
Q What is your business?

A Tavern.
Q What is the name of the tavern?
A Herb's Place.
THE COURT: Will you speak up, please, so every-
383 one may hear you.
BY MR. RUSSO:
Q Where is that place located? I want to hear you too now, Mr. Christiansen.
A Where is it located?
Q Yes, sir.
A In Ontarioville.
Q Is there a street address of some sort?
A Old Lake Street
Q How long have you been engaged in that business?
A About a year and nine months.
Q What was your business before that?
A I worked in the Elgin Metal Casket Company.
Q How long were you there?
A Around thirty years.
Q Are you acquainted with an automobile sales concern known as Highland Motor Sales?
A Yes, I know where it is at.
Q Where is it?
A It is on Grove Avenue, it is in Elgin, Highland Motors.
Q Now directing your attention, Mr. Christiansen, to on or about March 9, 1948, did you have a transaction with that company?
384 A Yes, sir.
Q What was the nature of that transaction?
A The what?
Q What was the nature of the transaction? What did you do?
A I bought a '48 Plymouth from them.
Q Can you describe it further, please? What kind of a Plymouth was that?
A Deluxe sedan.
Q A Deluxe sedan?
A Yes.
Q And did you buy it new or used?
A New.
Q With whom did you deal there?
A With who?
Q With whom did you deal?

A Well, I dealt with—he said his name was Sam. It was a guy working there.
Q I didn't quite get your answer.
A I dealt with a guy that was selling cars for him.
Q A guy that was selling cars for whom?
A A man, yes.
Q Sir?
385 A For Sam Achilli.
Q Do you recall the name of the individual that you did business with?
A Well, he called himself Sam.
Q He called himself Sam?
A Yes.
Q Now will you look about the court room, Mr. Christiansen, and see if you see Sam in this court room.
A I see him now. I didn't know him.
Q You see him now. Will you point him out, please?
A Right over there (indicating).
Q The third man at the defense counsel table?
A Yes.
MR. RUSSO: I would like to have the record show, your Honor, that this witness has identified the defendant, Sam Achilli.
THE COURT: It may so show.
BY MR. RUSSO:
Q How much did you pay for that car?
A Around $2300.
Q Was there a trade-in involved?
A Yes.
Q What kind of car did you trade in?
386 A A '36 Pontiac.
Q A '36 Pontiac?
A Yes.
Q Was that a four-door sedan?
A Yes.
Q Sir?
A Yes.
Q And how much were you allowed for that four-door sedan?
A $100.
Q How did you pay the balance of the purchase price on the Plymouth deluxe 1948 sedan?
A I paid him $900 in cash and then I had twelve months payments—

Q $900 in cash?
A Yes.
Q And the balance how?
A In payments, from the Union Bank.
Q You financed the car through the Union Bank?
A Yes.
Q Now do you remember the amount that you financed?
A Well, it was $50 a month for two years.
Q $50 a month is the amount that you paid it is not?
387 A Yes.
Q And you say you paid that over a period of two years?
A Yes.
Q So that you made 24 $50 payments. Now that included also the finance charges, did it not?
A Yes.
Q Do you recall the exact amount of financing?
A No, I don't.
Q Would you say that that was approximately $1200 that you financed?
A Yes.
388 Q When you financed the car, will you tell us how that happened? Did you get the money from Union Trust Bank and pay some cash, and then you paid the bank?
A Well, I suppose I did, because I paid the Union Bank the payments.
Q The payments were made—the Union Bank financed you?
A Yes.
Q And you paid them back?
A Yes.
MR. RUSSO: Will you mark this as Government's Exhibit 28 for identification, please.
(The document was thereupon marked Government's Exhibit 28 for identification.)
BY MR. RUSSO:
Q Now, Mr. Christiansen, I show you Government's Exhibit 28 for identification purporting to be a booklet of the Union National Bank and Trust Company of Elgin, Illinois. I direct your attention to the first item that appears in the upper left-hand corner. I want you to examine it,
389 please, and state if it refreshes your recollection as to the exact amount of financing on that car?
MR. BATTER: Just a minute. I object, your Honor. I

see no occasion for the witness to testify regarding any debt he has to a bank, or the liquidation of it.

THE COURT: He may answer.

BY MR. RUSSO:

Q Tell the jury, please. Does it refresh your recollection?

A Tell them this here (indicating)?

Q Yes.

A The amount of loan?

Q The amount that you financed.

A $1,050.

Q And you paid that back over a period of two years, is that correct?

A Yes, sir.

Q In $50.00 monthly payments?

A That is right.

Q And the total amount that you paid back to Union Trust Company was how much?

390 A It—

Q Speak up, please, so that the jury can hear you?

A That's $1,201?

Q Yes. Speak up so the jury can hear you.

A $1,201.

(Mr. Russo handed Government's Exhibit 28 for identification to Mr. Batter.)

MR. RUSSO: At this time, if your Honor please, I offer in evidence Government's Exhibit 28.

MR. BATTER: Your Honor, I object.

THE COURT: Objection sustained.

BY MR. RUSSO:

Q If I understand your testimony correctly, Mr. Christiansen, you were allowed $100 towards the purchase price of the car that you bought by virtue of a trade-in?

A Yes, sir.

Q And you paid $900 cash?

A Yes.

Q That is a total of $1,000, is that correct?

391 A Yes, that's correct.

Q And you financed the balance of $1,050?

A That is correct.

Q So the car cost you at Highland Motor Sales $2,050, is that correct?

A That's right.

MR. RUSSO: Your witness.

Cross Examination by Mr. Batter.

Q Did you get a sales ticket when you bought that car?
A I coul .n't remember that right now.
Q What?
A I can't remember right now whether I did or not. If I did, I haven't got it.
Q You can't remember whether you did or not?
A No.
Q But you can remember the amount involved, is that right?
A That is right.
Q Now, when you were allowed $100 trade-in on the car that you turned in, was that the first offer made to you, or was that the result of negotiations?
392 A It was the first offer.
Q You accepted it?
A Yes, sir.
Q How was the $900 paid?
A In money.
Q In cash?
A Yes, sir.
Q Did you get a receipt for it?
A I must have got a receipt for that, because I wouldn't give nobody $900 if I didn't have a receipt.
Q What?
THE COURT: Speak up, please, so everyone can hear you.
THE WITNESS: I must have a receipt for that.
BY MR. BATTER:
Q Do you have it?
A I had, but I don't know where it is right now. That's eight years ago. I don't know where it is any more.
Q How do you remember the amount to be $900.00?
A Well, I drawed it from the bank. I had a check, I gave them a check for it, and I got the money for that
393 much.
Q You went to the bank and what?
A I gave them a check for that much so I could draw $900.
Q Do you have that check?
A I don't know whether I have or not. Everything what I had, I left here. I couldn't tell you.
Q You left where?
A Right here.

MR. BATTER: Does the Government have any papers belonging to the witness?

(Mr. Russo handed documents to Mr. Batter.)

BY MR. BATTER:

Q Mr. Christiansen, I hand you a file that the Government has handed me and ask you—which I understand are the papers you gave to them, and I ask you: Is that all the papers you have assembled with respect to this transaction?

A Yes.

Q Is that all the papers that you gave the Government with respect to this transaction?

A Yes. That is all.

Q That is all of them?

394 A Yes.

Q Now, in these papers I do not find a sales slip from Highland Motor Sales. Can you explain why in this mass of papers you failed to have a sales slip from the Highland Motor Sales Company for the car?

A This is what I got right here (indicating), for the license.

Q Speak up, please.

A This is the license for it (indicating).

MR. RUSSO: You will have to speak louder, Mr. Christiansen. We can't hear you back here.

THE WITNESS: I say, this is the license. (Indicating.) That shows that I got the 1948 Plymouth.

BY MR. BATTER:

Q This is just the license application blank for a dollar and a half.

A Yes.

Q Do you have a similar slip for the sale of the car?

A I didn't get that until I paid for the car. It's supposed to be right here. It ain't here now.

395 MR. RUSSO: Will you keep your voice up? We cannot hear you back here.

THE WITNESS: Here (indicating).

MR. BATTER: That is something else.

BY MR. BATTER:

Q Do you have a sales slip from Highland Motor Sales covering the sale of the car?

A Maybe I had one. I can't remember eight years ago.

Q But you did not keep it with these paper if you had it, did you?

A I must not have. If I had it, it would have been here.
Q You testified that you paid $900 in cash?
A Well, I can't remember that for eight years, either.
Q That you can't remember?
A It's right down here in black and white, what I paid (indicating).
Q When you say it's right down here in black and white, what you paid, you were pointing to what documents?
A That was—I don't know what this is (indicat-
396 ing). It has nothing to do with the car.
Q You will have to speak up. We can't hear you.
A I don't know what that is here (indicating).
397 Q But that is one of the documents you pointed to?
A And that one, too (indicating).
Q This one, and this (indicating) is what?
A Nine-fifty.
Q This is a check for $950?
A Yes.
Q To your order, on the First National Bank, signed by yourself and cashed by you?
A Yes.
Q Now, this is for $950 and not $900?
A Well, I can't remember that, eight years ago.
Q You cannot remember?
A Not very good, no, not that long. That's what it is. I'm sorry I made the mistake.
MR. BATTER: That is all.

Redirect Examination by Mr. Russo.

Q Now that your recollection has been refreshed, did you pay $900 or $950 [illegible]?
A $950.
Q And you want to correct your testimony to that extent, is that correct?
398 A Yes.
MR. RUSSO: Thank you, sir.

Recross Examination by Mr. Batter.

Q Now, did you pay $950, or is that the amount you drew from the bank?
A Well I drawed that from the bank and then paid it to him.
Q On the same date you also drew from the bank $120, did you not?

A Well, I don't know whether it's the same day. I gave them a check for that. I don't think I drawed that. That's a check. They're both the same date.

Q Speak up, please.

A That's the same date. That would be ten-seventy.

Q In other words, do you now wish to revise your testimony and say that you paid Highland Motor Sales $1070 in cash?

A Yes.

Q Speak up, please.

A Yes.

Q That is what you paid them in cash?

A Yes, sir.

399 Q And you base that on the fact that on March 9th you cashed two checks, one for $120 and one for $950, is that correct?

A That is correct.

Q Now, then, does the refreshing of your recollection respecting these two checks change in any way the amount of allowance you got for the car you traded in?

A That would be one-seventy difference.

Q One-seventy difference from what?

A From what I said at first. I said it was $900, and $50 and $120 is $170.

Q Your first testimony was that you paid $900 in cash and you got $100 for the trade-in.

A That's right.

Q And the balance you financed, is that correct?

A That's right.

Q Now you say your testimony is that you paid $1070 cash, is that right?

A That's right. I didn't remember that.

Q What would there be left to get for a trade-in? If the cash and the trade-in amounted to a thousand dollars, did you pay them to take the car off your hands?

400 A I guess not.

Q You guess not?

A It looks like it, though.

MR. RUSSO: What?

THE WITNESS: I say, it looks like it, but I didn't.

MR. BATTER: That is all.

Redirect Examination by Mr. Russo.

Q Let me see if I understand the answers you made under Mr. Batter's cross examination.

You went to the bank and withdrew money on two checks, is that correct?

A That is right.

Q One in the sum of $950?

A Yes, sir.

Q And one in the sum of $120?

A That is right.

Q You were allowed $100 trade in on your old car?

A Yes, sir.

Q And you financed the balance of $1,050?

A That's right.

Q The car stood you a total of $2,220, is that right?

401 A That's right.

Q And you paid $950 and the $120 cash to Mr. Achilli, is that right?

A That's right.

MR. RUSSO: Thank you.

Recross Examination by Mr. Batter.

Q Mr. Christiansen, now that your memory has been refreshed by counsel—

MR. RUSSO: I object to that, if your Honor please. I have not refreshed his recollection. The witness has refreshed his recollection from documents supplied to him by Mr. Batter.

MR. BATTER: I will withdraw the question.

BY MR. BATTER:

Q Now that your recolleetion is refreshed, what is your summation of what you paid for that car and how? Let's see if we can't get the record straight.

MR. RUSSO: He has already answered those questions, if your Honor please. The question is repetitious.

402 MR. BATTER: This is cross examination, your Honor.

THE COURT: Objection sustained.

MR. BATTER: I beg your pardon?

THE COURT: Objection sustained.

MR. BATTER: All right.

BY MR. BATTER:

Q If I understand you correctly, Mr. Witness, you testified in response to the Government's questions that you paid $2200 odd for the car; is that correct?

A That's right.

Q What was that figure?

MR. RUSSO: $2,200.

BY MR. BATTER:

Q Let me show you another document from the file of documents handed to me by the Government which you had given to them. I ask you what that document is?

MR. RUSSO: May we have the document identified for the record, if your Honor please?

MR. BATTER: Yes.

403 MR. RUSSO: I don't know what he is talking about.

MR. BATTER: Will you please mark this for identification as Defendant's Exhibit 1, Mr. Reporter?

(The document was thereupon marked Defendant's Exhibit 1 for identification.)

BY MR. BATTER:

Q Is that document part payment—referring to Defendant's Exhibit No. 1 for identification—part payment of the car you purchased?

MR. RUSSO: I don't understand your question, Mr. Batter. Would you repeat it, please?

MR. BATTER: I said, was that given in part payment of the car?

A No. I paid this every two weeks. It's marked right on there (indicating).

BY MR. BATTER:

Q But this is the document that covers the balance of the payment on the car?

A That's right.

Q And the amount is how much?

404 A Twelve hundred—I can't read that (indicating). Is that a one?

Q $1201?

MR. RUSSO: Why don't you ask him if that is the note he executed when he financed the car?

THE WITNESS: Twelve-O-one.

BY MR. BATTER:

Q $1201?

A That's what I make out of it.

Q Now, if you subtract $1201 from the $2,234 that you say you paid for the car, that leaves how much balance?

MR. RUSSO: If your Honor please, that question is confusing.

THE COURT: Objection sustained.

BY MR. BATTER:

Q If you paid $2,234 for the car and signed a note for $1201, the balance could not have been the amount you

testified to as the cash you paid, could it?

MR. RUSSO: I object to that. The witness has already answered that question, if your Honor please.

THE COURT: Objection sustained.

405 MR. BATTER: Your Honor, don't I have a right to clarify and bring out the proper payment?

THE COURT: Well, that has already been covered by both sides.

MR. BATTER: Yet they aggregate a lot more and different from what the witness has testified to.

THE COURT: We have already had cross and recross and rebuttal and surrebuttal, and the Court thinks we have had enough.

MR. BATTER: May I ask one more question.

THE COURT: All right.

BY MR. BATTER:

Q From whom—or rather, with whom at Highland Motor Sales did you have your transaction—

MR. RUSSO: He has already answered that. That question has already been asked and answered.

MR. BATTER: Just a minute. Let me finish my question.

BY MR. BATTER:

Q (Continuing)—and for that purpose I hand you

406 this document, and see whether it refreshes your memory.

MR. RUSSO: I object, if your Honor please. The question has been asked and answered.

THE COURT: Objection sustained.

MR. BATTER: That is all.

MR. RUSSO: That you, sir.

(Witness excused.)

* * *

407 * * *

408 MRS. GRACE STUDT, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q Your name is Mrs. Grace Studt?

A Yes.

Q That is spelled S-t-u-d-t?

A Yes, sir.

Q Where do you live, Mrs. Studt?

A At Madison, Wisconsin.
Q Madison, Wisconsin?
A That is right.
Q Will you keep your voice up, please, ma'am, so that not only I but every member of the jury can hear you, please?
A Yes.
Q What is your occupation now?
A Psychiatric aid.
Q Where?
A Mendota State Hospital.
Q How long have you been there?
A Fourteen months.
409 Q Were you engaged in any business or occupation in 1946 and 1947?
A Yes, sir.
Q What business or occupation were you in?
A A cab business.
Q What was the name of that cab business?
A Veteran Cab Company.
Q I did not hear you.
A Veteran Cab Company.
Q Veterans Cab?
A Right.
Q Where was that located?
A Elgin, Illinois.
Q How long were you engaged in that business?
A It lacked about three months of being four years; from 1945 to 1948.
Q From some time in 1945 to some time in 1948, if I understand you correctly?
A August of 1948, I think it was, yes.
Q Now, in the conduct of the business of Veterans Cab were you in the business alone or associated with someone else?
A My husband and myself.
Q With your husband?
410 A Yes.
Q What was your husband's name?
A Elmer Studt.
Q Now, Mrs. Studt, directing—let me ask you this question first: Are you acquainted with an automobile sales company in Elgin, Illinois, named Highland Motor Sales?
A Yes, sir.

Q During the years 1946 and 1947 do you know who operated that business?

A Mr. Sam Achilli.

Q Do you see Mr. Achilli in the Court Room?

A Yes, sir.

Q Will you point him out, please, ma'am?

A The first man over there. (Indicating.)

Q The first man down at the far end of the defense counsel table?

A Yes.

MR. RUSSO: May the record show, your Honor, that she has identified the Defendant, Sam Achilli?

THE COURT: It may so indicate.

BY MR. RUSSO:

Q Now, Mrs. Studt, directing your attention to on
411 or about November 23, 1946, did you have occasion to have any business transactions with Sam Achilli at or about that time?

A Yes, sir.

Q What was the nature of that transaction?

A We purchased a new car.

Q What kind of a car was it that you purchased?

A A Plymouth.

Q Do you remember the year and make and model and so forth?

A It was a Plymouth four-door.

Q At the time you purchased that car did you receive anything from Mr. Achilli?

A (No answer.)

Q Did you get a sales slip?

A Yes, sir.

MR. RUSSO: Mr. Reporter, will you mark this for identification as Government's Exhibit 29.

(The document was thereupon marked Government's Exhibit 29 for identification.)

BY MR. RUSSO:

Q Now, Mrs. Studt, I show you Government's Ex-
412 hibit No. 27 for identification which purports to be a sales receipt from Highland Motor Sales.

A Yes.

Q I will ask you to examine it, please, and then state whether or not you received that from Mr. Achilli in connection with the automobile that you purchased from him?

A Yes, we did.

Q Will you examine it, please, and then state the model of the car, the make, the year of the car, the motor and serial number of the car?

A It was a 1946 Plymouth sedan, four-door sedan.

Q How much did you pay for the car?

A I paid $1,448.10.

Q $1,448.10?

A Yes.

413 Q Now in addition to those, did you have to pay sales tax?

A Yes, sir.

Q In what amount?

A $23.95.

Q What was the cost of the car to you as reflected on Government Exhibit No. 29?

A Plus the tax?

Q Yes.

A That would be $1,477.05.

Q How did you make payment?

A We had a cash payment of $492.35 and then the balance financed.

Q Does that represent the amount that you paid cash, plus the amount that you say was financed—does that represent the total amount that was paid on that car?

A No.

Q Was there an additional amount?

A Yes.

Q How much?

A $500.

Q Why did you pay $500 more than is reflected on Government Exhibit No. 29?

414 A To get the car.

Q Why was it necessary to pay $500 more?

A In order to get a new car.

Q Did you have a conversation with anyone about the car?

A Yes, sir.

Q And about having to pay $500 more?

A Yes, sir.

Q With whom did you have that conversation?

A Mr. Achilli.

Q Relate that conversation for the Court and Jury, please.

A Well, I don't remember the exact conversation at the time. We talked to him when we talked to him about purchasing the cars.

Q What was the substance of the conversation?
A That we would pay extra to get the car.
Q Was that $500 in addition to the price that is reflected on Government Exhibit No. 29?
A Yes, sir.
MR. RUSSO: I will ask that these documents be marked Government Exhibits 30, 31, 32 and 32-A for identification.
(The documents were thereupon marked, respec-
415 tively, Government Exhibits 30, 31, 32 and 32-A for identification.)
BY MR. RUSSO:
Q Directing your attention to on or about November 29, 1946, did you purchase a car from Highland Motor Sales at that time, referring to Government Exhibit 30 for identification?
A Yes, sir.
Q What kind of a car did you purchase?
A The same kind, a '46 Plymouth.
Q What is the cost of the car as reflected on Government Exhibit No. 30?
A $1,523.60.
Q And how much was the tax?
A $30.47.
Q What was the total cost to you as deflected on Government Exhibit No. 30?
A $1,554.07.
Q How did you pay for that?
A We made a down payment of $518.07, and the balance financed.
Q Through whom was the balance financed, if you recall?
A Elgin Acceptance Company.
416 Q Now does the total, the total purchase price of the car as reflected on Government Exhibit No. 30 comprise the total amount that you paid for the car?
A No.
Q Was there an additional cost?
A Yes, sir.
Q In what amount?
A $500.
Q Why was it necessary for you to pay $500 more than the cost price reflected on Government Exhibit No. 30?
A In order to purchase the car, to get one.
Q In other words, you had to pay $500 more for the car than the market price, is that correct?

A Yes, sir.

Q Now, Mrs. Studt, I show you Government Exhibit No. 31 for identification, purporting to be a sales slip of Highland Motor Sales, dated January 28, 1947. I ask you if you had a transaction with Highland Motor Sales at that time.

A Yes, sir.

Q With whom did you deal?

A You mean the person?

417 Q Yes.

A Mr. Achilli.

Q What kind of car did you buy?

A A Plymouth four-door sedan.

Q What was the total purchase price of the car as reflected on Government Exhibit No. 31?

A $1,447.65.

Q What was the amount of the tax?

A $29.55.

Q What was the total cost to you as reflected on Government Exhibit No. 31?

A $1,507.20.

Q How was that payment made?

A A down payment of $507.20, and the balance financed?

Q How much was financed?

A A thousand dollars even.

Q Did you have to pay anything in addition to the amount reflected on Government Exhibit No. 31 in order to get the car?

A Yes, sir.

Q And to whom did you pay that money?

A Well, I can't recall.

Q With whom did you deal?

418 A With Mr. Achilli, or the other fellow that was in the office.

Q But you did make the payment at the office, is that correct?

A Yes.

Q Now directing your attention to on or about May 21, 1947, did you have a transaction with Sam Achilli on that date?

A Yes, sir.

Q What was the nature of that transaction?

A That was another new Plymouth.

Q What was the total purchase price as reflected on Government Exhibit 32 for identification?

A $1,500.
Q And the sales tax?
A $30.
Q What was the total cost to you as reflected on Government Exhibit No. 32 for identification?
A $1,530.
Q How did you make payment for that car?
A $530 down payment and the balance financed.
Q What was the amount financed?
A $1,000.
Q In addition to the $530 that you paid there in
419 cash, did you make any other cash payment?
A Yes, sir.
420 Q Why was it necessary on that occasion to make an additional payment?
A To get the car.
Q How much additional payment did you make?
A $500.00.
Q Now, I show you Government's Exhibit No. 32-A for identification, and ask you to examine it and state whether or not it is related to Government Exhibit No. 32 for identification.
A Yes, sir.
Q Does it purport to represent the same transaction?
A On the same car, you mean?
Q Yes.
A No, sir, it isn't the same serial number.
Q Will you examine it again, please.
A No, sir, it isn't the same.
Q It is not?
A No, sir.
Q Was that a different transaction?
A That was a different transaction.
Q When did that transaction take place?
A Possibly January 28th. That was on the third car, I guess.
421 Q Maybe I handed you the wrong one. I am sorry. Now, will you examine Government Exhibit 32-A for identification and compare it with Exhibit 31 for identification, and state whether or not that purports to represent the same transaction?
A Yes, sir, these are the same.
Q Directing your attention to the signature on the bottom of the page of Exhibit No. 32-A, whose signature is that?

A Mr. Achilli's.
Q Was that put on there in your presence?
A I can't recall that it was.
Q Where did you get it?
A From Highland Motor Sales.
Q At the time that you made the purchase of that car?
A I can't recall that it was the same day.
Q Well, on or about the same day?
A Yes, it was. It was for the same car.
Q How many cars did you purchase altogether from Mr. Achilli?
A Five.
Q Do you have the sales slip for the fifth car?
A I do not, no.
422 Q Did you search for it?
A Yes, sir.
Q Were you able to locate it?
A No, sir.
Q Do you know what happened to it?
A No, sir, I don't know.
Q Do you recall the approximate time that you purchased that car from Mr. Achilli?
A May I look at some dates?
(Mr. Russo handed the witness a group of Exhibits.)
THE WITNESS: It was in September, I believe, of 1946.
BY MR. RUSSO:
Q In September of 1946. Do you have any recollection at the present time of the price that you paid for the car at that time?
A No, I don't.
423 Q Did you receive—I believe you testified you did receive a sales slip but you cannot locate it, is that correct?
A Yes. I am sure of that.
Q Do you recall whether or not, in addition to the purchase that was stated on the sales slip at that time, you also had to pay an additional sum to purchase that car?
A Yes, sir.
Q How much?
A Five hundred.
Q I believe you testified that each of these cars were financed, is that correct?
A That is right.

Q With whom were these cars financed?
A Elgin Acceptance Company.
MR. RUSSO: At this time, if your Honor please, I offer in evidence Government's Exhibits 29 through 32, including 32-A.
MR. BATTER: I have no objection to them at all, your Honor, if counsel will remove from the pencil notations appearing thereon that obviously were not part of the
424 original sales slip.
MR. RUSSO: Counsel did not put them on there, if your Honor please.
MR. BATTER: May I ask the witness some questions, your Honor?
THE COURT: Yes.
BY MR. BATTER:
Q With respect to Government's Exhibit 29 for identification, was this notation on there when you received that (indicating)?
A No, sir. I marked that so I would know which cab it was.
Q That is your writing?
A That is our State number. The State numbers each car for State Insurance, and I put that on there.
Q On this one, are those pencil notations (indicating) yours?
A Yes.
Q On this one is the pencil notation yours (indicating)?
A Yes, sir.
Q This (indicating) has nothing to do with any
425 State numbering, does it?
A No.
Q Why was that put on there?
A Just so I would have a memory, a notation.
Q When was it put on?
A I can't recall the date. Possibly it was after I had the slip.
Q Long after?
A Yes. I don't remember just what date I put it on there, but I put it on there so I would have a notation of just which car it was.
Q Several years later, perhaps?
A No.
Q Several months later?
A It may have been several months later.

MR. BATTER: The memoranda on there, your Honor, are obviously not memos made at the time, and subject to their deletion or removal I have no objection at all to the Exhibits.

THE COURT: All right. They may be removed and they will be admitted in evidence.

MR. BATTER: Can the witness remove them now?

426 THE COURT: Maybe counsel can during recess.

MR. BATTER: All right.

(The documents previously marked Government's Exhibits 29 to 32, both inclusive, and 32-A for identification, were thereupon received in evidence as Government's Exhibits 29 to 32 inclusive and 32-A.)

MR. BATTER: Are you through?

MR. RUSSO: Yes.

Cross Examination by Mr. Batter.

Q Now, Mrs. Studt, I direct you attention to Government's Exhibit 29 for identification, and ask you what initial there is at the bottom of that?

A That is "K".

Q Who is "K", do you know?

A The bookkeeper at Highland Motor Sales.

Q So that you received this from the bookkeeper?

A I don't remember whether the bookkeeper gave it to me or not. I received it from the office.

427 Q Now, this is dated November 23rd, 1946. It gives the purchase of a car plus sales tax, $1,477.05, and then it states, "Cash, $492.30, balance financed, $984.70.

Now, when you received this from the bookkeeper did you make any objection to it being incorrect?

A. No, sir.

Q Was it correct?

A I can't say that it was correct. It's the price he gave us on the car.

Q It is the price what?

A That he gave us on the car.

Q And is that the amount of cash you paid at that time?

A No, sir.

Q How much cash did you pay?

A You mean at that date?

Q Yes.

A We didn't always have the amount of cash—I mean,

at the same time. We made it sometimes in small payments.

Q How much cash did you pay that day?

A I don't recall.

428 Q. Is here any reason to believe that what is shown on here, $492.35, is not the correct payment?

A. That was the cash down payment on the car.

Q. That was the cash down payment you made on the car at that time?

A. On the sales slip price.

Q. Now, then, you testified that you made an additional payment?

A. Yes.

Q. When did you make that additional payment?

A. I can't recall the date. We never had the full amount to make it all in one payment.

Q. Do you have any receipts for the payments you made?

A. No, sir.

Q. How did you keep track of them?

A. I knew that I paid them.

Q. Well, if you paid it in a number of installments—

A. We didn't get receipts.

Q. If you paid it in a number of installments, how did you keep track of how much you paid?

A. Well, I knew that I paid it. They didn't give 429 us a receipt for the extra amount that we paid.

Mr. Russo: Will you keep your voice up, please, ma'am, so that the jury can hear you?

By Mr. Batter:

Q. You purchased this car on November 23rd, 1946, got title to it by $492.30 cash and a financed balance of $984.70. When did you begin paying the additional $500.00 you said you paid?

A. I don't recall the date.

Q. Was it long afterwards? Was it a week afterwards, a month afterwards, six months afterwards, or two years afterwards?

A. No. As soon afterwards as we could we would go over to the garage and give him the amounts.

Q. In how many payments did you pay the $500.00 you claim to have paid additional on that car?

A. I don't recall the number.

Q. You don't recall much about that at all, except the figure that stands in your mind, that it was $500.00?

A. Yes. That's what we paid.

Q. Why did you make any payment at all when here is a receipt including all the entire financing for 430 a new car?

A. We had to, to get a new car.

Q. But you had the car.

A. We didn't have the car yet.

Q. You didn't get this car on November 23rd, 1946?

A. We got the car on November—on that date.

Q. Yes.

A. And then we had to give him extra to buy the car.

Q. But you had the car, didn't you?

A. We had it at that date.

Q. And you had a receipt and financing for the full payment of it?

A. We told him we would pay the extra and we did.

Q. But you cannot recall how you paid that?

A. In cash.

Q. How many payments?

A. I don't recall how many payments. We divided it.

Q. Now, Government's Exhibit 30 is for the purchase of a car costing $1,554.07 on which you made a cash payment of $518.07 and the balance was financed for $1,036.00. Whose name or initial is attached to that 431 receipt.

A. "K".

Q. "K"?

A. Yes.

Q. That is the bookkeeper?

A. Yes, sir.

Q. Well, does that receipt truly reflect what took place on that day?

A. No.

Q. What did take place on that day?

A. We talked about purchasing a new car.

Q. What?

A. We talked about purchasing a new car.

Q. Well, you did purchase it on that day, didn't you?

A. Yes.

Q. So what was there more than this to talk about?

A. About the price of it.

Q. Well, isn't the price on here?

A. That's the list price.
Q. Yes. And what was that price?
A. $1,523.60.
Q. That is what this receipt shows, isn't it?
432 A. Yes, sir.
Q. And it shows a cash payment of $518.07?
A. Yes, sir.
Q. Now, does that truly and correctly reflect what took place?
A. Not the full transaction.
Q. What did take place in the transaction?
A. We had the—we paid $518. down, $518.07 down, and had the balance financed.
Q. Yes.
A. Then we made him the additional payments.
Q. You made whom an additional payment?
A. Mr. Achilli.
Q. Did you make the payment to Mr. Achilli direct?
A. I can't recall whether on each one we made the payment directly to Mr. Achilli or the other fellow.
Q. What other fellow?
A. Cons.
Q. Constantine?
A. Yes.
Q. But despite the fact you were making different payments to different people at different times, you
433 got no receipt for the payments you were making?
A. No, sir, I didn't. We didn't get a receipt.
Q. How did you, in your discussions with them, keep track of how much was paid?
A. I knew how much we paid. I could remember how much we paid.
Q. And you never had any differences with them on that score?
A. No.
Q. Now, let me draw your attention to this: Government's Exhibit 29 is dated November 23rd, 1946 and Government's Exhibit 30 is dated November 29th, 1946, six days later.
Am I to understand that on November 23rd when you got possession of the car referred to in Government's Exhibit 29, you paid $492.35 down and you agreed to pay an additional $500.00—you didn't have the $500.00 so.

did not pay it at that time—but six days later you did have $518.07 to apply on another car?

A. No, sir. We made this $518.07 as a down payment on this second car, I think in three different payments.

Q. You did not make this payment at that time?

434 A. All in one check, no, — or one payment. We didn't have it, no.

Q. Do you have any checks or anything to indicate when these payments were made?

A. I think we have a check—do you have it?

(Mr. Russo handed documents to Mr. Batter.)

435 By Mr. Batter:

Q. I hand you a document that just has been handed to me by counsel for the Government, and ask you what that is.

Mr. Russo: Keep your voice up, Mrs. Studt. I want everybody to hear this.

By the Witness:

A. It is a statement, I mean, made out on a check form, and it was held by the bookkeeper to show when we made the three payments on the down payment on this car, this second car. We made it in three different payments.

By Mr. Batter:

Q. This is actually a check drawn on the First National Bank dated November 29, 1946, for $518.07, which is the amount that appears on Government Exhibit No. 30, is it not, with a slip attached to it, "Hold"?

A. "Hold," that is right.

Q. Then what are the circumstances? Did you on November 29 make a payment of $518.07?

A. No, sir.

Q. Or did you not?

A. We did not.

436 Q. Directing your attention to the back—

Mr. Batter: I will ask to have this marked Defendant's Exhibit 2 for identification.

(The document was thereupon marked Defendant's Exhibit 2 for identification.)

By Mr. Batter:

Q. Directing your attention to the endorsements on the back of that check, Defendant's Exhibit 2 for identification, what do those items represent?

A. On December the 17th, 1946, we made a payment of $144, and on December 23, 1946, we made a payment of $200, and then the balance was $174, but there is no date on it when we—there is no date on when we made the balance of the $174.07.

Q. Was it ever paid?

A. Yes, sir.

Q. So that this payment of $518.07, which appears upon Government Exhibit No. 30, the sales slip for that car, was not paid in cash at that time, but in effect what you did was give them a check upon which in turn payments were made to use up the amount of that check, is that right?

437 A. That is right.

Q. Now then, when was the sum that you claim was paid in addition to this sum paid?

A. I can't remember the date.

Q. Now you have, and the Government has furnished, Defendant's Exhibit 32 for identification, which shows the payment of the $518.07 appearing on the sales slip, but you have nothing like this or anything else to show the $500 that you claim was subsequently paid in addition, is that right?

Mr. Russo: I object, if your Honor please. The question has been asked and answered several times.

The Court: Yes, I think so.

Mr. Batter: I was just clarifying it.

By Mr. Batter:

Q. Now I hand you Government Exhibit No. 31, dated January 28, 1947, just about two months subsequent to Exhibit No. 30, and ask you whether that reflects the true statement of what transpired on that date.

A. No, sir.

Q. It does not?

A. No, sir.

Q. Do you have any books and records that in-

438 dicate the contrary?

A. I can't answer that, sir. I don't know where all them books and things that we had in business are.

Q. By the way, the Veterans Cab Company, was that a corporation, partnership or individual proprietorship?

A. Individual proprietorship.

Q. And who was the proprietor?

A. My husband at the time.

Q. Did you keep the records?
A. I helped.
Q. Are those records available now?
A. I don't know where everything is, no.
Q. Have you looked for them?
A. Yes, sir.
Q. You haven't been able to find them?
A. No, sir. We broke up housekeeping since then, and moved so many times.
Q. Where did you find this document?
A. I had those in my possession.
Q. Referring to Defendant's Exhibit 32 for identification?
A. I had things that I had in my possession with
439 our income tax papers and things.
Q. But you had nothing in your income tax papers to show the payment of this $500 extra on each of the two cars represented in Government's Exhibit 29, 30 and 31?
Mr. Russo: Objection, if your Honor please. That has been asked and answered several times also.
Mr. Batter: That is the first time she has made reference to her income tax papers.
The Court: She may answer.
By the Witness:
A. I can't answer that faithfully because we broke up housekeeping, and I don't have our complete papers for every year, and receipts and things. I brought in what I had.
By Mr. Batter:
Q. Did you bring in anything in addition to the documents we now have before us?
A. Nothing on sales slips from Highland Motors.
Q. Nothing in the form of cancelled checks or checks?
A. Yes.
Q. You brought in some more of them?
440 A. Yes.
Q. Where are they?
(Mr. Russo handed documents to Mr. Batter.)
By Mr. Batter:
Q. I hand you a document that has just been handed to me by counsel for the Government, and ask you whether this has any connection with any of these documents about which you have been testifying.

First of all, I will have it marked for identification—

Mr. Russo: Just a moment. If your Honor please, I am going to object at this time to any questions concerning those documents inasmuch as they are beyond the scope of the direct examination. No question was asked of this witness concerning those documents. He was only examining her for the purpose of establishing the admissibility of the ones concerning which she testified.

If he wishes to make Mrs. Studt his witness, then he should properly put her on in his case in chief.

441 The Court: The objection is sustained.

By Mr. Batter:

Q. Now directing your attention to Government Exhibit 32, dated May 21, 1947, I ask you whether the cost of the car, the down payment and the balance to be financed as stated on that document, is correct.

A. That is correct on the sales slips as to what we had our down payment and financing.

Q. What is there incorrect about it, if anything?

A. What we gave extra to get the car.

Q. Then you have no record anywhere of any of these supposed additional payments that you have testified you have made, have you?

Mr. Russo: Just a moment, Mrs. Studt. I object to that question, your Honor.

The Court: Sustained.

By Mr. Batter:

Q. Do you have any record anywhere in the form of checks, in the form of receipts, or any other form, that will show the payment of any of these $500 items or part of them that you have testified you made?

Mr. Russo: Just a moment, Mrs. Studt. Same objection, if your Honor please.

442 The Court: Objection sustained. It has already been asked and answered.

Mr. Batter: That is all.

Mr. Russo: At this time, if your Honor please, do you want to rule on the admission of these exhibits? We have offered them in evidence.

The Court: Yes, they may be received with the exception of the penciled notations, which should be removed.

Mr. Russo: Yes, your Honor. I will get together with Mr. Batter at recess.

(The documents previously marked Government Exhibits 29,, 30, 31, 32 and 32-A for identification, respectively, were thereupon received in evidence as Government Exhibits 29, 30, 31, 32 and 32-A, respectively.)

Mr. Russo: I am not certain, if your Honor please, whether Mr. Batter has exhausted his cross examination or whether he wants to begin now. I have no further direct examination.

443 By Mr. Batter:

Q. Mrs. Studt, did you in the progress of your negotiations on the purchase of any of these cars have anything to do with Mr. Earl Gromer?

Mr. Russo: I object, if your Honor please.

The Court: Objection sustained.

By Mr. Batter:

Q. Did you know Mr. Earl Gromer, a partner of Mr. Achilli in the Highland Motor Sales Company?

Mr. Russo: Same objection.

The Court: Objection sustained.

Mr. Batter: No cross.

Mr. Russo: Thank you.

(Witness excused.)

444 C. BERNARD MAGNUSON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. C. Bernard Magnuson.

Q. Mr. Magnuson, will you keep your voice up, please, so that not only I, but every member of the jury may hear you too.

What is your address, please?

A. 416 Washington Street, Rockford, Illinois.

Q. What is your business?

A. My business?

Q. Yes.

A. I am not in business now.

Q. You are not in business now?

A. No.

Q. How long have you been unemployed or out of business?

A. Well, I am working for someone else, sir.
Q. By whom are you employed?
A. Blackhawk Pontiac Sales, Rockford.
Q. In what capacity?
445 A. Used car sales manager.
Q. How long have you been employed by Blackhawk Pontiac?
A. Five and a half years.
Q. Were you engaged in any business in 1946?
A. Yes, I was. I was in the used car business.
Q. What was the name of that business?
A. Ben's Auto Sales.
Q. Where was it located?
A. Rockford, Illinois.
Q. Are you familiar with an automobile sales concern known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. Elgin, Illinois.
Q. Was Ben's Auto Sales an individual proprietorship, a partnership, or corporation?
A. Individual proprietorship.
Q. That was your business?
A. Right.
Q. In the conduct of the business of Ben's Auto Sales, did you maintain a set of books and records?
A. Yes, sir.
Q. Did you keep those books and records in the
446 regular course of business?
A. Yes, I did.
Q. And was it the regular course of business to keep such records?
A. Yes, sir.
Q. Now, Mr. Magnuson, were you served with a subpoena duces tecum to bring with you the books and records of Ben's Auto Sales?
A. Yes, sir.
Q. Did you bring them?
A. No, sir.
Q. Why not?
A. Because I don't have them any longer.
Q. What happened to them, if you know?
A. They were lost or destroyed.
Q. Did you make a search for them?

A. Yes, sir.
Q. Were you able to locate them?
A. No, sir.
Q. Now as Ben's Auto Sales, did you ever have any business transactions with Highland Motor Sales?
A. Yes, sir.
Q. With whom did you deal there?
A. Primarily Mr. Joe Cirrincione.
447 Q. And with anyone else?
A. One or two times with Mr. Achilli.
Q. What was the nature of the transactions you had with Highland Motor Sales?
A. Automobile purchases.
Q. Now did there ever come a time, Mr. Magnuson, in connection with your transactions with Highland Motor Sales that you made available to an agent of the Internal Revenue Service the books and records of Ben's Auto Sales?
A. Yes, sir.
Q. When was that?
A. I don't know.
Q. What is your best recollection? Can you fix it approximately?
A. Three or four years ago.
Q. Three or four years ago?
A. Yes.
Q. Now at that time do you know whether or not a summary of the books and records of Ben's Auto Sales relating to purchases made by you from Highland Motor Sales in the years 1947 and '48 was made by anyone?
A. Yes, sir.
448 Q. By whom was it made?
A. I believe Mr. Coddington.
Mr. Russo: I will ask that this be marked Government Exhibit No. 33 for identification.
(The document was thereupon marked Government Exhibit 33 for identification.)
By Mr. Russo:
Q. Now, Mr. Magnuson, I show you Government Exhibit 33 for identification, and ask you if that is the summary you referred to.
Mr. Batter: Your Honor, I would like to see that before the witness has an opportunity to inspect it.
The Court: It may be identified first.

The Witness: This is my signature, so it must be the paper.

By Mr. Russo:

Q. Will you examine it, please, further, and see if it is the summary that you have referred to that was made by Mr. Coddington?

Mr. Batter: I think it is going beyond the identification now, your Honor. He has identified his signa-
449 ture.

The Court: He may answer.

By the Witness:

A. Yes, sir, that is it.

Mr. Batter: May I ask the witness a few questions, your Honor?

Mr. Russo: If your Honor please—

The Court: Well, not now. You may proceed, Mr. Russo.

By Mr. Russo:

Q. Now directing your attention to the signature in the lower right-hand corner of Government Exhibit No. 33, whose signature is that?

A. That is mine.

Q. Was that signature placed on there on or about the date that the summary was made?

A. Yes, sir.

Q. Does Government Exhibit No. 33 for identification correctly reflect the year, make and date of purchase, the motor number of the car purchased and the amount paid to Highland Motor Sales for the cars described thereon, according to the books and records of Ben's Auto Sales?

A. Yes, sir.

450 Q. Did you verify the data on Government Exhibit No. 33 for identification with the books and records of Ben's Auto Sales?

A. Yes, sir.

Q. Now tell us, please, how the payments to Highland Motor Sales for the purchases shown on there were made.

A. By check and by cash.

Q. To whom were the payments made?

A. Mr. Cirrincione.

Q. Now directing your attention to January 2, 1947,

did you have a transaction with Highland Motor Sales on that date?

A. Yes, sir.

Q. What was the nature of that transaction?

A. I purchased a '41 Buick.

Q. What was the motor number?

A. 44217960.

Q. What was the total price that you paid for the car?

A. $1200.

Q. $1200?

A. Right.

Q. Now did you have any other transactions in
451 January with Highland Motor Sales?

A. Yes, sir.

Q. What transactions did you have?

A. I purchased a '42 Plymouth and a 1941 Buick.

Q. What was the motor number of the Plymouth?

A. P14-75991.

452 Q. What was the amount you paid for it?

A. $1,100.

Q. What was the motor number of the Buick?

A. I don't know.

Q. What did you pay for the Buick?

A. $1,200.

Q. Directing your attention to May 5th, 1946, did you have a transaction on that date?

A. Yes, sir.

Q. What was that transaction?

A. A 1946 Ford.

Q. What did you pay for it?

A. $1,750.

Q. Directing your attention to May 27th, 1946, did you have a transaction with Highland Motor Sales on that date?

A. Yes, sir.

Q. What was the nature of the transaction?

A. A 1942 Oldsmobile.

Q. What did you pay for that?

A. $1,500.

Q. Did you have more than one transaction on that date?

A. I don't know.

453 Q. Directing your attention to another date in May, unnoted on Government's Exhibit 33, did you make another purchase?

A. Yes, sir.

Q. What purchase did you make?

A. A 1940 Plymouth.

Q. What did you pay for that?

A. $700.00.

Q. Directing your attention to June 1st, 1947, did you make a purchase on that date from Highland Motor Sales?

A. Yes, sir, I did.

Q. What did you purchase?

A. A 1941 Oldsmobile.

Q. What was the motor number?

A. 341600.

Q. How much did you pay for it?

A. $1,300.

Q. Directing your attention to on or about March 1st, 1948, did you have a transaction with Highland Motor Sales on that day?

A. I did.

Q. What was the nature of that transaction?

A. A 1941 Cadillac.

454 Q. The motor number?

A. 359507.

Q. What did you pay for that?

A. $1,450.

Q. During the month of March, 1948 did you have any other transactions with Highland Motor Sales?

A. Yes, I did.

Q. What was the nature of that transaction?

A. A 1939 Chevrolet.

Q. What did you pay for it?

A. $650.00.

Q. Directing your attention to April 1st, 1948, on or about that date did you have a transaction with Highland Motor Sales?

A. Yes, sir.

Q. What was the nature of that transaction?

A. 1940 Oldsmobile.

Q. What was the motor number?

A. 35950.

Q. What did you pay for it?
A. $1,050.
Q. Directing your attention to on or about July 16th, 1948, did you have a transaction with Highland Motor Sales on or about that date?
455 A. Yes, sir.
Q. What was the nature of that transaction?
A. A 1941 Plymouth.
Q. What was the motor number?
A. P-12-63656.
Q. What did you pay for it?
The Court: Speak up a little so everyone can hear you, please. Proceed.
By Mr. Russo:
Q. What did you pay for it?
A. $1,000.
Q. Mr. Magnuson, directing your attention to on or about April 23rd, 1948, did you have a transaction with Highland Motor Sales on that date?
A. I can't recall.
Q. I show you Government's Exhibit 33 for identification, and direct your attention to the signature in the lower left-hand corner.
A. Yes.
Q. I ask you whose signature that is.
A. That's my signature.
Q. Will you examine Government's Exhibit 33 for identification and see if that refreshes your recollection?
456 A. Yes, sir.
Q. Now, tell the Court and Jury what if any transaction you had on or about April 23rd, 1948.
A. I purchased a 1946 Chevrolet.
Q. From whom?
A. From Highland Motor Sales.
Q. Describe that transaction as best you recall it, Mr. Magnuson.
A. I was told I was buying the car from another party and taken to his house where I made out the check.
Q. In whose name did you make out the check?
A. Bert Finn.
Q. You made the check payable to him?
A. Right.
Q. In what amount?

A. $1,800.
Q. From whom did you receive title?
A. Highland Motor Sales.
Q. To whom did you deliver the check?
A. Highland Motor Sales.

Mr. Russo: At this time, if your Honor please, we
457 offer in evidence Government's Exhibit 33 for identification.

Mr. Batter: May I ask the witness some questions respecting this, your Honor?

The Court: Yes.

By Mr. Batter:

Q. Mr. Magnuson, I show you Government's Exhibit 33 for identification.
A. Yes.
Q. Now, tell me when you signed that document.
A. The date, sir?
Q. Yes.
A. I can't recall the date now.
Q. Can you approximate it?
A. No.

Mr. Batter: I object to it, your Honor. The witness cannot recall signing it.

Mr. Russo: That is not so, your Honor.

Mr. Batter: It has not been properly identified.

Mr. Russo: He testified he signed it.

458 The Court: Objection overruled. It may be received in evidence.

(The document previously marked Government's Exhibit No. 33 for identification was thereupon received in evidence as Government's Exhibit No. 33.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Magnuson—let me have that other document the witness had for examination.

(Mr. Russo handed Mr. Batter a document.)

By Mr. Batter:

Q. Mr. Magnuson, when did you cease doing business under the trade name that you used when you acquired these cars from Highland Motor Sales Company?
A. 1949.

Q. What was the trade name under which you operated?

A. Ben's Auto Sales.

Q. That was an individual proprietorship?

459 A. Yes.

Q. What has become of the books and records of that company?

A. They have been lost or destroyed.

Q. When did you last see them?

A. I don't know how many years ago it was.

Q. What was the occasion for their becoming lost or destroyed?

A. I don't know.

Q. When were they destroyed?

A. I don't know.

Q. Well, if they were destroyed you would know so, would you not?

A. Well, they were lost or destroyed, I don't know which.

Q. Were they lost or destroyed completely or in part? Do you still have some of the checks that you used?

A. No.

Q. Do you still have some of the ledgers that you used?

A. No, sir.

Q. Do you still have some of the cash books that you used?

460 A. No, sir.

Q. Do you still have some of the sales memorandums or purchase memorandums?

A. No, sir.

Q. In other words, the complete thing was either lost or destroyed, is that correct?

A. Yes, sir.

Q. Now, Government's Exhibit 33 bears your signature. Will you tell me the circumstances under which you signed that document?

A. I don't understand you, sir.

Q. What?

A. I don't understand you.

Q. Will you tell me the circumstances under which you signed that document?

A. Well, the Government men came out to see me

and at that time I had some checks, and so forth, and I signed it.

Q. Who were the Government men who came out to see you?

A. I know it was Mr. Coddington, that's all I know.

Q. What was the conversation that ensued between you that led up to your signing this document?

461 A. Conversation about the purchase of cars at Highland Motor Sales.

Q. Give me in substance the conversation.

A. I can't do that.

Q. What can you give me?

A. That's all I can give you.

Q. What is that?

Mr. Russo: He has answered the question, if your Honor please.

Mr. Batter: He has not answered it.

By Mr. Batter:

Q. Did Mr. Coddington come to you and inquire whether you purchased certain cars?

A. Yes, sir.

Q. Did he have a list of the cars that he presented to you?

A. I don't know.

Q. Did he examine your books before he asked you to sign that statement?

A. Yes, sir.

Q. Did you go over your books with him?

A. Yes, sir.

Q. In whose writing is this document, Exhibit No. 33? Whose writing is that?

462 A. This? (Indicating.)

Q. Yes.

A. I don't know.

Q. It was not prepared in your presence?

A. Yes, sir, it was.

Q. You don't know who prepared it?

A. No. There was two men there.

Q. Yes. What did they do?

A. What did they do?

Q. Yes.

A. They prepared that document.

Q. In your presence?

A. Yes, sir.

Q. What was the conversation or discussion that took place?

A. I couldn't repeat that verbatim, sir.

Q. In substance what was it?

A. As I told you before, regarding the purchase of cars at Highland Motor Sales.

Q. Well, what was the mechanics? Did they go to your books and scan through them and find cars that were bought from Highland? Did they come with a list of cars that were bought from Highland? Did you out of your memory tell them what cars were bought
463 from Highland? What did happen?

Mr. Russo: I object, if your Honor please. He has asked that question at least twice now.

Mr. Batter: I am simply trying to exhaust an evasive witness, your Honor.

The Court: Objection sustained.

By Mr. Batter:

Q. Now, then, can you testify before this Court under oath that this list of cars on this Exhibit you know as a fact were purchased by you from Highland Motor Sales on the dates stated in those amounts?

Mr. Russo: If your Honor please, the witness has so testified.

Mr. Batter: He may have on direct. He has not on cross.

The Court: He may answer.

A. I did, sir.

By Mr. Batter:

Q. What?

A. I did.

Q. You did what?

464 A. I purchased those cars.

Q. At those prices?

A. Yes, sir.

Q. On those dates?

A. Yes, sir.

Q. On what do you base that statement?

A. I base that on this paper that was taken from my records.

Q. Well, then, this paper was taken from your records, was it?

A. It was prepared—yes, it was.

Q. In other words, when the Agents and you began this sheet was blank and then as they turned into your records they developed the material that was placed hereon?

A. I believe so, sir.

Q. What do you mean, you believe so? Was it or wasn't it?

A. I believe it was.

Q. Did you check every figure with them as it was done?

A. Yes, sir.

Mr. Russo: He has already answered that question, your Honor.

465 By Mr. Batter:

Q. Now, then, would you find for me on this list, Government's Exhibit 33, a 1946 Chevrolet that you purchased on April 23rd, 1948 for $1,800?

A. That car isn't on this list.

Q. Well, then, this is not a complete list, is it?

A. I can't answer that.

Q. But the car I just mentioned to you is not on that list?

A. It is not on that list, no.

Q. But you did buy such a car from Highland Motor Sales, did you not?

A. Yes, sir.

Mr. Batter: Your Honor, I move that this Exhibit be stricken. By the witness' own admission it is incomplete.

The Court: Motion denied. Proceed.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. If I recall correctly, you testified that some of these transactions were had with Sam Achilli?

466 A. Very few.

Q. Approximately how many? Your best recollection.

A. Two or three.

Q. Two or three?

A. Yes.

Q. Do you see Sam Achilli in the Court Room?

A. Yes, sir.

Q. Will you point him out, please?
A. Right there. (Indicating.)
Q. The third man at the defense counsel table?
A. Yes, sir.

Mr. Russo: I would like to have the record show, your Honor, that he identified the Defendant, Sam Achilli.

The Court: It may so indicate.

Mr. Russo: No further questions. Thank you, Mr. Magnuson.

(Witness excused:)

The Court: We will now recess, ladies and gentlemen of the jury, but before you go, Mr. Batter has two or three exhibits he would like to have you examine, so that may be done now, Mr. Batter.

467 Mr. Batter: Thank you.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

468 The Court: Proceed.

HANLEY CLARK, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified, as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Hanley Clark.
Q. Where do you live, Mr. Clark?
A. Rockford.
Q. Do you have a street address?
A. 820 James Avenue.
Q. What is your business or occupation now?
A. I operate Rockford Auto Auction.
Q. How long have you operated that business?
A. About two and a half years.
Q. What was your business or occupation prior to the time that you became connected with Rockford Auto Washers?
A. Automobile business, used cars.
Q. Was that Rockford Auto Auction?
A. That is right.

469 Q. And at that time who were you in business with?

A. Well, prior to the Auction, with my brother, partners.

Q. What kind of business was that?

A. Used cars.

Q. What was the name of that business?

A. Clark Brothers.

Q. Where was it located?

A. 425 Chestnut, Rockford.

Q. Will you keep your voice up a little, Mr. Clark, so not only I, but all the members of the jury can hear you.

A. Surely.

Q. How long did you operate as Clark Brothers?

A. Well, from about 1948 until, well, 1952—1952, I guess it was, until we went into the Auction.

Q. What business were you engaged in before you engaged in the automobile business with your brother as Clark Brothers?

A. Clark & Omark, the same thing.

Q. Was that the automobile business too?

A. That is right, sir.

Q. Was Clark & Omark a partnership, individual proprietorship or corporation?

470 A. Just a partnership.

Q. What was the name of your partner?

A. Omark, Harold Omark.

Q. Where was that business located?

A. It was on Church and Chestnut, 202 South Church.

Q. In Rockford?

A. In Rockford, yes sir.

Q. Are you familiar with an automobile sales company in Elgin, Illinois, known as Highland Motor Sales?

A. Yes, sir.

Q. Did the partnership of Clark & Omark ever have any business transactions with Highland Motor Sales?

A. Yes, sir.

Q. And in the conduct of the business of Clark & Omark, did you keep any books and records?

A. Yes, sir.

Q. Were those books and records kept in the regular course of business?

A. Yes, sir.

Q. And was it the regular course of business to keep such records?

A. Yes, sir.

Q. Mr. Clark, were you served with a subpoena
471 duces tecum to bring with you the books and records of Clark & Omark?

A. Yes, sir.

Q. Did you bring those records with you?

A. No, sir.

Q. Why not?

A. They were lost, misplaced.

Q. Did you make a search for them?

A. Yes, sir.

Q. Were you able to locate them?

A. No, sir.

Q. And you say that you now do not have them?

A. No, sir.

Q. In connection with the operation of your business as Clark & Omark, did there come a time when an inquiry was made of you concerning purchases made by Clark & Omark from Highland Motor Sales?

A. Yes, sir.

Q. Were you asked to make available to anyone the books and records of Clark & Omark?

A. Yes, sir.

Q. When was that?

A. I think in 1950. I don't remember exactly.

Q. Is that your best recollection?

472 A. That is right.

Q. Now do you recall now whether at that time a summary of the books and records of Clark & Omark relating to purchases of automobiles from Highland Motor Sales was made by anyone?

A. Yes, sir, there was.

Q. By whom?

A. Mr. Coddington, I believe was the gentleman's name.

Q. Made by Mr. Coddington?

A. I think, if I am not mistaken.

Q. Who was Mr. Coddington?

A. Well, he was a Government man, that is all I know, an investigator.

Mr. Russo: I will ask that this document be marked Government's Exhibit 34 for identification.)

(The document was thereupon marked Government's Exhibit 34 for identification.)

By Mr. Russo:

Q. Now, Mr. Clark, I show you Government's Exhibit No. 34 for identification, and ask you if that is the summary to which you have referred?

473 A. I would say so.

Q. Directing your attention to the signature in the upper right-hand corner, whose signature is that?

A. Mine.

Q. Directing your attention to the date immediately underneath the signature, when was that date put on there?

A. May 2, 1950.

Q. Was the document signed on or about that date?

A. Yes, sir.

Q. Will you state, please, whether or not Government Exhibit No. 34 for identification correctly reflects the books and records of Clark & Omark as of May 2, 1947?

Mr. Batter: Just a moment.

Your Honor, I object to that. I would like to first exhaust the witness' recollection a bit as to where his books and records are. They are the best evidence, what the witness has before him and he has been asked to testify is secondary evidence.

The Court: He may answer.

By Mr. Russo:

474 Q. Answer the question.

A. This was taken from our records.

Q. Now at the time that that data was taken from your records, did you verify Government Exhibit 34 with the books and records of Clark & Omark?

A. Yes, sir.

Q. Will you tell us, please, from whom all the cars that are listed on Government Exhibit No. 34 were purchased?

A. From Highland Motor Sales.

Q. With whom did you deal there?

A. The used car manager, Cons—I don't know what his last name is.

Q. Would that be Cons Cirrincione?

A. Yes, sir.

Q. Now directing your attention to Government Exhibit No. 34 for identification, and to the column headed, "Date," what does the information under that heading reflect?

A. January—the month of January, and the make of the automobile, the price paid, motor number.

Q. Let me ask you this: Does the information under the column headed "Date" reflect the date of purchases that you made from Highland Motor Sales?

475 A. Yes, sir.

Q. Now directing your attention to the column headed, "Make and Year," does the information under that heading reflect the make and year of the cars that you purchased from Highland Motor Sales?

A. Yes, sir.

Q. Now directing your attention to the column marked, "Price Paid," does that column reflect the price that you paid for each of the automobiles described thereon?

A. Yes, sir.

Q. Directing your attention to the column entitled, "Motor Number," does that reflect the data on your records as to the motor number of each of the automobiles described thereon?

A. Yes, sir.

Q. Directing your attention to on or about January 21, 1946, did you have any transactions with Highland Motor Sales on that date?

A. Yes, sir.

Q. What transactions did you have?

A. We purchased a—

Q. Will you speak up, please, so that last juror can hear you.

476 A. I have a cold.

I purchased a '46 Buick for the amount of $2825.

Q. What was the motor number?

A. 46951515.

Q. Directing your attention to January 23, 1947, did you have any transaction with Highland Motor Sales on that date?

A. A 1941 Ford—two 1941 Fords for the amount of $2,000.

Q. You purchased two Fords?

A Yes, sir.

Q. And for both you paid $2,000?

A. Yes, sir.

Q. What was the motor number on the first of those two Fords?

A. FEV-174148, and on the other one, 6531582.

Q. Directing your attention to the next date, what is the next date reflected on there?

A. January 27.

Q. Did you have a transaction with Highland Motor Sales on that date?

A. A 1940 Lincoln Zephyr for $850. Motor No. D14-14744.

477 Q. Directing your attention to the next date—

A. February the 3d, 1942 Oldsmobile for $2,050. Motor No. CH-436239.

Q. Did you have a transaction on the next date reflected on there?

A. February 15, a 1941 Chevrolet for $950. No motor number.

Q. What is the next date reflected on there?

A. February 22d.

Q. What transaction did you have?

A. A 1941 Plymouth for $1150. Motor No. A-258669.

Q. What date are we talking about now?

A. The 22d.

The next one is the 27th.

Q. Just a moment. The 22d?

A. That is right, sir.

Q. What is the first transaction on the 22d? I believe you misread that.

A. What did I say, a Plymouth? 1941 Oldsmobile for $1150. Motor number, it is either G or A258669.

Q. Will you examine the symbol before the motor number and make certain as to what that is?

A. I would say it is a G.

Q. What is the next date reflected there?

478 A. February 27, a 1942 Chrysler for $1450. No motor number.

Q. And the next date and transaction?

A. March 7, 1940 DeSoto for $950. No motor number.

Q. And the next date and transaction?

A. March 17, a 1941 Lincoln for $1045. No motor number.

Q. And the next date and transaction?

A. March 25, a '37 Ford for $475. Motor No. 80696.

Q. And the next date and transaction?

A. March 28, a 1941 Ford for $875. Motor No. 18-5912305.

Q. What was the next date and transaction?

A. April 3, a 1942 Oldsmobolie for $1300. Motor No. CA-432928.

The next date was—there is no date on that.

Q. Was it some date in April?

A. It would have to be between the 3d and the 12th.

479 Q. What transaction follows?

A. A '41 De Soto, and a 1942 Packard, and another '42 Packard, for the amount of $1,550.

Q. Let me ask you, did you purchase all three of those at the same time?

A. Yes, sir.

Q. What did you pay for all three?

A. $1,550.

Q. And the motor number of each?

A. The 1941 De Soto, SOS-104259. The first 1942 Packard, E8985. The other 1942 Packard was E315948.

Q. What is the next date and transaction?

A. April 12th, a 1942 Pontiac and $1,300. Motor No. P4KB-11534.

Q. What is the next date and transaction?

A. April 16th, a 1941 Plymouth for $900, Motor No. PW1-182433.

Q. What is the next date and transaction?

A. April 25th, a '39 Ford for $400.00. Motor No. 4711933.

Q. What is the next date and transaction?

A. April 19, a '38 Ford for $750. Motor No. 4192878.

480 Q. What is the next date and transaction?

A. May 3, a 1941 Plymouth, price $1,250. Motor No. P12-237162.

Q. And the next date and transaction?

A. I don't know what that is supposed to be—it looks like the 23rd too, doesn't it?

Q. Give us your best interpretation of the figure, and speak up so the jury can hear you.

A. May 26th, a 1938 Ford, $750. Motor No. 3192878. May 31st, a 1941 Plymouth for $1,250. No motor number. May 7th, a 1942 Olds for $1,450.

Q. Let me stop you there for a moment. Will you look at that date again?

A. January 7th, a 1942 Oldsmobile for $1,450.

Q. No, will you look at the date again.

A. 31 here? This is June here. The last one was a 1941 Plymouth for $1,250, no motor number. May 31st, right? And the next one—

Q. What did you say you paid for the Plymouth?
A. $1,250.
Q. And the next date and transaction?
A. June 7th, 1952 Oldsmobile for $1,450. No motor number.
481 Q. Please keep your voice up so the jury can hear you. The next date and transaction?
A. I have a cold. I can't unless I scream.
Next date June 3, a 1942 Buick for $1,750. Motor No. 44983349.
The next date June 3—
Q. Will you look at that date again?
A. July 3rd, a 1941 Chevrolet for $1,100, and the motor number AA-912227.
Now you want to go on—
Q. Yes. Did you have any other transactions?
A. Yes. In 1947, November 8th, a 1942 Cadillac for $1,500. Motor No. 8381046.
December 9th, a 1936 Chevrolet for $200. Motor No. 66-7618.
1948, May 5, a 1941 Buick for $950. Motor No. 44359700.
June 22nd, a 1940 Pontiac for $775. Motor No.—
Q. Is that $775?
A. Yes, $775. Motor No. 8204583.
482 July 12th, 1942, a Plymouth for $800, Motor No. 312-17190.
August 18th, 1947, a Ford for $1,800, Motor No. 7998-1616983.
November 4th, 1941, a Ford for $750, Motor No. 186089169.
November, no date, a 1939 Plymouth for $400, Motor No. P-8-130338.
November, a 1941 Ford for $750, Motor No. 186612335.
Q. How was the payment of those cars made?
A. By check.
Q. To whom was payment made?
A. To Sam.
Q. Now, at the time that Government's Exhibit 34 for identification was made and verified with your records, were you also asked to produce all checks of Clark & Omark relating to those purchases?
A. Yes, sir.
Q. Were you able to find all those checks?
A. I think nearly all of them, to the best of my knowledge.

Mr. Russo: Will you make these as Government's
483 Exhibits 35, 36, 37 and 38 for identification, please, Mr. Reporter.

(The documents were thereupon marked Government's Exhibits Nos. 35, 36, 37 and 38, for identification.)

By Mr. Russo:

Q. Now, I show you Government's Exhibit No. 35 for identification, purporting to be a check drawn on the Illinois National Bank and Trust Company on January 23rd, 1947, payable to the order of Highland Motor Sales in the amount of $2,825.

A. Yes.

Q. I will ask you if you have ever seen the original before?

A. Yes, sir.

Q. Do you know where the original is?

A. No, sir.

Q. Did you make a search for it?

A. Yes, sir.

Q. Were you able to locate it?

A. No, sir.

Q. Is Government's Exhibit 35 for identification a true and correct copy of that original?

A. Yes, sir.

484 Q. Now, directing your attention again to Government's Exhibit 35 for identification and to the signature in the lower right-hand corner, whose signature is that?

A. My signature.

Q. Was your signature placed on Government's Exhibit 35 for identification on or about the date that the check bears, January 23, 1947?

A. Yes, sir.

Q. What was that check given in payment for?

A. I don't know, sir.

Q. Will you look at Government's Exhibit 34 and see if you can ascertain for which car it was given in payment?

A. It looks like for a 1946 Buick?

Q. A 1946 Buick that you purchased on what date?

A. January 21st.

Q. Is the amount shown on the check the same amount that is shown on the summary?

A. Yes, sir.

Q. To whom did you deliver the check, Government's Exhibit No. 35?

A. To Cons.

Q. Now, directing your attention to the reverse
485 side, one portion of the Exhibit that purports to be the reverse side of that check—

A. Highland Motor Sales—

Q. Let me finish the question, please.

A. Excuse me, sir.

Q. Will you examine it, please, and state whose endorsement is on there?

A. Highland Motor Sales by Sam Achilli.

Q. Now, I show you Government's Exhibit 36 for identification which purports to be a check drawn on the Illinois National Bank and Trust Company dated January 21st, 1947, payable to the order of Highland Motor Sales in the sum of $2,000.

A. Yes.

Q. I ask you if you have ever seen the original of that document?

A. Yes, sir.

Q. Do you know where the original of that document is?

A. No, sir.

Q. Did you make a search for it?

A. Yes, sir.

Q. Were you able to locate it?

A. No, sir.

486 Q. Is Government's Exhibit 35 a true and correct copy of the original?

A. 35?

Q. 36. I am sorry. I meant to refer to Government's Exhibit 36 for identification.

A. This (indicating) is 35.

Q. 36.

A. That's right, sir.

Q. Directing your attention to the signature in the lower right-hand corner of Government's Exhibit 36, whose signature is that?

A. My signature.

Q. Was your signature placed on Government's Exhibit 36 on or about the date the check bears, January 21st, 1947?

A. (No answer.)
Q. Sir?
A. There is a little discrepancy here in date, but the check was 1st—21, and according to this was the 23rd, but that is for the two automobiles.
Q. Keep your voice up, please, so the jurors can hear you.
A. That's for the two automobiles we purchased on the 23rd.
487 Q. That check was given in payment for two automobiles that you purchased on the 23rd?
A. That is right.
Q. The two Fords?
A. Yes, sir.
Q. To whom did you deliver that check?
A. Cons.
Q. Now, I show you Government's Exhibit 37 for identification which purports to be a check drawn on the Illinois National Bank and Trust Company, a check of Clark & Omark bearing No. 199, dated January 23rd, 1947, payable to the order of cash in the sum of $1,750.
A. Yes.
Q. I direct your attention to the signature—first, I will ask you whether you have ever seen the original of that check?
A. Yes, sir.
Q. Do you know where the original is now?
A. No, sir.
Q. Did you make a search for it?
A. Yes, sir.
Q. Were you able to locate it?
A. No, sir.
488 Q. Is Government's Exhibit 37 for identification a true and correct copy of the original?
A. Yes, sir.
Q. Now, directing your attention to the signature in the lower right-hand corner, whose signature is that?
A. Cons'—right here is my signature (indicating).
Q. Was your signature placed on there on or about the date that the check bears?
A. Yes, sir.
Q. Now, directing your attention to the reverse side of that check, that portion of the Exhibit that purports to be the reverse side, will you examine it please, and

state whether or not there are any endorsements thereon?

A. There's two. There's "C. J. Cirrincione" and "Sam Achilli."

Q. "C. J. Cirrincione" and "Sam Achilli"?

A. Yes. That's right.

Q. To whom did you deliver that check?

A. Cons.

Q. Can you associate that check with any of the automobiles on Government's Exhibit 34?

489 A. What is the date on that? It's possible it's this automobile right here. (Indicating.)

Q. It looks like June 23rd, 1947.

A. This is for a 1942 Buick, for an amount of seventeen-fifty.

Mr. Russo: Did you ladies and gentlemen hear the answer?

Jurors: Yes.

The Witness: I'm sorry, but I can't talk any louder.

Mr. Weber: I think a couple of the jurors in the back did not hear.

Mr. Russo: They cannot hear you back there, Mr. Clark.

The Witness: Then give me a loud speaker.

By Mr. Russo:

Q. Will you try to do a little bit better, please?

A. O.K.

Q. Will you tell us once more so the members of the jury who did not hear your reply? Will you give us the answer that you gave us before?

A. (No answer.)

Mr. Russo: Will you read the last question and 490 the answer, please, Mr. Reporter.

(The record was thereupon read as above recorded.)

By Mr. Russo:

Q. Now, Mr. Clark, I hand you Government's Exhibit 38 for identification, purporting to be a check of Clark Motor Sales drawn on the Illinois National Bank and Trust Company, Check No. 173, dated November 8th, 1947, payable to Sam Achilli in the amount of $1,500.

A. Yes.

Q. I will ask you if you have ever seen the original of that check?

A. Yes, sir.

Q. Do you know where the original is now?
A. No, sir.
Q. Did you make a search for it?
A. Yes, sir.
Q. Were you able to locate that?
A. No, sir.
Q. Is Government's Exhibit No. 38 a true and correct copy of the original?
A. Yes, sir.
491 Q. Directing your attention to the signature in the lower left-hand corner thereof, whose signature is that?
A. My signature.
Q. Directing your attention to the date, Mr. Clark, was your signature placed on Government's Exhibit 38 for identification on or about the date the check bears, November 8th, 1947?
A. Yes, sir.
Q. What was that check given in payment for?
A. A 1942 Cadillac for the amount of $1,500.
Q. Now, were all of the other cars for which I have not shown you checks paid for?
A. Yes, sir.
Q. Was payment on all of the other cars made by cash or by check?
A. I can't remember, sir.
Q. Were they made by one or the other or by both, or a combination?
A. Well, when we were in business we were a little short on cash and we done just about any way to buy automobiles.
Q. But you do say that all the cars were paid for?
A. Yes, sir.
492 Q. To whom was payment for each of those cars made?
A. Cons.
Q. Were all the cars listed on Government's Exhibit 34 for identification bought during the year 1947 on the dates concerning which you testified?
A. To the best of my knowledge, yes.
Q. Directing your attention to Government's Exhibit 38 for identification and to that portion thereof that purports to be the reverse side of the check, does the reverse side of the check bear an endorsement?

A. Yes, sir.
Q. Whose endorsement does it bear?
A. Sam Achilli's.
Q. Directing your attention to Government's Exhibit 36 and to that portion of it that purports to be the reverse side thereof, what endorsement if any does that bear?
A. "For Deposit Only, Highland Motor Sales."
Q. Is that a signed endorsement or a stamped endorsement?
A. A stamped endorsement.
493 Q. On Government's Exhibit 38 for identification is that a signed endorsement or a stamped endorsement?
A. A signed endorsement.
Q. Directing your attention to Government's Exhibit 35 for identification, and to that portion of it that purports to be the back of a check, does that bear any endorsement?
A. It bears two endorsements, "Highland Motor Sales by Sam Achilli", and then, "Pay to the Order of"—well, some oil company. I can't make it out.
Q. Is the endorsement, "Highland Motor Sales by Sam Achilli" a stamped endorsement or a written endorsement?
A. A written endorsement.
Q. And the other endorsement to which you referred is a stamped endorsement—or rather is the other endorsement to which you have referred a stamped endorsements or a written endorsement?
A. A stamped endorsement.
Mr. Russo: I offer these in evidence, if your Honor please.
(Mr. Russo handed documents to Mr. Batter.)
494 Mr. Russo: I just want to ask one more question.
By Mr. Russo:
Q. Mr. Clark, directing your attention to the last nine automobiles at the bottom of Government's Exhibit 34—or rather, the last seven, were they purchased in 1947 or 1948?
A. In 1947,—oh. Wait a minute. The last seven cars were purchased in 1948. In November and December they were purchased in 1947.
Q. But the last seven were purchased in 1948?
A. Yes, sir.
Mr. Russo: Now, if your Honor please, the Government

offers in evidence Government's Exhibits 34, 35, 36, 37 and 38.

Mr. Batter: May I ask the witness a few questions, your Honor?

The Court: All right.

495 By Mr. Batter:

Q. Mr. Witness, I ask you to look at Government's Exhibit for identification No. 34.

The Court: Will you speak up please? The jurors cannot hear you.

By Mr. Batter:

Q. I ask you to look at Government's Exhibit for identification No. 34, Mr. Clark.

A. Yes, sir.

Q. Mr. Clark, where are your books and records?

A. I don't know, sir.

Q. Looking at Government's Exhibit 34 for identification I find the upper part marked, "Cars purchased by Clark & Omark", and the lower part marked, "Purchased by Clark Motor Sales."

Are those two separate organizations?

A. Yes, sir.

Q. Are they both partnerships between you and your brother?

A. No. The first one was between Mr. Omark and myself, and the last seven cars were bought by my brother and myself.

Q. What has become of the books of Clark & Omark?

A. I don't know, sir.

496 Q. Was that a partnership?

A. Yes, sir.

Q. Where were the books of that partnership maintained?

A. We had them there at the office at the time that report was made.

Q. Where was the office?

A. It was at Church and Elm in Rockford.

Q. Church and Elm in Rockford?

A. 202 South Church.

Q. Were they there during the year 1947?

A. Yes.

Q. You say they were there when this report was made, which was in 1950?

A. At the time we done business in 1947 we had them

at 202. At the time the report was made they were at 425 Chestnut.

Q. 425 Chestnut. Is that the address of Clark Motors?

A. That is right.

Q. Now, these books of Clark Motors were at 425 Chestnut?

A. Right.

Q. At all times?

497 A. Yes, sir.

Q. When did you first discover the disappearance of the books of both of these companies?

A. Well, when I was asked to bring them to Chicago I made a search for them and I couldn't find them.

Q. When were you asked to bring them to Chicago?

A. Well, at the last trial we had, which has been a few months back.

Q. Then between May of 1950, and, as you say, a few months back, you were entirely unaware of these books being missing?

A. Yes, sir.

Q. How did you maintain your books? Did you keep a separate set of books for each year, or were they carried forward one year to another?

A. Well, we kept a card system, and a sales book is all we had, and then a ledger.

Q. And a ledger?

A. Yes.

Q. Did you have a separate ledger for each year or did you carry it forward from year to year?

A. Each year.

Q. A separate ledger for each year?

A. Yes.

498 Q. Were the separate ledgers for each year all contained in one binder or were they separate binders?

A. Separate binders.

Q. So you had a complete set of books for each year?

A. That's right, sir.

Q. Now, these books here for Clark Motors cover in part 1947. Is that binder completely missing?

A. Yes, sir.

Q. It also covers books for the period May to November, 1948. Is 1948 completely missing?

A. Yes, sir.

Q. Now, in addition to the ledgers and the sales books

that are missing, what about your checks and your vouchers and your sales vouchers?

A. They are all missing now.

Q. They are all missing?

A. Yes, sir.

Q. When were they first discovered missing?

A. When we made a search for them at the time we were subpoenaed to bring the books to Chicago.

Q. How long before that did you first notice the absence of any of these records?

A. I had no occasion to look for them until then.

499 Q. How did you file your checks and your sales slips and your various supporting documents for these books?

A. In large envelopes.

Q. And those envelopes were marked by the year or the month or how?

A. By the year and month.

Q. By the year and month?

A. Yes, sir.

Q. Then all the envelopes, all the ledgers, all the cash books and all the sales slips for the year 1947 for the firm of Clark & Omark, and for the year 1948 for the firm of Clark Motors—every piece of record is missing, is it?

A. That's right, sir.

Q. Can you account for their being missing in any way.

A. No, sir.

Q. Was there a fire?

A. No, sir.

Q. Was there a theft?

A. No, sir.

Q. Was there a throwing them all out?

500 A. No, sir. I just don't know where they're at. We moved from Church Street to Chestnut, from Chestnut to North Second, and from North Second out to where we're at now, 173.

Q. Where you are now?

A. Yes, sir.

Q. Where is that?

A. 6402 Forest Hills Road, Highway 173.

Q. Then you moved from Clark & Omark to 425 Chestnut?

A. That's right.

Q. At that time you had the books?

A. That's right, sir.

Q. Then when did you move from 425 Chestnut to—what was this other address?

A. 6402 Forest Hills Road. About two and a half years ago.

Q. About two and a half years ago?

A. Yes, sir.

Q. That would bring us down to 1952.

A. Yes, sir.

Q. There was one move in between there, wasn't there?

A. No. We moved from 202 South Church, which 501 was Clark & Omark, and when he and I dissolved partnership my brother and I went in business at 425 Chestnut, and we moved from there to North Second Street.

Q. When did you move to North Second Street. That's the address I was looking for.

A. 4912 North Second, I guess is the address there. We were there from about 1948 until 1952. We weren't there too long. We subleased the property and then moved—

Q. Then that is where the books were in May, 1950, when this review was made, isn't that correct?

A. No. The books were at 425 Chestnut.

Q. I thought you said—

A. In 1950.

Q. I thought you said you were on North Second Street until 1952.

A. No. We were at 425 Chestnut until we moved on North Second, and then we moved from North Second to 6402 Forest Hills Road.

Q. Oh. You moved from 425 Chestnut to North Second?

A. That's right.

Q. When was that move made?

A. Well, let's see. In 1950 we were at 425 Chestnut, and I don't know the exact date on that.

502 Q. Approximately.

A. Well, let's go in reverse. We have been at 6402 for two and a half years.

Q. That would bring us back—this is 1955—to late 1953, wouldn't it?

A. Well, I think we might as well jump that North Second Street deal, because we weren't there but a short time.

Q. Well, why jump it? I am trying to find out whether the books were moved to that address.

A. They were moved to that address—

Q. They were moved to the North Second Street address?

A. That's right, as far as I know. I don't know where they're at. I don't know where we lost them, or we would have gone back and got them.

Q. But you had them at North Second?

A. As far as I know we did have.

Q. You were at North Second during what period?

A. That was probably in 1952.

Q. In 1952?

A. The year 1952, yes.

Q. From North Second you moved to Forest Hills Avenue?

503 A. To Forest Hills Avenue, yes.

Q. Did you have the books when you moved to Forest Hills Avenue?

A. I don't know.

Q. You don't know?

A. I don't remember whether we did or not.

Q. You had no occasion to look for them at that time?

A. That's right.

Q. Were the books of any other period than 1947 and 1948 or subsequent to 1948 missing at that time?

A. I only looked for the ones that you asked for and they weren't there.

Q. I didn't ask for anything.

A. Well, the Department. The summons I got asked me to bring the books in for—

Q. In the course of looking for those particular ones did you find any others that were missing?

A. I had no occasion to look for any others. I only looked for one set of books and I couldn't find them.

504 Q. In looking for that one set of books, you mean your eyes were never cast on any other set of books?

A. I don't know. As I say, I was only asked to look for one specific set of books, and that's what I looked for, and they weren't there.

Q. You would have to look to see what they were, and when you were looking to see what they were, did you see that any other set of books was missing?

Mr. Russo: I object to arguing with the witness.

Mr. Batter: I am not arguing with the witness. I am just trying to pin him down.

The Court: Objection sustained.

Mr. Batter: I object, your Honor, to Government's Exhibit 34 as not the best evidence, and as being a statement of the books of two different companies and the absence of the books of both companies is not satisfactorily explained.

The Court: The Exhibit may be received in evi-
505 dence.

(The document previously marked Government's Exhibit 34 for identification was thereupon received in evidence as Government's Exhibit 34.)

The Court: At this time we will recess, ladies and gentlemen of the jury, and return back here at ten o'clock tomorrow morning. The witness is instructed not to discuss this case with anyone, and that includes members of your immediate family, until you return to the witness stand tomorrow morning.

Mr. Batter: To facilitate the examination may I have these Exhibits overnight?

Mr. Russo: Yes.

The Court: All right.

Mr. Russo: The witness would like to ask me a question. He indicates that he would. May I have it done before your Honor?

The Court: Yes.

The Witness: I wonder if it would be possible for
506 me to come in some other date, because our sale is tomorrow and it's just about impossible for me to be here tomorrow. I would appreciate it if we could do it some other way.

My brother just got out of the hospital—he was in a bad wreck—

The Court: It would be agreeable with the Court, if it is with counsel, to conclude his examination day after tomorrow.

Mr. Russo: It would have to be Monday.

The Court: Next Monday, yes.

Mr. Batter: That is perfectly satisfactory to me, if the witness in the meantime—

The Witness: That will be fine with me.

Mr. Batter: That will be perfectly satisfactory with me if the witness in the meantime does not discuss this case with anyone.

The Court: The witness is instructed not to discuss this case with anyone, including members of his own family, until he returns to the witness stand next Monday 507 morning.

We will now recess until ten o'clock tomorrow morning.

(And thereupon the trial of the above-entitled matter was adjourned until ten o'clock a.m. of the following day, Thursday, April, 14th, 1955.)

508-509 ***

510 FRANK M. WARNER, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?

A. Frank M. Warner.

The Reporter: How do you spell your last name, please?

The Witness: Warner, W-a-r-n-e-r.

Mr. Russo: Will you keep your voice up, please, so the last member of the jury may hear you as well as I.

By Mr. Russo:

Q. Where do you live, Mr. Warner?

A. 227 Preston Avenue, Elgin, Illinois.

Q. What is your business or occupation?

A. Printer.

Q. What is the name of the company for which you work?

A. Roto Color, Incorporated.

Q. Where is that located?

A. St. Charles, Illinois.

511 Q. How long have you been there?

A. Three and a half years, approximately, now.

Q. Are you familiar with an automobile concern called Highland Motor Sales?

A. I am.

Q. Where is that located?

A. Elgin, Illinois. Lake Street, I think it is.

Q. Have you ever had occasion to have any transactions with that company?

A. I have.

Q. Directing your attention to February 4th, 1948, did you have a transaction with Highland Motor Sales on or about that date?

A. I did.

Q. With whom did you deal there?

A. I don't hear you, sir.

Q. With whom did you deal?

A. Mr. Sam Achilli.

Q. What was the nature of the transaction?

A. I traded a car for a new one, a Plymouth car.

Q. What kind of a car did you buy?

A. 1948 Plymouth De Luxe two-door, white walls, heater and seat covers.

Q. What was the total purchase price of the car?

512 A. Approximately $1,800.

Q. Now, how was that transaction—let me ask you this: I believe you testified that you traded in a car?

A. I did.

Q. What kind of a car did you trade in?

A. 1941 Chevrolet.

Q. Were you given an allowance for that car?

A. Yes, I was.

Q. How much were you allowed on it?

A. Well, I hate to state figures, because I don't have the records in front of me, and I don't—I hate to give an exact figure on it.

Q. What payments did you make?

A. What?

Q. Strike that question. How did you make payment?

A. Well, I made them by check.

Q. By check?

A. Yes.

Mr. Russo: Will you mark this as Government's Exhibit 39 for identification, please, Mr. Reporter.

513 (The document was thereupon marked Government's Exhibit No. 39 for identification.)

Mr. Russo: Will you mark this as Government's Exhibit No. 40 for identification, please.

(The document was thereupon marked Government's Exhibit No. 40 for identification.)

By Mr. Russo:

Q. How many checks did you use to make payment, Mr. Warner?

A. I think there was two as a down payment along with the car I traded in.

Q. I show you Government's Exhibit No. 39 for identification which purports to be a check drawn on the Union National Bank & Trust Company dated February 4th, 1948, payable to the order of Highland Motor Sales in the sum of $195 and purporting to be signed by Frank M. Warner.

Directing your attention to Government's Exhibit No. 39, and to the signature in the lower right-hand corner, whose signature is that?

A. That's mine.

514 Q. Was your signature placed on Government Exhibit No. 39 for identification on or about the date the check bears, February 4, 1948?

A. Was my signature?

Q. Was your signature placed on the check on or about the date of the check?

A. It was on or about the date, yes.

Q. Now directing your attention to Government Exhibit No. 40 for identification, which purports to be a check on the Union National Bank & Trust Company, dated February 3, 1948, payable to the order of Cash in the sum of $305, and purporting to be signed by Frank M. Warner, and directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. That is mine.

Q. Now what were both of those checks, Government Exhibit No. 39 for identification and Government Exhibit No. 40 for identification, given in payment for?

A. A 1948 Plymouth—down payment on the 1948 Plymouth.

Q. Was the total of those two checks given as a down payment towards the purchase price of the car 515 that you have described?

A. Yes.

Q. Did that transaction take place on or about February 3 or 4, 1948?

A. Yes, it did.

Q. To whom did you deliver those checks, Mr. Warner?

A. Mr. Achilli.

Q. Do you recall the amount of that purchase price that was financed?

A. Well, that would be the balance of what he allowed me on the car—them two checks, plus what he allowed me for the car, minus the cost of the car. That was financed. I don't remember exact what figures they were.

Q. For the purpose of refreshing your recollection, was it $600 that was financed?

A. Approximately.

Q. I believe that you testified that the cost of the car to you was $1800.

A. Approximately $1800.

Q. Yes, sir. Now, if your answer that approximately $600 was financed and that you paid a down payment of $305 and $195, which totals $1,100, would you say then
516 that the balance that was allowed you as a trade-in was approximately $700?

Mr. Batter: Object to that, your Honor. Pure supposition.

Mr. Russo: It is calculation, if your Honor please.

The Court: He may answer it.

The Witness: I have forgotten the question.

Mr. Russo: Read the question, please, ma'am.

(Question read.)

By the Witness:

A. I do, yes.

By Mr. Russo:

Q. Now I show you Government Exhibit 39 for identification and direct your attention to the reverse side, thereof, and ask you to state what endorsement, if any, appears on there.

A. Highland Motor Sales.

Q. I show you Government Exhibit No. 40 for identification, and ask you to state what endorsement, if any, appears on there.

A. C. J. Cirrincione.

Q. Mr. Warner, directing your attention to Gov-
517 ernment Exhibit 39, it appears that that check was drawn payable to the order of Highland Motor Sales.

A. Yes.

Q. Now directing your attention to Government Exhibit No. 40, it appears that that check is drawn payable to the order of cash.

Now will you explain, please, why one was drawn payable to the order of Highland Motor Sales and the other drawn payable to the order of Cash?

A. It just might have been an oversight on my part and I didn't know who to pay it to, and I just made it out to Cash so it is payable to anybody at the garage who would accept it.

Q. And you delivered both of those checks to Mr. Achilli, I believe you said.

A. Yes.

Q. Do you know Mr. Achilli?

A. Yes, I do.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Will you point him out, please?

A. The gentleman at the end over there, that table.

Q. The third man at defense counsel's table?

A. Yes, sir.

518 Q. Is he the man with whom you dealt?

A. Yes.

Mr. Russo: At this time, if your Honor please, the Government offers in evidence Government Exhibits Nos. 39 and 40.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 39 and 40, respectively, for identification, were thereupon received in evidence as Government Exhibits 39 and 40.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Warner, with this car that you purchased, what did you buy in the form of accessories?

A. The accessories were all on the car when it was delivered to me.

Q. In other words, the price that you paid for it included accessories?

A. Yes, sir.

Q. What were those accessories?
519 A. Oh, white wall tires, heater, seat covers.
Q. Was there a radio?
A. And radio, pardon me, yes.
Q. Spare tire?
A. Yes.
Q. Windshield wipers?
A. Yes.
Q. Anything else?
A. Well, that is all I can think of right now.
Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. Is it true, Mr. Warner, that all those accessories concerning which you have testified were part of the total purchase price of the car?
A. They were part of the total price.
Mr. Russo: Thank you. You may be excused.
(Witness excused.)

520 JOHN MEAGHER, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is John Meagher?
A. That's right.
Q. That is spelled M-e-a-g-h-e-r?
A. That's right.
Q. Where do you live, Mr. Meagher?
A. 375 Prairie Street in Elgin.
Q. Will you please keep your voice up so every member of the jury can hear you?
A. Yes.
Q. Is that in Elgin?
A. Yes.
Q. What is your business, Mr. Meagher?
A. I work for the Northern Illinois Gas Company.
Q. I cannot hear you.
A. I work for the Northern Illinois Gas Company.
Q. What is the nature of your work?
A. I am a construction worker.

Q. How long have you been employed by Northern
521 Illinois Gas Company?

A. Well, it's just become the Northern Illinois Gas Company, but I have been with this company for seventeen years.

Q. Are you acquainted with an automobile concern known as Highland Motor Sales?

A. Yes, sir.

Q. Where is that company located?

A. In Elgin.

Q. Did you ever have any business transactions with that company?

A. Yes.

Q. What was the nature of that transaction?

A. I bought a car.

Q. What kind of a car was it you bought?

A. '46 Plymouth sedan.

Q. Was that a new car or a used car?

A. A used car.

Q. Directing your attention to on or about October 11th, 1948, is that the date on which you had that transaction?

A. Approximately, yes.

Q. What was the total purchase price of that car?
522 A. Well, as far as I can remember, I would say around $1,700; $1,600 or $1,700, I don't know.

Q. How was the purchase price paid?

A. A thousand dollars in cash and my old car, and a little down payment, $65.00 or $70.00 down payment.

Q. $65.00 or $70.00 down payment and $1,000 cash?

A. That's right.

Q. And you turned in another car?

A. Yes, I did.

Q. What kind of a car was it that you turned in?

A. A '42 Plymouth Club Coupe.

Q. How much were you allowed on the Plymouth Club Coupe?

A. I don't remember.

Q. Would the allowance on the Plymouth Club Coupe be the difference between the approximately $1,700 you have testified you paid and the total of the difference between $1,000 cash and the $65 or $70.00 that you made as a down payment?

A. Yes.
Q. Where was the money paid?
A. Down at the office.
Q. To whom did you make payment?
523 A. I don't remember who the person was.
Q. At the time you purchased that car were you given a delivery slip or a sales slip of any sort?
A. I guess so, I guess I was.
Q. Do you have that slip now?
A. No, I don't.
Q. Did you make a search for it?
A. I looked for it and I couldn't find it.
Q. Were you able to locate it?
A. No.
Q. In negotiating the purchase of that car, Mr. Meagher, with whom did you deal?
A. I don't remember who it was.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Mr. Meagher, do you have a receipt for the $1,000 payment that you made?
A. No.
Q. Did you get one?
A. I think I might have. I don't remember.
Q. But you don't have it now?
A. No, I don't have it now.
524 Q. Did you get a receipt for the $60 or $70 payment that you made?
A. I might have, but I don't remember.
Q. You don't have it now?
A. No, I don't have it now.
Mr. Batter: That is all.
Mr. Russo: Thank you, sir. That is all.
(Witness excused.)

HAL PLUMB, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Hal Plumb, I believe, is that correct?
A. That's right.

Q. Is that spelled P-l-u-m-b?
A. That's right.
Q. How old are you, Mr. Plumb?
A. I'll be seventy-five in October.
Q. What is your address?
525 A. Presently, 602 Center Street, McHenry, Illinois.
Q. What is your business or occupation?
A. Right now I am dabbling a little in real estate.
Q. Are you associated with any firm, or connected with any firm?
A. Yes.
Q. What is the name of that firm?
A. Right now it's the McHenry Realty Company, 532 Main Street.
Q. How long have you been with the McHenry Realty Company?
A. I just transferred from the other broker here in the last two weeks.
Q. Whom were you with before?
A. Fitzgerald Real Estate.
Q. Before you were associated with the Fitzgerald Realty Company, with whom were you associated?
A. Well, I was originally with the McHenry Realty.
Q. I see.
A. So between the two of them the last three years I have switched back and forth.
Q. What was your business or occupation in
526 1946?
A. I then was a salesman for the Wear Ever Aluminum Company.
Q. Do you know the Defendant, Sam Achilli?
A. Yes. I met him.
Q. How long have you known him?
A. Oh, I just met him through a call for a set of Wear Ever. That was the only personal contact.
Q. Will you state for the Court and jury the circumstances under which you met him?
A. Well, I was then, as I said, with the Wear Ever Aluminum Company and I got his name and called on him to see if we could sell him a set of Wear Ever.
It was an evening call, and I met Mr. Achilli and Mrs. Achilli.

Q. Where did you meet them?
A. At their home in Elgin.
Q. Yes, sir?
A. So I demonstrated my set and they were impressed with it and they bought a full set of the Wear Ever, and after the sale was made, then I had an old 1946 coupe—I bought in '35, but it was a '36—
527 Q. It was a 1936 coupe?
A. Yes, sir.
Q. What make was it?
A. Ford.
Q. Yes, sir, Go ahead.
A. So then we were talking over the sale and I says, "I've got an old Ford coupe and I need a new car, because I don't think this Ford will ever get through the winter, and in my business I need a new car", and I says, "I'll make you a proposition: If you will sell me a Plymouth, a new Plymouth, I will make you a present of the Ford coupe."

Well, it must have impressed him, and he says, "Maybe we can make a deal."

Well, he took me down that night—oh, I guess around ten o'clock or so, and he had this 1946 new Plymouth and he says, "I think we can make a deal", so the next evening, or afternoon, I come over, and I brought the Ford over and the papers, the title, and I had a check for $1,525.00 and I gave him the check and turned over the Ford to him and drove away.

That's the last time I saw Mr. Achilli.
528 Q. Do you see Mr. Achilli in the Court Room?
A. I do now, sitting over there. (Indicating.)
Q. Is he the same Mr. Achilli with whom you dealt?
A. Well, he's got a little age on him, but—
Q. Is he the same man?
A. I am pretty sure he is.
529 Q. And he is the same man to whom you delivered the check for $1,525?
A. Yes.
Q. Now do you happen to have that canceled check, Mr. Plumb?
A. No, I don't.
Q. At the time of that transaction were you given any receipt or sales slip?

A. I must have been given the sales contract and the title.

Q. Do you have any slip or invoice that he may have given you?

A. No, I haven't.

Q. You have no documents now relating to that transaction?

A. No.

Q. Now do you remember approximately when it was that this transaction took place?

A. Well, to the best of my recollection and memory, it was either in November or December.

Q. Of what year?

A. 1946. I connect it up because the weather was very cold.

Q. And where was it, if you recall, that you de-
530 livered the check to him?

A. In his office.

Mr. Russo: Your witness, Mr. Batter.

Cross Examination by Mr. Batter.

Q. Mr. Plumb, in the Plymouth that you bought, were there any accessories?

A. Nothing only fully equipped. What do you mean by accessories?

Q. Were there seat covers?

A. No.

Q. Radio?

A. No.

Q. Heater?

A. Yes.

Q. Extra tire?

A. I think there was. I am not sure.

Q. Windshield wiper?

A. Sir?

Q. Windshield wiper?

A. Yes.

Q. Can you recall any other accessories beyond the basic car included in the price?

531 A. No, there was nothing that I know of, only that would make the car run, the heater and stuff.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. All the things that you have mentioned, Mr. Plumb, were they a part and included in the total purchase price of the car?

A. Yes.

Mr. Russo: Thank you, sir. You may be excused.

The Witness: Thank you.

(Witness excused.)

DUANE W. MULL, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state and spell your name, please, sir?

A. Duane, D-u-a-n-e, W. Mull, M-u-l-l.

Q. Mr. Mull, will you please keep your voice up
532 so the last juror over here may hear you.

Where do you live, Mr. Mull?

A. 456 Ellis Street.

Q. Where is that located?

A. In Elgin, Illinois.

Q. What is your business or occupation?

A. General contractor.

Q. A general contractor?

A. Yes.

Q. Are you employed for yourself or by someone else?

A. By someone else.

Q. For whom do you work?

A. Elgin Construction Company.

Q. And where is that located?

A. In Elgin.

Q. How long have you been with the Elgin Construction Company?

A. Oh, approximately five years.

Q. Prior to the time, Mr. Mull, that you were employed by Elgin Construction Company, what was your business or occupation?

A. Well, for a short period of time I was in the real estate and insurance business, and prior to that the
533 automobiles business.

Q. When you were in the real estate business, were you employed by yourself or by someone else?

A. By myself.

Q. How long were you in that business?

A. That overlapped the automobile business, I would say, a couple of years, three years.

Q. What was the name of the automobile business in which you were engaged?

A. The Avenue Motor Sales.

Q. And where was that located?

A. In Elgin.

Q. Was Avenue Motor Sales an individual proprietorship, a partnership or corporation?

A. A partnership.

Q. What is the name of your partner?

A. Robert J. Knaak.

Q. How do you spell that name, please?

A. Robert, R-o-b-e-r-t, J. Knaak, K-n-a-a-k.

Q. Will you tell us, please, the period in which Avenue Motor Sales was engaged in business?

A. From, I believe, the early part of 1947 through a portion of 1949.

Q. Are you acquainted with a concern known as 534 Highland Motor Sales?

A. Yes.

Q. Where is that located?

A. In Elgin.

Q. Do you know Sam Achilli?

A. Yes.

Q. How long have you known him?

A. Oh, for quite a number of years. I would say sometime in the early 40's or late 30's.

Q. Do you know his connection with Highland Motor Sales?

A. I would believe it would be that of an owner.

Q. Now while you were doing business as Avenue Motors, did you have any transactions with Highland Motor Sales?

A. Yes.

Q. What was the nature of those transactions?

A. Purchase of automobiles.

Q. And in the purchase of those automobiles, with whom did you deal?

A. Well, with either Mr. Achilli or Mr. Cirrincione.
Q. Do you see Mr. Achilli in the court room?
A. Yes.
Q. Will you point him out, please?
535 A. Sitting on the end at that table (indicating).
Q. Is he the third man from the end sitting at defense counsel table?
A. That is correct.
Q. Is he the man at Highland Motor Sales with whom you dealt?
A. Well, as I said before, I dealt with both of them.
Q. You mentioned Mr. Cirrincione and Mr. Achilli.
A. Yes.
Q. Is he the same Mr. Achilli with whom you dealt?
A. Yes.
Q. Now in the conduct of the business of Avenue Motor Sales, did you keep a set of books and records?
A. Yes.
Q. Were those books and records kept in the regular course of business?
A. Yes.
Q. Was it the regular course of business to keep such books and records?
A. Yes.
Q. Mr. Mull, were you served with a subpoena duces tecum to bring with you the books and records of Avenue Motor Sales relating to the transactions had by your
536 company with Highland Motor Sales?
A. Yes.
Q. Did you bring those books and records with you?
A. No, they have been destroyed.
Q. Did you make a search for them?
A. Yes.
Q. Were you able to locate them?
A. No.
Q. Tell us, if you know, what happened to them.
A. Oh, I believe that sometime, about two or three years ago, when we were housecleaning they were just thrown out.
Q. Keep your voice up, please.
A. The Government had taken such checks and records in one of the meetings I had with the investigating agent, and I felt that he had taken all he wanted.

Q. But you say now that those records are lost or misplaced, is that correct?

A. That is correct.

Q. And you also just testified that you made those records available to an agent?

A. That is correct.

Q. Did you get those records back?

A. Well, no. He kept a good number of them. I
537 don't have a detailed list of what he kept or anything of that nature, but he did keep basically, I believe, checks.

Q. Now, at the time that the agent made an examination of your books and records, did he also make a summary?

A. Yes.

Q. Of the transactions between Avenue Motor Sales and Highland Motor Sales?

A. Yes.

Q. Who made that summary, Mr. Mull?

A. I believe it was an agent by the name of Mr. Coddington.

Q. And by whom was he employed, if you know?

A. I don't know which branch of the Government it would be—

Q. He was employed by the Government, is that right?

A. Yes.

Mr. Russo: I will ask that this document be marked Government Exhibit 41 for identification.

(The document was thereupon marked Government Exhibit 41 for identification.)

538 By Mr. Russo:

Q. Mr. Mull, I show you Government Exhibit No. 41 for identification and ask you if that is the summary to which you have just referred.

A. Yes.

Q. Directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. My own.

Q. Directing your attention to the signature in the lower left-hand corner, whose signature is that?

A. Mr. Knaak's.

Q. Was your signature and Mr. Knaak's signature placed on Government's Exhibit 41 on or about the date the document bears?

A. Yes.

Q. The 13th day of September, 1950, is that correct?

A. Yes.

Q. Now did you verify the date that is contained on Government's Exhibit No. 41 with the books and records of Avenue Motor Sales?

A. Yes.

Q. And does Government Exhibit No. 41 correctly reflect the data that was on the books of Avenue Motor
539 Sales at the time that the summary was made?

A. From our records, yes.

Q. Now directing your attention to the column headed, "Date" on Government Exhibit No. 41 for identification, what does that purport to reflect?

A. The date of each purchase.

Q. And directing your attention to the column headed, "Year and Make," what data does that purport to reflect?

A. The year and make of automobile.

Q. Directing your attention to the column headed, "Motor Number," what information or data does that purport to reflect?

A. The motor number of the automobile.

Q. Directing your attention to the column headed, "Price," what does that purport to reflect?

A. The purchase price.

Q. Now, Mr. Mull, directing your attention to April 24, 1948, did you on or about that date have a transaction with Highland Motor Sales?

540 Mr. Batter: Just a minute, please. I object, your Honor, to the witness testifying from a document that is not in evidence. The document has been fully identified—

The Court: He may answer.

Mr. Russo: You may answer, sir.

The Witness: The question was, did we have—

By Mr. Russo:

Q. Directing your attention to on or about April 24th, 1948, did you as Avenue Motor Sales have a transaction with Highland Motor Sales?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of an automobile.

Mr. Batter: I renew my objection, your Honor. The

document speaks for itself. The witness is talking from a document.

Mr. Russo: At this time, your Honor, I offer Government's Exhibit 41 in evidence.

Mr. Batter: I object to this, your Honor. It does
541 not purport to be any record of any books or book entries. This is simply an affidavit by the witness that he purchased such cars.

Mr. Russo: If your Honor please, the witness has testified that it correctly reflects the books and records of Avenue Motor Sales and that he verified the data on that document with his books and records and that it correctly represents and reflects the data on his books and records.

The Court: It may be received subject to the objection.

(The document previously marked for identification Government's Exhibit 41, was thereupon received in evidence as Government's Exhibit 41.)

By Mr. Russo:

Q. Now, Mr. Mull, directing your attention to April 24th, 1948, did you on or about that date have a transaction with Highland Motor Sales?

A. Yes.

Mr. Batter: I object to that, your Honor. The
542 document speaks for itself.

Mr. Russo: I am not asking him a thing about the document, your Honor. I asked him if he had a transaction.

The Court: He may answer.

A. Yes.

By Mr. Russo:

Q. What was the nature of that transaction?

A. The purchase of an automobile.

Q. What kind of an automobile did you buy?

A. A 1941 Hudson.

Mr. Batter: I object to that, your Honor. The witness is reading from a document in evidence and the document in evidence speaks for itself.

Mr. Russo: He has a right to refresh his recollection from that document, if your Honor please.

The Court: Well, there is no basis that he has exhausted his recollection yet. Objection sustained.

543 By Mr. Russo:

Q. What car did you purchase on April 24th, 1948?

A. I have already seen the document, so I'll say a 1941 Hudson.

Q. What was the motor number of that Hudson?

A. I wouldn't have the least idea.

Q. Is there anything from which you can refresh your recollection?

A. About the motor number?

Q. Yes, sir.

A. No.

Q. Will you examine Government's Exhibit 41 for identification, and examine it.

A. Yes.

Q. Does that refresh your recollection as to the motor number?

A. Well, if this was taken from our records, that motor number would have been for that automobile.

Q. Will you state the motor number, please?

Mr. Batter: I object, your Honor. The document speaks for itself.

The Court: He may answer.

A. 1042759.

544 By Mr. Russo:

Q. How much did you pay for that car?

A. $850.00.

Mr. Batter: May I have a continuing objection to this entire line of examination, if your Honor please?

The Court: Yes. That may be indicated.

By Mr. Russo:

Q. What was your answer, please?

A. $850.

Q. Did you have more than one transaction with Highland Motor Sales on or about April 24th, 1948?

A. That would be the other automobile, a 1939 Oldsmobile.

Q. If I am correct, I believe you testified that the first automobile was a 1939 automobile. What was the second one?

A. A 1941 Hudson.

Q. What was the motor number of that?

A. The motor number of the Oldsmobile was F-927201.

Q. Now, will you examine again, please, and tell us what the price that you paid for the Oldsmobile was?

545 A. $650.

Q. What was the price you paid for the Hudson?
A. $850.
Mr. Batter: Your Honor, I move that those answers be stricken. I object to the form of the question. He is asking the witness what the price was.
Mr. Russo: What is the price paid?
Mr. Batter: He is not asking the witness what his books showed, or he is not asking the witness what that document shows.
The Court: Well, I take it that if the witness has exhausted his memory he can resort to any document that might refresh his recollection. The question is whether this refreshes his memory or not. If it does not, that is one thing. If it does, he is at liberty to refresh his memory from the document.
Mr. Batter: May I ask him a question preparatory to an objection?
546 Mr. Russo: If your Honor please, I do not like to have him interrupt my direct examination.
The Court: You may proceed with the examination, and I will do the ruling, gentlemen. Proceed.
By Mr. Russo:
Q. Did you have a transaction with Highland Motor Sales on or about May 15th, 1948?
A. Yes.
Q. What kind of a car did you purchase?
A. I couldn't tell you without looking at that document.
Q. Will you examine Government's Exhibit 41 for identification and see if it refreshes your recollection?
A. That would be a 1941 Oldsmobile.
Mr. Batter: I object, your Honor. The witness has not indicated whether that refreshes his recollection or not. He is simply reading from the document.
The Court: Objection sustained. He may answer the question.
547 The Witness: A 1941 Oldsmobile.
The Court: Well, the question was, does that document refresh your recollection?
The Witness: Whose question was that? Oh; yours (point to Mr. Russo).
The Court: Yes.
The Witness: Yes, it certainly does.
The Court: All right. You may proceed. I think, coun-

sel, if you will ask him a general question and do it all at once, it will save time.

By Mr. Russo:

Q. Do you have an independent recollection, Mr. Mull, of the date on which the purchases were made by Avenue Motor Sales from Highland Motor Sales, the name, the make, the model of the car, the motor number and price paid, without referring to any other document?

A. No; only the automobile itself.

Q. Can you testify without reference to Government's Exhibit 41 independently concerning those transactions?

A. Only to the make and possibly the year of the 548 automobile in each case.

Q. Is there any way that you can refresh your recollection except by reference to Government's Exhibit 41?

A. That's the only method right now.

Q. Is that the only way you know?

A. That's the only way.

Mr. Batter: I think counsel ought to go further and ask him whether that reference will refresh his recollection.

The Court: Proceed with the examination, please.

By Mr. Russo:

Q. Now, directing your attention to May 15th, 1948, did you on or about that date have a transaction with Highland Motor Sales?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of a 1941 Oldsmobile.

Q. Will you please keep your voice up so the jury may hear you, too.

A. Yes.

Q. What was the motor number?

549 A. G-332179.

Q. What was the price you paid?

A. Eleven hundred—

Mr. Batter: I object, your Honor. We have not completed the question as to whether this establishes an independent recollection.

The Court: Objection overruled. Proceed.

A. $1,175.

By Mr. Russo:

Q. Directing your attention to May 8th, 1948, did you have a transaction with Highland Motor Sales on that date?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of a 1939 Plymouth.

Q. What was the motor number?

A. P-12-457765.

Q. Will you refer to the motor number again, please?

A. I beg your pardon. I looked at the wrong one.

Q. Will you give the motor number again?

550 A. P-828349.

Q. What was the amount that was paid for that car?

A. $950.

Q. Directing your attention to June 1, 1948, did you have a transaction with Highland Motor Sales on or about that date?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of a 1942 De Soto.

Q. What was the motor number?

A. S-10-11585.

Q. What was the amount you paid for that car?

A. $1,100.

Q. Did you have another transaction with Highland Motor Sales on or about the same date?

A. Yes.

Q. How many others? How many other cars did you purchase?

A. Two.

Q. What was the next car that you purchased on that date?

A. 1941 Plymouth.

Q. What was the motor number?

551 A. P-12-457756.

Q. What did you pay for that car?

A. $1050.

Q. What was the other car that you purchased on that date?

A. A 1947 Plymouth.

Q. What was the motor number?

A. P-15-476849.

Q. How much did you pay for that car?

A. $1850.

Q. Directing your attention to June 3rd, 1948, did you on or about that date have a transaction with Highland Motor Sales?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of a 1940 Chevrolet.

Q. Will you keep your voice up, please.

A. Yes.

Q. What was the motor number?

A. 3048108.

Q. How much did you pay for that car?

A. $950.

Q. Directing your attention to July 12th, 1948, did you on or about that date have another transaction with
552 Highland Motor Sales?

A. Yes, sir.

Q. What was the nature of that transaction?

A. The purchase of a 1938 Ford.

Q. What was the motor number of that car?

A. 18-4571390.

Q. What was the price you paid for that?

A. $600.

Q. Directing your attention to August 3rd, 1948, did you on or about that date have another transaction with Highland Motor Sales?

A. Yes.

Q. What was the nature of that transaction?

A. The purchase of a 1941 Buick.

Q. What was the motor number of that Buick?

A. 54436264.

Q. How much did you pay Highland Motor Sales for it?

A. $1500.

Q. Directing your attention to August 12th, 1948, did you have another transaction with Highland Motor Sales?

A. Yes.

Q. What was the nature of that transaction?

553 A. The purchase of a 1936 Ford.

Q. What was the motor number of that Ford?

A. 2904482.

Q. How much did you pay Highland Motor Sales for it?

A. $300.00.

Q. Now, with respect to each of the transactions concerning which you have testified, Mr. Mull, with whom did you deal at Highland Motor Sales?

A. Either Mr. Achilli or Mr. Cirrincione.

Q. Do you see Mr. Achilli in the Court Room?

A. Yes.

Q. Will you point him out, please?

A. The third man at the furthest table. (Indicating.)

Q. The third man at defense counsel table?

A. Yes.

Q. Is he the same man with whom you dealt at Highland Motor Sales?

A. Yes.

Q. How did you pay for each of the cars concerning which you have testified?

A. Well, by making finance arrangements, and generally the balance in either cash or check.

554 Q. With whom did you finance—strike that question.

Let me ask you this: Were each of those cars partially paid for and partially financed?

A. Yes, I believe so, on this list.

Mr. Russo: Will you mark this as Government's Exhibits beginning with No. 42, for identification, please.

(The checks were thereupon marked Government's Exhibits Nos. 42, through 52, both inclusive, for identification.)

555 Q. Mr. Mull, I hand you Government's Exhibit No. 42 for identification, which purports to be a check of the Elgin—

Mr. Batter: Your Honor, I object to counsel describing the document. It is marked for identification. That is sufficient identification to hand it to the witness.

The Court: Proceed.

By Mr. Russo:

Q. I show you Government Exhibit No. 42, which purports to be a check of the Elgin Acceptance Company, Check No. 877, dated April 28, 1948, payable to the order of Avenue Motor Sales, in the sum of $600, and purporting to be signed by Earl H. Gromor.

I will ask you if you have ever seen that check before.

A. Yes.

Q. Directing your attention to the reverse side thereof, will you state, please, what if any endorsement it bears?

A. The name of the Avenue Motor Sales and myself.

Q. Is there any other endorsement?

A. Highland Motor Sales.

556 Q. Is the endorsement of Avenue Motor Sales and Duane W. Mull a stamped or a written endorsement?

A. Handwritten.

Q. And the endorsement of Highland Motor Sales, is that a stamped or written endorsement?

A. Stamped.

Q. I ask you to examine Government Exhibit 42, and ask you if you can relate it or associate it with any transactions shown on Government Exhibit 41.

A. That would be check written for the partial financing for the purchase of the 1939 Oldsmobile.

Q. What was the amount financed?

A. $600.

Q. Did you make a down payment toward the purchase price of that car?

A. That would be $50.

Q. You made a down payment of $50?

A. Yes.

Q. The balance then was financed, and this represents the financing?

A. Yes.

Q. Now after you received that check from Elgin Acceptance Corporation, to whom did you deliver it?

A. To the Highland Motor Sales.

557 Q. Did you deliver it to them on or about the date the check bears?

A. Yes.

Q. Now, Mr. Mull, I show you Government Exhibit No. 43 for identification, which purports to be a check of the Elgin Acceptance Company—

Mr. Batter: Your Honor, may I have a continuing objection to this entire procedure?

The Court: It may be so understood.

By Mr. Russo:

Q. (Continuing)—Check No. 878, payable to the order of Avenue Motor Sales in the amount of $700, and purporting to be signed by Earl H. Gromer.

I will ask you if you have seen this check before.

A. Yes.

Q. What were the circumstances under which you saw it?

A. That would be the check used in the financing of a portion of the purchase of the automobile.

Q. Which automobile?

A. The 1941 Hudson.

Q. Directing your attention to the reverse side of
558 Government Exhibit No. 43, I ask you to examine it and state whose endorsement if any it bears.

A. In my own handwriting, my own signature.

Q. What endorsement does it bear?

A. Duane W. Mull.

Q. And what is above your signature, if anything?

A. "Avenue Motor Sales."

Q. Now I believe you testified that you received this from Elgin Acceptance Company.

A. Yes.

Q. After you received it, what if anything did you do with it?

A. It was used in the purchase, as a portion of the purchase of a 1941 Hudson.

Q. What was the amount that was financed?

A. $700.

Q. Did you make any down payment on the purchase price of the 1941 Hudson?

A. That would be $150.

Q. After you received this check, what if anything did you do with it?

A. I gave it to the company for partial purchase price of the automobile.

Q. To whom did you deliver it, if you know?

559 A. Highland Motor Sales.

Q. Now, Mr. Mull, I show you Government Exhibit No. 44, purporting to be the check of Elgin Acceptance Company, No. 881, dated May 18, 1948, payable to the order of Avenue Motor Sales in the sum of $850, and purporting to be signed by Earl H. Gromer.

Have you ever seen this check before?

A. This particular one, no.

Q. Directing your attention to the endorsement on the back, whose endorsement if any does it bear?

A. Avenue Motor Sales by Robert J. Knaak.

Q. Who is Robert J. Knaak?

A. My former business partner.

Q. Are you acquainted with the signature of Robert J. Knaak?

A. Yes.
Q. Is that his signature?
A. I believe so.
Q. Was this a transaction had by Avenue Motor Sales with Highland Motor Sales?
A. Yes.
Q. What endorsement if any appears under the signature of Mr. Knaak?
560 A. Mr. Achilli's, or the name, "Sam Achilli."
Q. The name, "Sam Achilli"?
A. Yes.
Q. Now I ask you if you can associate Government Exhibit No. 44 with any transaction shown on Government Exhibit No. 41.
A. That would be the financing arrangements made for the purchase of the 1941 Oldsmobile.
Q. And what was the amount financed?
A. $850.
Q. And if $850 is the amount financed, what was the amount that was made as down payment?
A. $325.
Q. Now I show you Government Exhibit No. 45 for identification, which purports to be a check of the Elgin Acceptance Company, No. 879, dated May 8, 1948, payable to the order of Avenue Motor Sales, in the amount of $600, and purporting to be signed by Earl H. Gromer.
Directing your attention to the back thereof, I will ask you if there is an endorsement thereon.
A. Yes.
Q. What endorsement does it bear?
561 A. Avenue Motor Sales by Robert J. Knaak.
Q. I believe you testified that Mr. Knaak is your partner?
A. Yes.
Q. Now I ask you if you can associate Government Exhibit No. 45 with any transaction that is reflected on Government Exhibit No. 41.
A. That would be the financing for the 1939 Plymouth.
Q. Is that the car that bears motor number P8-28349?
A. Yes.
Q. What was the amount financed on that transaction?
A. $600.
Q. What if any was the down payment?
A. $350.

Q. I show you Government Exhibit No. 46 for identification, which purports to be a check of Elgin Acceptance Company, dated May 22, 1948, payable to the order of Avenue Motor Sales, in the sum of $800, and purporting to be signed by Nan Jean Baumann.

I will ask you to examine that check, please, and state whether or not you have ever seen that before.

A. Yes.

Q. Directing your attention to the reverse side
562 of Government Exhibit 46, will you state, please, whether or not it bears any endorsement?

A. Avenue Motor Sales, Duance W. Mull.

Q. Is that your signature?

A. Yes.

Q. Was it placed on there on or about the date that appears on the check?

A. Yes.

Q. Now I will ask you to take Government Exhibit No. 46 and state whether or not you can associate that check with any of the transactions reflected on Government Exhibit No. 41.

A. That would be the financing of the 1942 DeSoto.

Q. What was the amount financed?

A. $800.

Q. How much if anything was made as down payment?

A. $300.

The Court: We will now take a short recess, ladies and gentlemen.

The witness will remain in the witness chair, please.

(Recess taken.)

563 The Court: You may proceed.

By Mr. Russo:

Q. Now, after you purchased the car reflected on Government's Exhibit 46 for identification, as you have associated it with Government's Exhibit 41, what if anything did you do with that check?

A. It was turned into Highland Motor Sales.

Q. Do you have any recollection as to what individual you delivered it to?

A. No.

Q. Now, I hand you Government's Exhibit 47 for identification purporting to be the check of Elgin Acceptance Company, dated May 22nd, 1948, payable to the order of

Nan Jean Baumann—or rather, payable to the order of Avenue Motor Sales in the sum of $700 and purporting to be signed by Nan Jean Baumann.

A. Yes.

Q. I will ask you if you have ever seen that check before?

A. That's the check used for the financing of the 1941 Plymouth.

Q. You have seen that check before?

564 A. That's the check used for the financing of the 1941 Plymouth.

Q. You have seen that check before?

A. Yes, sir.

Q. Directing your attention to the reverse side of it, will you state whether or not it bears an endorsement?

A. "Avenue Motor Sales by Duane W. Mull."

Q. Does it bear any other endorsement?

A. The name of Mr. Sam Achilli.

Q. Now, after you received that check from the Elgin Acceptance Company, what if anything did you do with it?

A. It was tendered in payment for the automobile.

Q. Will you keep your voice up, please?

A. It was tendered in payment for the automobile.

Q. For what automobile was it tendered in payment?

A. The 1941 Plymouth sedan.

Q. What was the motor number of that sedan?

A. P-12457765.

Q. Will you state, please, what the down payment

565 you made on that car was?

A. $350.

Q. Now, I show you Government's Exhibit No. 48, purporting to be a check of the Elgin Acceptance Company, No. 894, dated May 22, 1948, payable to the order of Avenue Motor Sales in the amount of $1,500, and purporting to be signed by Nan Jean Baumann.

A. Yes.

Q. I will ask you if you have ever seen that check before?

A. Yes.

Q. Now, directing your attention to the reverse side of Government's Exhibit 48 for identification, will you please state whether it bears any endorsements?

A. "Avenue Motor Sales by Duane W. Mull."

Q. Is the signature "Duane W. Mull" your signature?
A. Yes.
Q. Was it placed on that Exhibit on or about the date of the check?
A. Yes.
Q. What other endorsements, if any, appear on 566 there?
A. Mr. Sam Achilli's, Mr. George Musso's, and the Knetzer Motor Sales.
Q. After you received that check what if anything did you do with it?
A. It was tendered in payment for that particular automobile.
Q. For what automobile was it tendered in payment?
A. The 1947 Plymouth.
Q. What is the motor number of the 1947 Plymouth that you are testifying about?
A. P-15-476849.
Q. Now, directing your attention to Government's Exhibit 48, will you state please how much down payment if any you made on the purchase price of that car?
A. $350.
Q. To whom did you make the down payment, if you recall?
A. It would be handed to the Highland Motor Sales.
Q. Keep your voice up, please.
A. To Highland Motor Sales.
567 Q. Directing your attention now to Government's Exhibit 49 purporting to be a check of the Elgin Acceptance Company, Check No. 904 dated May 1st, 1948, payable to the order of Avenue Motor Sales in the sum of $700 and purporting to be signed by Nan Jean Baumann, I will ask you if you have ever seen that check before?
A. Yes.
Q. To what transaction does Government's Exhibit No. 49 relate?
A. The 1940 Chevrolet.
Q. After you received—by the way, what is the motor number of that Chevrolet?
A. 3048108.
Q. After you received Government's Exhibit 49 for identification, what if anything did you do with it?

A. It was used in the financing of that particular purchase.

Q. Now, directing your attention to the back of Government's Exhibit No. 49 for identification, what if any endorsements does that bear?

A. "Avenue Motor Sales, Duane W. Mull."

Q. Whose signature is the signature of Duane W. Mull that appears on there?

568 A. My own.

Q. What if any other endorsements appear thereon?

A. The name of Sam Achilli.

Q. After you received that check from Elgin Acceptance Company, what if anything did you do with it?

A. It was tendered in payment for that purchase.

Q. To whom did you deliver it?

A. Highland Motor Sales.

Q. Now, I show you Government's Exhibit No. 50 for identification, purporting to be the check of Elgin Acceptance Company, Check No. 954 dated July 20th, 1948, payable to the order of Avenue Motor Sales in the sum of $475 and purporting to bear the signature of Nan Jean Baumann.

A. Yes.

Q. I will ask you if you have ever seen that check before?

A. Yes. This is the check for the financing of the 1938 Ford.

Q. Did you receive that check from Elgin Acceptance Corporation?

A. Yes.

569 Q. Now, directing your attention to the reverse side of Government's Exhibit No. 50, I will ask you to state what if any endorsements appear on the back thereof.

A. "Avenue Motor Sales, Duane W. Mull."

Q. Whose signature is the signature of Duane W. Mull?

A. My own.

Q. Is there any other endorsement on there?

A. "For Deposit Only, Highland Motor Sales."

Q. Is that a written endorsement or stamped endorsement?

A. Stamped.

Q. After you received Government's Exhibit 50 from Elgin Acceptance Company, what if anything did you do with it?

A. It was tendered in part payment for the purchase of the automobile.

Q. Will you please keep your voice up, Mr. Mull.

A. It was tendered in part payment for the purchase of the automobile.

Q. For what automobile was it tendered in payment?

A. The 1938 Ford.

570 Q. What motor number?

A. 18-4571390.

Q. Now, what if any down payment did you make toward the purchase price of that automobile?

A. $125.00.

Q. Now, I show you Government's Exhibit No. 51 for identification purporting to be a check of the Elgin Acceptance Company, No. 916, dated June 10th, 1948, payable to the order of Avenue Motor Sales in the amount of $1,090 purporting to be signed by Nan Jean Baumann.

A. Yes.

Q. I will ask you if you have ever seen that check before?

A. Yes.

Q. From whom did you receive that check?

A. Elgin Acceptance Company.

Q. Directing your attention to the back of the check, will you state, please, what if any endorsements appear thereon?

A. "Avenue Motor Sales, Duane W. Mull."

Q. Whose signature is that of Duane W. Mull?

A. My own.

Q. Does there appear to be another endorsement 571 on the back of the check?

A. The name "Sam Achilli."

Q. After you received Government's Exhibit 51 from the Elgin Acceptance Company, what if anything did you do with it?

A. It was tendered in payment for—in part payment for the purchase of that automobile.

Q. For what automobile was it tendered in part payment?

A. The 1941 Buick.

Q. What was the motor number of that Buick?

A. 54436264.

Q. I believe you testified that it was tendered in part payment, is that correct?

A. Yes.

Q. I now hand you Government's Exhibit 52 for identification purporting to be a check of Avenue Motor Sales, No. 271, dated August 3rd, 1948, payable to the order of cash in the amount of $410, check drawn on the First National Bank of Elgin and purporting to bear the signature of Duane W. Mull.

A. Yes.

Q. Directing your attention to the signature in
572 the right-hand corner thereof, whose signature is that?

A. My own.

Q. Was that signature placed on there on or about the date the check bears?

A. Yes.

Q. Directing your attention to both Government's Exhibits 51 and 52, will you state, please, to whom you delivered those checks?

A. In payment for the 1941 Buick, to the Highland Motor Sales.

Q. For what Buick was that tendered in payment?

A. The 1941 Buick.

Q. What motor number?

A. 54436264.

Q. Were both of those checks tendered in payment on or about the dates they bear?

A. Yes.

Q. What was the amount that was paid down towards the purchase price of that car?

A. $410.

573 Mr. Russo: Will your Honor indulge me just a moment, please.

By Mr. Russo:

Q. Mr. Mull, directing your attention again to Government Exhibit No. 42 for identification, I will ask you to state, please, the amount of the check, the date of the check—

Will you state those first, please?

A. $600 and April 28, 1948.

Q. Directing your attention to the back of the check, what endorsement if any appears on there?

A. Avenue Motor Sales by myself, Duane W. Mull.
Q. And the signature of Duane W. Mull is your signature?
A. Yes.
Q. What if any other endorsement does it bear?
A. The stamped endorsement of the Highland Motor Sales.
Q. Now directing your attention to Government Exhibit No. 43 and directing your attention to the reverse side thereof, what if any endorsements appear on the back of that check?
A. Avenue Motor Sales by myself, Duane W. Mull.
Q. Is that your signature?
574 A. Yes.
Q. And it was placed on there on or about the date the check bears?
A. Yes.
Q. Does it bear any other endorsement?
A. Yes.
Q. What endorsement does it bear?
A. I don't have the least idea. I can't read it.
Q. You didn't deliver that check to the person whose name appears to be on there as the last endorser?
A. I couldn't tell that unless someone wrote that at the Highland Motor Sales.
Q. Directing your attention to Government Exhibit No. 44 and to the back thereof, what endorsement if any appears thereon?
A. Avenue Motor Sales by Robert J. Knaak.
Q. And do any other endorsements appear thereon?
A. The name, Mr. Sam Achilli. Also Sid Luckman Motors Incorporated.
Q. Directing your attention to Government Exhibit No. 49, will you state, please, the amount of the check?
A. $700.
575 Q. Will you associate that check with Government Exhibit No. 41 and state, please, the amount of down payment you made toward the purchase price of the car reflected by Government Exhibit 49?
A. Will you read back that question, please?
Q. What was the amount of the down payment on that purchase?
A. $700.

Q. That is the amount financed, is it not? What is the amount of the down payment you made to Highland Motor Sales at the time you purchased the car?

A. That is the same thing. The payment I made them and the amount financed would be the same amount, $700.

Q. Did you make a cash down payment before you financed it?

A. That would be $250.

Q. Directing your attention to Government Exhibit No. 52 for identification, and directing your attention to the reverse side thereof, whose endorsement appears on there, if any?

A. I don't have the least idea.

Q. To whom did you deliver that check?

A. Highland Motor Sales.

576 Q. You didn't deliver it to the person whose name appears on there as an endorser?

A. I don't know the signature nor the person.

Mr Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 41 through 52, inclusive.

I believe your Honor has already admitted in evidence Government Exhibit No. 41.

The Court: That is right.

Mr. Batter: Your Honor, may I ask the witness one question?

The Court: All right.

By Mr. Batter:

Q. I hand you Government Exhibits for identification, Nos. 42 to 52, inclusive, and ask you whether in each occasion the notation appearing on the left-hand end of the check was there at the time that the check was made and used. Will you inspect them, please?

A. I don't think I can answer that. Most of these are seven years old and the handwriting is different for the payments and the description of the automobile.

577 Q. Are there any of them in your handwriting?

A. No.

Q. Can you identify the handwriting of any of them?

A. No, I cannot—well, now, I beg your pardon. There is one in my own handwriting. That would be No. 52.

Q. Was that legend on there at the time that you endorsed that check?

A. Yes.

Q. It was on there?

A. Yes, I wrote the entire check.

Q. Now when these other legends were put on the checks, you do not know?

A. No, sir.

Mr. Batter: I have no objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 42 through 52, inclusive, for identification, were thereupon received in evidence as Government Exhibits 42 through 52.)

Mr. Russo: Your witness.

578 *Cross Examination by Mr. Batter.*

Q. Mr. Mull, when did the Avenue Motor Sales Company cease doing business?

A. What was that, sir?

Q. When did the Avenue Motor Sales Company cease doing business?

A. I think approximately in the spring of 1949.

Q. The spring of 1949?

A. I believe so.

Q. What happened to its records after it ceased doing business?

A. They were stored in one or two different spots—in the real estate office that we maintained at one time, well, two different real estate offices, and we moved a portion of them to my home, those that were left after the Government agent had taken what he wanted, and they were eventually cast out sometime, I would say, about 1952.

Q. What do you mean by cast out in 1952?

A. Well, destroyed or thrown away.

Q. Now some of them, you say, the Government did not return to you?

A. That is correct.

579 Q. The Government still has some of your records?

A. The checks involved.

Mr. Batter: May I ask the Government to produce the checks?

(Mr. Russo handed some documents to Mr. Batter.)

By Mr. Batter:

Q. Mr. Mull, will you describe to me how you maintained your books of account?

A. They were generally kept on a single sheet which had a number of different headings, describing the automobile and its age, make, model, serial number, and so on.

Q. That would be what, your cash book or your disbursements book, or what would it be?

A. Well, it is a journal, I believe, that is sold from almost any stationery store. It is a very simplified form of bookkeeping record.

Q. What would you record on that sheet?

A. All the information that I have just spoken of.

Q. What information would you record?

A. The date that we purchased the automobile, the make, the year, model, serial number, the price paid, and if the automobile had any repairs of any nature
580 before it was sold that was generally entered, and then the eventual selling price, and I guess the state sales tax figure.

Q. Would it also include the cost?

A. Yes.

Q. Would it show from whom it was purchased?

A. Yes.

Q. Now with this book of original entry, what supporting documents would you have for the entry you would make in those books?

A. Just our original checks or notations of payment, and of course any receipts that we might have had or repairs, or things of that nature.

Q. Would it include the bill for the car itself?

A. Very seldom if ever we received a receipt from purchases made from any dealers.

Q. But to the extent that you did receive them, would that be included in that docket record?

A. I am sure they would be if we received them.

Q. Have you been able to find any bill of sales from the Highland Motor Sales for any care that you purchased from them?

A. No.

Q. Have you looked for them?

581 A. Yes.

Q. Were there any, do you know?

A. I can't remember having received a definite bill of sale from them. I mean, the transactions and checks, I generally felt made up the records that we were required to keep.

Q. But you are unable to state that you never did receive any, are you?

A. I think I can qualify that by saying I never did.

Q. You are certain of that?

A. I am pretty sure of it. I can't recall having received a bill of sale from the Highland Motor Sales.

Q. But you wouldn't make the definite statement that you had not received any, would you?

A. No, I would not.

Q. Now these books, excepting for the part the Government has furnished, are entirely missing?

A. That is correct. I didn't have any more use for them. I felt that the Government had taken what they wanted and they were being moved around three or four times, and we just got rid of them. I can't say what day, what hour, or anything of that nature, but they were no longer useful to me.

582 Q. But that was some time in 1952?

A. Yes; I believe so.

Q. Why did you choose suddenly in 1952, three years after you went out of business, to get rid of those records rather than one year or two years or five years or six years? What prompted you in the selection at that time?

A. Oh, I suppose it was because of all the newspaper stories you hear about the Government no longer requiring records after three years, or something of that nature. I don't know. I can't recall exactly what it was at the time. It's hard to answer.

Q. Did you say there were newspaper stories to the effect the Government only required you to keep records for three years?

A. Well, I can't substantiate that statement, but I have heard of it.

Q. Then you concluded it was a good time to get rid of these?

A. Well, I felt they were no longer useful, yes.

Q. Now, from that book of original entry where, would you enter your affairs, then? Did you keep
583 a ledger?

A. Well, the book is completely within itself. Each page carries the complete transaction of the automobile, the purchase of it, the eventual handling and the selling of it.

Q. Then you had—

A. It was all on one page.

Q. You had no ledger then?

A. No. You mean a regular journal?

Q. Yes.

A. No.

Q. For instance, how would you keep track of your total indebtedness to Elgin Acceptance Corporation?

A. That was all on the same page. There was a summary sheet within the bookkeeping system, and it was at that time taken care of.

Q. That is all missing, too, is it?

A. Yes. That was all in the one big mess of th ngs that we had left.

Q. Now, in your course of doing business there did you have occasion to finance cars other than those that you purchased from Highland Motor Sales?

584 A. Yes; I believe so.

Q. And did you finance some of them with the Elgin Acceptance Corporation?

A. Yes.

Q. So that the financing of a car through the Elgin Acceptance Corporation does not necessarily mean that car was purchased from Highland Motor Sales, does it?

A. No; not necessarily.

Q. Now, on Government's Exhibit 41 the first item is a 1939 Oldsmobile purchased purportedly on April 24th, 1948, Motor Number 929201 at a price of $650.

I hand you Government's Exhibit No. 42 and ask you whether that check was used in part payment for that car?

A. Yes.

Q. How was the balance of the payment made?

A. Either by check or cash.

Q. If it was by check, would it be included in those checks that the Government just gave me?

A. I can't tell you that, sir. I don't have any idea of what they took and what they didn't take. They took
585 a stack of things, and that was it.

Q. You mean they took more than this?

A. Not that I know of. I mean, they took—

Q. I thought you just said they took the stack.

A. Whatever the stack amounts to. I didn't take the numbers of them, or have photostats.

Q. You have no receipt for what the Government took from you?

A. No, I don't believe I have.

Q. You did not check any inventory with them of what they took from you?

A. Only that they concerned the automobiles that were placed on their statement, or that they felt were—

Q. What?

A. Or at least that they felt were on their statement. I didn't take the checks out and hand them to them.

Q. Do I understand you to say, then, that you did not check against your records every item on Government's Exhibit 41 and satisfy yourself that both the date, the type of automobile, the motor number and the price is in fact what your records show to be purchased from Highland Motor Sales?

586 A. No. We did check them while the agent was there, at our first meeting, I believe.

587 Q. Where was that meeting?

A. In Elgin. In the Elgin Tower Building.

Q. Oh. It was not in your offices?

A. No. It was in the Elgin Tower Building.

Q. What did you do, bring down to that office all your records?

A. Yes, sir; the whole works.

Q. The whole works?

A. Yes.

Q. And that included checks, included bills, included receipts and everything that you had?

A. The whole boxfull, yes.

Q. How big a box would that make?

(The witness indicated three dimensions approximately 2 feet by 2 feet by 3 feet.)

Q. You took it all back with you excepting these certain items?

A. Yes. There were just an entire miscellaneous assortment of whatever there was, bills of all descriptions, books, checks, and so forth.

Q. At this meeting in Elgin at the Tower Building how did you proceed? Did you pick out the cars that you had purchased from Highland Motor Sales, did
588 the Government agent pick them out, or just how did you proceed at that meeting to assemble this data?

A. Well, I had nothing to do with the assembling or the selection of the data. We left that boxful there and we were told to come back when he called us.

Q. And did he call you?

A. Yes.

Q. How long later?

A. Oh, it may have been anywhere from two to four days.

Q. Who was this agent?

A. Mr. Coddington.

Q. Mr. Coddington?

A. Yes.

Q. When you returned from two to four days later, what was stated to you?

A. Well, the data, that is, most of it that's on the checks, were, I believe, enfolded in a rubber band and this statement was verified with this particular list of automobiles against the sheets that we had.

We took the book and sat on one side of the table and the agent was on the other and we checked the num-
589 bers and dates and so forth, the data from those sheets.

Q. What was the nature of that check? Did you call them out to him or did he call them out to you?

A. He read them and we checked them.

Q. He read from what? From the books or from the statement?

A. From the statement.

Q. He read from the statement and you checked your books to see whether your books showed this information?

A. That's correct. We had a bunch of loose sheets we were able to take out of the book and we had a big stack of them there and had to run through them to find the particular purchases.

Q. What kind of loose sheets and stacks were those?

A. Well, they were loose sheets you can slide out of a bookkeeper's book, and we had all the car purchases there and had to look them up to verify this information.

Q. With reference to these loose sheets that you pulled out, what did they show respecting any particular car?

590 A. That was the complete record, those loose sheets.

Q. Is this the same record you testified about before that you kept in chronological order?

A. Yes.

Q. Or is this a separate record?

A. No. This is the same one.

Q. So that what you did is, you went through those records that were kept in chronological order, looked for those items that the Government agent called out to you and then confirmed the date, the automobile, the motor number and price?

A. Yes, from our records.

Q. And at that time were you also handed your check to cover the down payment, assuming there was a check on the down payment?

A. No.

Q. What happened then?

A. Well, we were more or less dismissed after we had signed this statement. We were asked to read it carefully and verify its contents and we signed it and we left the office and we were given the balance of the things that the Government did not keep.

591 Q. Well, now, as a matter of fact, from what you have just narrated you are not in a position to testify that this list includes every car that you purchased from the Highland Motor Sales, are you?

A. I am sure it did not.

Q. You are sure that it did not?

A. I mean, I'm positive we made quite a number of more purchases than just those.

Mr. Batter: Your Honor, I think we have established the undependability and unreliability and the partiality, or partialness of this Government's Exhibit 41, and I ask that it be stricken from the record and the jury be instructed to disregard all testimony regarding it.

The Court: The motion is denied.

By Mr. Batter:

Q. Now, Mr. Mull, Government's Exhibit 21 shows purchases of two cars on April 24th, 1948, an Oldsmobile for $650 and a Hudson for $850.

Now, Government's Exhibit 42 I understand is associated with the Oldsmobile and that check is for
592 $600, endorsed by the Highland Motor Sales Company, and Government's Exhibit 43 is for $700, bears your endorsement and—do you know what other endorsement is on there?

A. No, sir, I don't.

Q. You don't?

A. I can't even read it.

Q. You can't even read that endorsement?

A. No.

Q. Now, then, on April 28th I have your check here to the order of cash for $150.00 that bears the endorsement of Highland Motor Sales, rubber stamped.

Mr. Russo: May I interrupt, please? Is that one of the checks concerning which he has already testified?

Mr. Batter: No, it is not.

Mr. Russo: Then I object to any cross examination concerning that inasmuch as it is beyond the scope of the direct examination.

The Court: Objection sustained.

Mr. Batter: Your Honor, I am tracing the purchase price of this car.

593 The Court: This has not been presented here before, is that it?

Mr. Russo: That is exactly right.

Mr. Batter: The purchase price of this car appears on this Exhibit as $650 and $850. The two checks counsel spoke about and that have been introduced are for $600 and $700, in each case they fall short of the purchase price shown on Exhibit 42.

The Court: Objection sustained.

By Mr. Batter:

Q. How did you pay the difference between the amount of those checks and the amount shown on Government's Exhibit 42?

Mr. Russo: The question is not clear, if your Honor please. It is confusing.

By Mr. Batter:

Q. How did you pay to the Highland Motor Sales the difference between the $650 appearing on Government's Exhibit 41 and the $600 appearing on Government's Exhibit 42 which you say is partial payment of it?

A. Either by check or cash.

594 Q. Do you know which it is?

A. No. I couldn't substantiate that.

Q. Do you have that check here, if it was by check?

A. No, I don't.

Q. May it have been by check?

A. It may have been.

Q. I hand you a group of checks presented to me by the Government, being your checks, and ask you if one of those checks covers the balance of payment on that car?

Mr. Russo: Objection, if your Honor please.

The Court: Objection sustained.

Mr. Batter: May I ask the basis of your Honor's ruling? I am trying to prove the balance of the purchase price of that car.

The Court: I do not think it is proper cross examination. If you wish to put him on later as your own witness, I presume you can.

Mr. Batter: But the Government already procured testimony that the car cost $650. They have estab-

595 lished $600 of that cost and—

Mr. Russo: The witness has testified—

Mr. Batter: (Continuing) —I think it is proper for me to cross examine to find out how the balance of that cost was paid.

Mr. Russo: The witness has testified as to all that.

Mr. Batter: Not on cross examination.

The Court: Objection sustained.

Mr. Batter: No further cross.

Mr. Russo: Thank you, Mr. Mull. That will be all.

(Witness excused.)

The Court: Ladies and gentlemen of the jury, we will now recess until two o'clock. You will return back here promptly at that time, please.

(Whereupon, the trial of the above-entitled matter was recessed until 2:00 o'clock p.m. of the same day, Thursday, April 14, 1955.)

596 • • •

597 BARNEY RUBINSKY, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you please state and spell your name, sir?
A. Barney, B-a-r-n-e-y, Rubinsky, R-u-b-i-n-s-k-y.
Q. Mr. Rubinsky, will you keep your voice up, please, so every member of the jury may hear you?
A. Yes.
Q. What is your address?
A. 1344 South Austin Boulevard in Cicero.
Q. What is your business or occupation?
A. Used automobiles.
Q. What is the name of your business?
A. Barney's Auto Mart.
Q. Where is that located?
A. 1600 South Cicero Avenue in Cicero.
Q. How long have you been engaged in that business?
A. At the present location?
598 Q. Yes, sir.
A. For four years, at the present location.
Q. Where were you before?
A. Lamon Auto Sales.
Q. Well, how long have you been in the automobile business altogether?
A. Since 1941.
Q. Were you in the Service?
A. Yes, sir.
Q. Did you go into business after you came out of the Service?
A. Yes, sir.
Q. Were you an automobile dealer in 1948?
A. Yes, sir.
Q. Under what name were you doing business in 1948?
A. Lamon Auto Sales.
Q. Where was that located?
A. 5363 Madison Street in Chicago.
Q. Was Lamon Auto Sales an individual proprietorship, a partnership or a corporation?
A. A partnership.

Q. What was the name of your partner?

A. David Bain.

599 Q. Do you know of an automobile company known as Highland Motor Sales?

A. Yes, I do.

Q. Where is that located?

A. In Elgin, Illinois.

Q. Did you ever have occasion to transact any business with Highland Motor Sales?

A. Yes, I did.

Q. With whom did you transact your business there?

A. With Mr. Achilli.

Q. Do you see Mr. Achilli in the Court Room?

A. Yes, sir, I do.

Q. Will you point him out, please?

A. Yes, sir. That gentleman with the glasses. (Indicating.)

Q. The third man on the end of defense counsel table?

A. Yes, sir.

Q. Is he the Sam Achilli with whom you transacted your business?

A. Yes, sir, he is.

Q. What was the nature of your business transactions with him?

A. The purchasing of used cars for resale. pur-

600 poses.

Q. Mr. Rubinsky, were you served with a subpoena duces tecum to bring with you the books and records of Lamon Auto Sales?

A. Yes, sir, I was.

Q. Did you bring those books and records with you?

A. No, sir, I didn't; no, sir.

Q. Why not?

A. They were destroyed in a fire.

Q. When?

A. In 1952.

Q. Now, prior to the destruction by fire of the books and records of Lamon Auto Sales, did you ever make those books and records available to anyone connected with the Bureau of Internal Revenue?

A. I did.

Q. When was that, please?

A. In 1949.

Q. How many purchases of automobiles did you make from Highland Motor Sales?

A. Three.

Q. How did you pay for them?

A. By check.

601 Mr. Russo: Mr. Reporter, will you mark these as Government's Exhibits 53, and so forth, for identification, please.

(The checks were thereupon marked Government's Exhibits Nos. 53 to 56, both inclusive, for identification.)

By Mr. Russo:

Q. Now, Mr. Rubinsky, directing your attention to on or about April 13th, 1948, did you have a transaction with Highland Motor Sales at that time?

A. Yes, sir, I did.

Q. What was the nature of that transaction?

A. The purchasing of used cars for resale.

602 Q. What kind of car did you buy on or about that date?

A. Well, sir, I bought a '36 Pontiac, and I bought a Buick—I think there was two Buicks, I believe.

Q. Is there anything from which you can refresh your recollection as to the dates and makes of the automobiles that you purchased?

A. Well, sir, one was a '36 Pontiac—

Q. No. Please answer the question. Is there anything from which you can refresh your recollection?

A. I don't understand.

Q. Is there any paper in existence from which you can refresh your recollection as to the date and make and sale price of the cars that you purchased from Highland Motors?

A. By the checks.

Q. Is there anything else?

A. By the affidavit.

Mr. Russo: I will ask that this document be marked Government Exhibit 57 for identification.

(The document was thereupon marked Government Exhibit 57 for identification.)

603 By Mr. Russo:

Q. Directing your attention to Government Exhibit No. 57 for identification, I will ask you to examine

it, please, and state whether or not your signature appears on there.

A. It does.

Q. Was your signature placed on there on or about the date the document bears, the 27th day of March, 1950?

A. It was.

Q. Will you examine it, please, and refresh your recollection as to the dates, makes and prices that you paid for those cars?

A. On April—

Q. Just refresh your recollection.

A. Yes, sir.

Q. Have you done so?

A. Yes, sir.

Q. Now directing your attention to on or about April 6, 1948, did you have a transaction on that date?

A. Yes, sir, I did.

Q. What was the nature of that transaction?

A. Purchase of a used car.

604 Q. What kind of car was it?

A. A Pontiac; 1936.

Q. I show you Government Exhibit No. 53 for identification, and I will ask you to examine it, please, and refresh your recollection as to the make of car you purchased on or about that date.

A. I am sorry, that was a 1940 Dodge.

Q. How did you pay for that 1940 Dodge?

A. By check.

Q. I show you Government Exhxibit No. 53 for identification, purporting to be a check drawn on the National Bank of Commerce, dated April 6, 1948, No. 356, payable to the order of Highland Motor Sales, in the amount of $675, and directing your attention to the signature on the bottom of it, I will ask you whose signature that is.

A. That is mine.

Q. Does Government Exhibit No. 53 purport to be a true and correct copy of the original?

A. It does.

Q. Is it a copy of one of the checks that was destroyed by fire?

A. It is.

Q. I believe you testified that the automobile you
605 purchased was a 1940 Dodge sedan, is that correct?
A. That is correct.
Q. What was the purchase price? What did you pay for it?
A. $675.
Q. Is Government Exhibit No. 53 a correct copy, a correct photostatic copy of the original check?
A. Yes, sir, it is.
Q. That you transferred to Highland Motor Sales at the time you made payment?
A. Yes, sir, it is.
Q. To whom did you deliver the original?
A. To the best of my knowledge, to Mr. Achilli.
Q. Now directing your attention to on or about April 13, 1948, did you have a transaction with Highland Motor Sales at or about that time?
A. Yes, sir, I did.
Q. What was the nature of that transaction?
A. Purchase of a used car for resale.
Q. What kind of car did you purchase?
A. A Pontiac or Buick, I don't—
Q. I hand you Government Exhibit 54, consisting of two checks attached to two pages, purporting to be photostatic copies of checks. Will you examine them,
606 please, and state whether or not you ever saw the originals?
A. I did.
Q. Of both checks?
A. Yes, sir, I did.
Q. What happened to the originals?
A. They were destroyed in the fire.
Q. Now directing your attention to the first of the two checks on Government Exhibit No. 54, which purports to be a check drawn on the National Bank of Commerce, dated April 13, 1948, No. 379, payable to the order of Highland Motor Sales in the amount of $200, and purporting to be signed by Barney Rubinsky, directing attention to the signature in the lower right-hand corner thereof, whose signature is that?
A. That is mine.
Q. Was that signature placed on Government Exhibit No. 54, the first of those two checks, on or about the date the check bears, April 13, 1948?

A. Yes, sir.
Q. Is it a true and correct copy of the original check?
A. Yes, sir.
607 Q. What did you do with the original?
A. The original was destroyed, sir.
Q. At the time you had the transaction with Sam Achilli, what did you do with the original?
A. The original I gave to Mr. Coddington, I believe.
Q. At the time of the transaction, Mr. Rubinsky, did you deliver the check to anyone?
A. Yes, sir, I did.
Q. At the time that you bought the car?
A. Yes, sir, I did.
Q. To whom did you deliver the check?
A. To Mr. Achilli or his manager.
Q. What was the check in payment for?
A. An automobile.
Q. What automobile?
A. 1936 Pontiac sedan.
Q. And what is the serial number and motor number of the automobile, the Pontiac sedan that you purchased?
A. The motor number is 6-179568. The serial number is 6BB62713.
Q. Now from where were you reading the information that you have just testified about?
608 A. From the back of the check.
Q. When was that information placed upon the original check?
A. At the time of the purchase.
Q. Was it on there at the time that you delivered the check to Mr. Achilli or his manager?
A. Yes, sir, that is correct.
Q. What was the full price that you paid for that automobile, Mr. Rubinsky?
A. $325.
Q. Government Exhibit No. 54, the first of those two checks, is for what amount?
A. For $200.
Q. Now directing your attention to the second of the two checks on Government Exhibit No. 54, which purports to be a check of the National Bank of Commerce, dated April 16, 1948, Check No. 390, payable to the order of Cash in the amount of $125, and directing your atten-

tion to the signature in the lower right-hand corner thereof, whose signature is that?

A. It is mine.

Q. Is the second of the two checks a true and correct copy of the original?

609 A. It is.

Q. What did you do with the original at the time of your transaction with Highland Motor Sales?

A. I beg your pardon?

Q. At the time that you bought the car, what did you do with that original check?

A. I handed it to Mr. Achilli or his manager.

Q. Do both of those two checks reflect the correct amount that was paid for the 1936 Pontiac sedan that you purchased from Highland Motor Sales?

A. It does.

Q. Now directing your attention to on or about July 31, 1948, did you have a transaction with Highland Motor Sales at or about that time?

A. I did.

Q. What was the nature of that transaction?

A. Purchase of a used automobile for resale.

Q. What kind of an automobile was it?

A. A Buick.

Q. Do you remember the year, make and model, and so on?

A. No, sir, I don't.

Q. Is there anything from which you can refresh your recollection?

610 A. (No answer)

Q. Will you examine Government Exhibit No. 57 for identification, please?

A. 1940 Buick, that is what it was.

Q. That refreshes your recollection?

A. Yes, sir, it does.

Q. What did you pay for that Buick?

A. $900.

Q. How did you make payment?

A. By check.

Q. Did you make payment by one check or more than one check?

A. To my knowledge I made it on two checks.

Q. Now I show you Government Exhibits Nos. 55

and 56 for identification. Government Exhibit 55 purports to be the photostatic copy of a check drawn on the National Bank of Commerce, dated August 2, 1948, No. 740, payable to the order of Highland Motor Sales, in the sum of $750. Also it is purportedly signed by Barney Rubinsky.

I will ask you if that is a true and correct copy of the original?

A. It is.

Q. Now I show you Government Exhibit No. 56, purporting to be a check drawn on the National Bank of
611 Commerce, dated July 31, 1948, No. 741, payable to the order of Cash, in the sum of $150, and purporting to be signed by Barney Rubinsky.

Is that a true and correct copy of the original?

A. Yes, sir, it is.

612 Q. Now, I believe you testified that both of these checks were given in payment for a 1940 Buick automobile, is that correct?

A. That is right, sir.

Q. The originals?

A. That is right, sir.

Q. To whom did you deliver the originals?

A. To Mr. Achilli or his manager.

Q. Mr. Rubinsky, directing your attention to this fact, that Government's Exhibit 55 is drawn payable to the order of Highland Motor Sales and that Government's Exhibit 56 is drawn payable to the order of cash, will you explain please why one was drawn payable to the order of Highland Motor Sales and the other was drawn payable to the order of cash?

A. It was done as per request.

Q. At whose request?

A. Mr. Achilli or his manager.

Q. Now, directing your attention to the two checks that comprise Government's Exhibit 54, and directing your attention to the fact that the first of those two checks, Check No. 379, is drawn payable to the order
613 of Highland Motor Sales and the second of these two checks, Check No. 390, is drawn payable to the order of cash, will you tell the Court and the jury please, why they were drawn payable in that fashion?

A. As per request.

Q. At whose request?
A. Mr. Achilli or his manager.
Q. Mr. Rubinsky, directing your attention to the 1946 Dodge, do you remember the motor number?
A. 1940 Dodge.
Q. 1940 Dodge. Do you remember the motor number of that car?
A. From memory?
Q. Yes.
A. No, sir, I don't.
Q. Is there anything from which you can refresh your recollection?
A. From the back of the check.
Q. I am talking about the motor number now.
A. No. There isn't, no.
Q. Is there anything else from which you can refresh your recollection?
A. No, sir, there isn't.
Q. I show you Government's Exhibit 57 and ask
614 you to examine it and state whether or not that refreshes your recollection.
A. Yes, sir. This does, yes, sir.
Q. What is the motor number of that 1940 Dodge?
A. D-14-147503.
Q. Now, you have testified about the Pontiac. Do you know what the motor number of the 1940, I believe it was, Buick, concerning which you testified, is?
A. Yes, sir, I do.
Q. What is the motor number of that car?
A. 4383867.
Q. Mr. Rubinsky, will you examine Government's Exhibit 54 for identification, and directing your attention to the back portion of that check will you state, please, whose endorsement, if anyone's, it bears?
A. "For Deposit Only, Highland Motors."
Q. Directing your attention to the second of the two checks that comprise Exhibit 54, will you state, please, with respect to Check No. 379 whether or not an endorsement appears on the back thereof?
A. Yes, sir, it does.
615 Q. What endorsement appears on there?
A. "For Deposit Only, Highland Motors."
Q. Directing your attention to the second of those two checks, what endorsement if any appears on there?

A. "Deposited to Account of Highland Motor Sales, First National Bank of Elgin."

Q. Directing your attention to Government's Exhibit No. 55 and to the back of that check, what endorsement if any appears thereon?

A. "For Deposit Only, Highland Motor Sales."

Mr. Russo: At this time, if your Honor please, the Government offers in evidence Government's Exhibits 53, 54, which comprises photostatic copies of two checks, Government's Exhibits 55 and 56.

Mr. Batter: May I ask the witness a few questions, your Honor?

The Court: Yes.

By Mr. Batter:

Q. Government's Exhibits 53, 54, 55 and 56 were presented to you for the purpose of refreshing your recollection. Now, do these Exhibits in fact refresh
616 your recollection of the happenings at these times other than just relying upon what you find these Exhibits contain?

A. Well, sir, those Exhibits were took from our records.

Mr. Batter:

Q. Do these Exhibits which were presented to you for the purpose of refreshing your recollection in fact refresh your recollection of the transactions at that time?

Mr. Russo: If your Honor please, those Exhibits were not handed to him for the purpose of refreshing his recollection. My recollection of his testimony is that his recollection was refreshed from Government's Exhibit No. 57 for identification, which was not offered in evidence.

Mr. Batter: With that qualification I will withdraw my question.

By Mr. Batter:

Q. Now, Mr. Rubinsky, directing your attention
617 to Government's Exhibit 53 which is a photostat, can you tell me whether in fact you examined this photostat and compared it with the original before the original was lost or destroyed?

A. No, sir, I did not.

Q. Then you do not know, as a matter of fact, whether the rear of that check, what purports to be the

rear of that check is in fact the rear of that check, do you?

A. I know my handwriting, sir.

Q. You do not know, as a matter of fact, whether the rear of this check on Government's Exhibit 53 is in fact the rear of check No. 356, do you?

A. I am sorry, I can't answer.

Q. You did not make a comparison of the original check with this photostat front and back, did you?

A. No, sir; I didn't, no, sir.

Q. Therefore you are unable to testify, are you, that the rear of this check is in fact the rear of check No. 356?

A. Yes, sir.

Q. You can?

A. No, sir, I can't.

Q. You can't?

618 A. No, sir.

Q. Now, directing your attention to Government's Exhibit No. 54, did you in fact compare these photostats with the originals before the originals were destroyed?

A. No, sir, I didn't.

Q. Therefore you can't testify in fact that what purports to be the rear of Check No. 379 and Check No. 390, is in fact the rear side of that check, can you?

A. No, sir.

Q. Directing your attention to Government's Exhibit 55, did you in fact compare that photostat with the original of that check before it was destroyed?

A. No, sir, I didn't.

Q. Can you therefore testify as a matter of fact that the rear of Check No. 740 is in fact the rear of that photostat attached thereto?

A. No, sir, I can't.

Q. Directing your attention to Government's Exhibit 56, did you before that check was destroyed, the original of that check was destroyed, make a comparison of it with this photostat?

619 A. No, sir, I didn't.

Q. Can you then as a matter of fact testify that what purports to be the rear of that check is in fact the rear of Check No. 741?

A. No, sir, I can't.

Mr. Batter: I object, your Honor, to the introduction of these Exhibits as not being properly identified and as not being in fact established to be photostats of the original records.

The Court: That is as far as the rear of the checks are concerned. That was all the questions related to.

Mr. Batter: It is all in one Exhibit, your Honor.

The Court: Let's see them, please.

(Mr. Batter handed the documents to the Court.)

Mr. Russo: Before your Honor rules, I would like to ask the witness one more question.

By Mr. Russo:

Q. Mr. Rubinsky, is there any doubt in your mind that the portion of each of those Exhibits that pur-
620 ports to be the rear of those checks is in fact the rear of those checks?

Mr. Batter: Just a minute. I object to any opinion of the witness.

Mr. Russo: I did not ask him for an opinion. I asked him if there is any doubt in his mind.

The Court: He may answer.

A. No, sir. There's no doubt in my mind, no, sir.

Mr. Russo: Thank you, sir.

The Court: It may stand. They may be received.

Mr. Russo: I understand your Honor's ruling to be that they are admitted into evidence?

The Court: Yes.

(The documents previously marked Government's Exhibits Nos. 53 to 56, both inclusive, were thereupon received in evidence as Government's Exhibits Nos. 53 to 56, inclusive.)

Mr. Russo: You may cross examine.

621 *Cross Examination by Mr. Batter.*

Q. Mr. Rubinsky, I have before me Government's Exhibit 54 in the amount of $200. On the rear of that Exhibit there appears the following legend:

"1936 Pontiac sedan, Motor Number 6-179568, Serial Number 6-BB-62713."

From this Exhibit you recall the purchase of that Pontiac sedan. How much did you pay for that Pontiac sedan?

A. $325.

Q. Government's Exhibit 54 calls for $200. How did you pay the difference?

A. I gave two checks.

Q. You gave two checks?

A. Yes, sir, I did.

Mr. Batter: Are these (indicating) one Exhxibit?

Mr. Russo: Yes.

Mr. Batter: Can we have them fastened together in some way?

Mr. Russo: Yes.

(The documents were thereupon stapled together
622 by the Marshal.)

By Mr. Batter:

Q. Mr. Rubinsky, I have here Government's Exhibit 56 which purports to be a check for $150 dated July 31st, 1948, and Government's Exhxibit 55 which purports to be a check dated August 2nd for $750.

If I understand your testimony correctly, those two checks aggregate one purchase?

A. They do, sir.

Q. What purchase was it?

A. The purchase of a Buick.

Q. Why were the checks drawn several days apart?

A. I can't remember that, sir.

Q. You can remember it was the purchase of a Buick, but you can't remember why—

A. Yes, sir.

Q. (Continuing) —there was three days between the payments?

A. No, sir, I can't.

Mr. Russo. Speak up so the jury can hear you, please.

The Witness: I am sorry.

623 By Mr. Batter:

Q. Government Exhibit No. 53 purports to be for the purchase of a 1940 Dodge, dated April 6, 1948. How much did you pay for that car?

A. $675.

Mr. Batter: That is all.

Mr. Russo: That is all, Mr. Rubinsky. Thank you.

(Witness excused.)

ADOLPH BERNSTEIN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. Will you state and spell your name, please, Mr. Bernstein?

A. Adolph, A-d-o-l-p-h, Bernstein, B-e-r-n-s-t-e-i-n.

Q. If it is at all possible, can you speak just a little bit louder so that all the members of the jury may hear you.

A. Yes, sir.

Q. What is your address, please?

A. 38 River Bluff Road, Elgin, Illinois.

624 Q. What is your business or occupation?

A. At the moment I am temporarily retired. I was one of the owners of the Elgin Fruit & Produce Company.

Q. Were you engaged in business with the Elgin Fruit & Produce Company in 1946?

A. I was, sir.

Q. Do you know of an automobile sales company known as Highland Motor Sales?

A. I do, sir.

Q. Directing your attention to on or about July 30, 1946, Mr. Bernstein, did you have a transaction with Highland Motor Sales at or about that time?

A. I did.

Q. With whom did you have your transaction?

A. With Sam Achilli.

Q. Do you see him in the court room?

A. Yes, I do.

Q. Will you point him out, please?

A. Right over there (indicating).

Q. The third man sitting at defense counsel table?

A. That is correct.

Q. Is he the same Sam Achilli with whom you dealt?

A. That is right.

625 Q. What was the nature of that transaction?

A. I had a 1941 Buick sedan, which I traded in for a new 1946 Plymouth station wagon.

Q. What was the arrangement as to the price and how the payment for the 1946 new Plymouth station wagon was made?

A. The sales price of the Plymouth station wagon was $1,701 fully equipped, and Sam allowed me $850 for my Buick car, and I gave him my personal check for $851.

Mr. Russo: I will ask that this document be marked Government Exhibit 58 for identification.

(The document was thereupon marked Government Exhibit 58 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 58 for identification, purporting to be a check drawn on the Elgin National Bank, dated July 30, 1946, Check No. 4519, payable to the order of Highland Motor Sales, in the sum of $851, and purporting to be signed by Adolph Bernstein.

Is that the check to which you refer?

626 A. That is the check that I gave him.

Q. Directing your attention to the signature on the bottom, the right-hand corner of Government Exhibit No. 58, whose signature is that?

A. That is my signature.

Q. Was it placed on there on or about the date the document bears?

A. Exactly on that date.

Q. To whom did you deliver that check?

A. To Sam Achilli.

Q. Directing your attention to the reverse side of Government Exhibit No. 58, will you state, please, whether or not an endorsement appears on the back thereof?

A. Yes, there is an endorsement here.

Q. What endorsement appears on there?

A. Highland Motor Sales, Earl H. Gromer.

Mr. Russo: At this time, if your Honor please, we offer in evidence Government Exhibit No. 58.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government Exhibit 58 for identification was thereupon received
627 in evidence as Government Exhibit 58.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Bernstein, when you bought this station wagon, did you deliver your car in part payment or had that happened prior thereto?

A. No, on the same day, all at the same time.

Q. You delivered your car?

A. I took my car down there, left it and took the other car, completed the transaction all at one time.

Q. Do you have the sales slip, or was there a sales slip given to you on the car?

A. Yes, there was, sir.

Q. Do you have it?

A. No, I do not, sir.

Q. What has become of it?

A. I couldn't find it among my records.

Q. Now on what do you base your recollection that you were allowed $800, or was it $850, for the car you traded in?

A. I know the exact transaction. It was on my
628 check stub at home. I wrote in the purchase price of the car and how much allowance, and I show the amount of my check drawn.

Q. Have you got that check stub with you?

A. No, I have not.

Q. Is it in existence?

A. Yes, it is.

Q. But you didn't bring it?

A. No, I did not.

Q. When did you last look at it and see that figure?

A. I believe it was last October, if I am not mistaken.

Q. And when was the entry made on that stub?

A. Oh, at the time of the purchase, the time the check was drawn.

Q. Which would be back in 1946?

A. Which would be back in 1946, yes sir.

Q. Now what kind of a car was it you got, a station wagon?

A. Yes.

Q. Were there any accessories included?

A. Yes, all the accessories were included in the car.

629 Q. What accessories did you get?

A. I think there was a radio and heater and, if I am not mistaken, there was a spotlight on it, rear

vision mirror, whatever extras there were on the car when I saw it.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Bernstein.

(Witness excused.)

CLARENCE H. JOHNSON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Clarence H. Johnson.

Q. Where do you live, Mr. Johnson?

A. 1479 Marcus Court East, Park Ridge.

Q. That is in Illinois?

A. In Illinois.

Q. I am having just a little difficulty hearing you, Mr. Johnson. I would like for you to speak up so that not only I, but every member of the jury may hear
630 you too.

A. Yes, sir.

Q. What is your business or occupation?

A. I am an automobile dealer.

Q. What is the name of your business?

A. C. H. Johnson Motor Sales.

Q. Where is your business located?

A. 4216 Irving Park Road.

Q. In what city?

A. Chicago, Illinois.

Q. How long have you been in that business?

A. Since 1943.

Q. How long have you been at this present address?

A. Since 1946.

Q. Prior to 1946, what was your address?

A. 3922 Irving Park.

Q. Are you acquainted, Mr. Johnson, with an automobile concern named Highland Motor Sales?

A. Yes, sir.

Q. Have you ever had any transactions with Highland Motor Sales?

A. Yes, sir.

Q. What is the nature of those transactions?

A. I purchased four used automobiles.

631 Q. You purchased four new automobiles?

A. Four used automobiles.

Q. Did you purchase those over a period of time, or in one transaction?

A. In one transaction.

Q. Will you relate for the Court and Jury, please, how that transaction came about?

A. In what respect, sir?

Q. How it was that you learned of these automobiles, how they were found for you, if that be the truth, and how you consummated the rest of the transaction.

A. I had a salesman working for me at the time and his job was to go out and locate and buy used cars, and he in turn had located four cars at Highland Motor Sales.

Q. Did he tell you of them?

A. Yes, sir.

Q. And as a result of his information, what if anything did you do?

A. Well, we purchased the automobiles.

Q. Now, Mr. Johnson, were you served with a subpoena duces tecum to bring with you the books and records of C. H. Johnson Motor Sales?

A. Yes, sir.

632 Q. Did you bring those books and records with you?

A. No, sir.

Q. Why not?

A. Because they were destroyed by fire.

Q. Can you tell us approximately when it was that they were destroyed by fire?

A. I believe it was December 12, 1953.

Q. Now at any time between August, 1946, and December 12, 1953, did you ever make those books and records available to an agent of the Bureau of Internal Revenue?

A. Yes, sir.

Q. Do you recall when?

A. I believe it was approximately 1950.

Q. Can you tell us, please, what if anything it was that the agent did in connection with those books and records?

A. He took transcripts of my records of deals involving the purchasing of used cars by me from other dealers.

Mr. Russo: I will ask that this be marked Government Exhibit 59 for identification.

633 (The document was thereupon marked Government Exhibit 59 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 59 for identification, and ask you whether or not that is the summary to which you have referred?

A. Yes, sir, it is.

Q. I ask you now, Mr. Johnson, whether or not the data reflected on that exhibit correctly reflects the data on your books and records with respect to your transactions with Highland Motor Sales.

A. Yes, sir, it does.

Q. Were those books and records kept in the regular course of business?

A. Yes, sir.

Q. And was it the regular course of business for you to keep such books and records?

A. Yes, sir.

Q. Now do the figures on that exhibit correctly reflect the data on the books and records of C. H. Johnson Motor Sales?

A. Yes, sir, they do.

634 Q. What were the four cars that you purchased from Highland Motor Sales, Mr. Johnson?

A. A 1940 Chevrolet convertible; a 1941 Chevrolet two-door; a 1941 Buick, and a 1938 Dodge convertible.

Q. What was the date on which you made that purchase?

A. 8/19/46.

Q. What did you pay for the Chevrolet convertible?

A. $737.

Q. And how did you pay for that?

A. By check.

Q. How much did you pay for the Chevrolet town sedan?

A. $799.33.

Q. How much did you pay for the Buick?

A. $1108.33.

Q. How much did you pay for the Dodge?
A. $503.33.
Q. How was payment for those three cars made?
A. They were made by check and cash.
Q. Now tell us, please, what the motor number of the Chevrolet convertible was.
A. 3127907.
Q. And of the Chevrolet town sedan?
A. AA373322.
635 Q. And of the Buick?
A. 14173379.
Q. And of the Dodge convertible?
A. 30064983.
Q. Do you have any record in your possession reflecting the method by which payment for those automobiles was made?
A. No, sir.
Q. Do you have with you any document of a personal nature from which you could refresh your recollection as to the method by which that payment was made?
A. No, sir.
Mr. Russo: Your witness.

Cross Examination.

Mr. Batter: Let me have that document that you refreshed his memory from.
Mr. Russo: The witness has it.
(The witness handed document to Mr. Batter.)
By Mr. Batter:
Q. Mr. Johnson, you testified that a Government man prepared what has been marked as Government Exhibit No. 59 for identification from your records, did you
636 not?
A. Yes, sir.
Q. Where was that comparison made?
A. What do you mean by that? Where did he take—
Q. Was it made at a Government office, or made at your office?
A. No, made at my office.
Q. And where was that office?
A. 4216 Irving Park Road.

Q. Can you recall when it was done?
A. Not exactly, but it was during the year 1950.
Q. During the year of 1950?
A. Yes, sir.
Q. Now the records from which this record was extracted were in existence for how long after that date?
A. Until the time of the fire I experienced in, I believe it was, 1953.
Q. What was the form of records that you did keep?
A. To be frank with you, practically everything.
Q. No, I don't mean what was destroyed. I mean, what was the form of records that you kept in the ordinary course of business.
A. I kept everything.
637 Q. Did you have a cash book?
A. Yes, sir.
Q. Did you have a journal?
A. Cash book, journal.
Q. And a ledger?
A. Ledger, disbursements, receipts.
Q. A disbursements book?
A. Yes, sir.
638 Q. And you had receipts?
A. Yes, sir.
Q. Invoices?
A. Yes, sir.
Q. And all of that was destroyed in the fire?
A. Records of that nature after a couple of year were kept in a cubbyhole of the offices which are on a balcony. My showroom is on the main floor and I have offices in my balcony and above the balcony is a cubbyhole.

All of these records were just put there and forgotten about, and when the fire occurred in the shop the fire raced along the ceiling and naturally all these papers were there, and the fire was actually concentrated where all these old records were stored.

Q. Well, were these records actually destroyed by fire at that time or just scorched?
A. Destroyed.
Q. They were actually burned up and destroyed?
A. Yes, sir, because one of the Fire Chiefs at the fire from Engine House 69 even stated at that time that

he noticed they were business records and that he would only be too glad to testify that there was not much
639 left of them.

Q. Now, outside of your bills and your invoices—I guess your cancelled checks were destroyed, too, is that right?

A. Yes, sir; they were altogether.

Q. Now, outside of those, were your regular books of account kept year by year in separate binders—

A. Yes.

Q. —or in separate sheets?

A. In separate binders.

Q. In other words, you kept a separate set of books for each year?

A. Yes, sir.

Q. This is 1946. The bound books for 1946—

A. Were upstairs.

Q. They were upstairs?

A. Yes.

Q. And they were burned up?

A. Yes, sir.

Q. You mean the fire actually consumed them?

A. Consumed enough of them that there wouldn't be anything left to have worked from, and at that time if I had any thought of this occurring, I probably would
640 have kept the ashes.

Q. Well, they weren't all really reduced to ashes, were they?

A. Not all, no.

Q. Fire just singes and scorches that kind of record, doesn't it?

A. No, no, no. They were actually burned.

Q. They were, huh?

A. I would say most of the pages were about two-thirds gone.

Q. Now, at the time this record was extracted from your books were the checks drawn out?

A. Yes, sir.

Q. Did the Government take them with them, or did you take them? Did you keep them?

A. Some of them—on some of them payment was made in check and in some payment was made in cash.

Q. Yes.

A. I can't recall. It seems that from my records it seems they had taken out something and returned it to me and it was put back in the proper folder. Whether that was in reference to that, I can't recollect.

641 Q. They did take some of your checks?

A. Some of them, and returned them.

Q. And brought them back later?

A. Yes, but whether it was in regards to this particular instance, that I don't recollect.

Q. Have you inquired from the Government since then whether they have any of your checks, or photostats of them?

A. No. They were returned.

Q. Or photostats of them?

A. I don't know about photostats. I never inquired.

Q. I say, have you inquired from them?

A. No, sir.

Q. But you cannot tell us from this record how much was paid in cash and how much was paid by check, can you?

A. No, sir.

Q. Now, then, I noticed some of these prices are quite odd prices, $799.33, $1108.33 and $503.33. Can you explain why you would trade in a car at such an odd figure?

A. Yes, sir, because during 1946 the OPA was in effect. These were OPA ceiling prices, and during

642 the effectiveness of OPA they had what they called a low book or a low ceiling price on the car, a figure at which I could buy a car for, and the maximum figure at which I could buy a car for, and then they had a higher figure at which I could sell that car for warranty.

Q. Then do I understand these figures are the OPA ceiling prices that you paid?

A. Those figures are what I paid, which coincide with the maximum to the penny of the OPA minimum ceiling price.

Q. Now, again directing your attention to Government's Exhibit 59 for the purpose of refreshing your recollection, I notice with respect to the car of August 19th, 1946, there appears opposite it the legend "Highland Motor Sales", is that correct?

A. That's correct.

Q. But when I look at the next car I find no such legend.

A. That's correct.

Q. I find a different legend, "F. J. Feldschmitt, 11 North State Street, Elgin."

A. Yes.

643 Q. What is the significance of that legend as compared to the one above of Highland Motor Sales?

A. On the 1940 Chevrolet convertible, the car had been assigned over on the back of the title to Highland Motor Sales, and as such I realized Highland Motor Sales would always have a record of that title in their files automatically.

The other three titles were turned over with the signature of the owner on the back, signed, and the Highland Motor Sales name not inserted in it, and as such I inserted the name of the original owner of the car because it is common once in a while in our business to lose a title or mislay it, and if the title was lost or mislaid I would then be in a position to contact the previous registered owner and obtain a duplicate title, and in the case of Highland Motor Sales, where it was registered in their name, all I would have to do would be to contact Highland Motor Sales and as a rule they would have obtained another title for me.

Q. You did make the purchase of all four of these cars from Highland Motor Sales?

644 A. Yes, sir.

Q. This legend appearing here actually appeared upon your books, did it?

A. Yes, sir.

Q. Now, I notice here another column entitled "Used Dealer's stock number."

A. Yes, sir. That's the way we distinguish our automobiles.

Q. Was that stock number card also destroyed?

A. It would have to be with the rest of the records. It probably was destroyed with the rest of them.

Q. You have not been able to find it anywhere, have you?

A. No, sir. I know who I sold that one car to, if that helps any.

Mr. Batter: I do not think that is of any concern here. That is all.

Mr. Russo: Thank you, Mr. Johnson.

(Witness excused.)

The Court: We will take a short recess, ladies and gentlemen of the jury.

645 • • •

646 MRS. FLORENCE WILDHAGEN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mrs. Wildhagen, will you please state your name, and speak loudly so every member of the jury may hear you?

A. Florence Wildhagen.

Q. How do you spell your last name?

A. W-i-l-d-h-a-g-e-n.

Q. Where do you live, please, ma'am?

A. I live in Elgin, Illinois, 997 Wayne Street.

Q. What is your business?

A. I am a chef.

Q. By whom are you employed?

A. Now?

Q. Yes.

A. I am employed at the Red Lion by Ed Musso.

Q. Are you acquainted with an automobile concern in Elgin known as Highland Motor Sales?

A. I am.

Q. Directing your attention to on or about February 12, 1948, did you have a transaction with Highland

647 Motor Sales?

A. I did.

Q. What was the nature of that transaction?

A. I bought a secondhand car.

Q. What kind of car did you buy?

A. Chevrolet.

Q. What year model?

A. I think it was a 1941, as near as I can remember.

Q. Was that new or used?

A. A used car.

Q. What was the total purchase price of that car?
A. $1,000.
Q. How was payment made?
A. I am not just sure. I can't remember exactly. But I think it was a $500 payment down.
Q. And how was that payment made?
A. Well, I don't remember.
Q. Was that by cash or by check?
A. I can't say any more because I have—I don't know, I pay the bills and that is all I know.
Q. You do remember, though, that you paid $500 down, is that correct?
A. Yes, $500 was paid down.
Q. How was the balance paid?
648 A. In monthly payments.
Q. Was the balance of $500 financed?
A. It was.
Q. By whom was it financed?
A. Oh, I can't remember the name of their finance company now. It slips my mind.
Q. To refresh your recollection, was it the Elgin Finance Company?
A. Acceptance.
Q. Elgin Acceptance Company?
A. That is right.
Q. Now with whom did you deal?
A. I dealt with Highland Motors.
Q. With what individual at Highland Motors?
A. Well, I just couldn't tell you who the individual was because it could have been the manager, but I am not sure.
Q. Do you recall his name?
A. I don't know what his last name is. I never could remember it.
Q. Was there a trade-in involved in that purchase?
A. No, sir.
Mr. Russo: Your witness.
Mr. Batter: No cross.

649 JOHN BERNHARD, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?
A. John Bernhard.
Q. Will you spell your last name, please?
A. B-e-r-n-h-a-r-d.
Q. Will you speak loudly, please, so we all may hear you.
What is your address, Mr. Bernhard?
A. 619 Wellington Avenue, Elgin, Illinois.
Q. What is your business?
A. Auto upholsterer.
Q. By whom are you employed?
A. Corwin Auto Top Company.
Q. Where is that located?
A. 633 Raymond Street, Elgin, Illinois.
650 Q. Are you acquainted with an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. In Elgin on Wellington Avenue.
Q. Directing your attention to August, sometime in August, 1936, did you have a transaction with Highland Motor Sales at that time, at or about that time?
A. No, sir, not in 1936.
Q. I beg your pardon. I mean 1946.
A. Yes, sir.
Q. With whom did you deal?
A. Cons Cirrincione, salesman for Highland Motors.
Q. What was the nature of that transaction?
A. I bought a 1936 Ford coupe.
Q. What did you pay for the 1936 Ford coupe?
A. About $450.
Mr. Batter: Will you speak a little louder, Mr. Bernhard, please?
The Witness: About $450.
By Mr. Russo:
Q. Was there a trade-in allowance involved in that

transaction?

651 A. Yes, sir, a 1936 Chevrolet, two-door sedan.

Q. And how was the $450 paid?

A. In cash.

Q. To whom was it paid?

A. To Cons Cirrincione.

Q. Do you know the amount that was allowed you or credited to you toward the purchase price of the 1936 Ford?

A. No, sir, I do not.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Do you have a bill of sale?

A. No, sir, I do not.

Q. Do you have a receipt for the money, the $450?

A. No, sir.

Q. Did you have one?

A. I had one but destroyed it.

Q. Was the $450 price exclusive of the trade-in, or was it included in the trade-in?

A. I don't know, sir. It has been quite a while ago.

Q. I mean, did you pay $450 plus the car, or did
652 you pay $450 of which the trade-in car was a part?

A. $450 plus the car, I believe it was.

Q. Plus the car?

A. I believe it was. I couldn't say for sure.

Q. You are not sure?

A. No, sir.

Mr. Batter: That is all.

Mr. Russo: Thank you, sir.

(Witness excused.)

DALE HAUPTLY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mr. Hauptly, will you state your full name and spell your last name?

A. Dale Hauptly, H-a-u-p-t-l-y.

Q. Where do you live, sir?

A. Elgin, Illinois.

Q. Whereabouts?

A. 813 Goethe.
Q. What is your business or occupation?
653 A. I am a plasterer laborer.
Q. How long have you been engaged in that business?
A. Three years.
Q. Are you acquainted with an automobile concern in Elgin known as Highland Motor Sales?
A. Yes, sir.
Q. Directing your attention to on or about January 4, 1946, did you have a transaction with that company at or about that time?
A. Yes.
Q. What was the nature of that transaction?
A. I bought a used car, a 1936 Pontiac.
Q. With whom did you deal in connection with that transaction?
A. Sam Achilli.
Q. Do you see Sam Achilli in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. Over there (indicating).
Q. The third man sitting at defense counsel table at the far end?
A. That is right.
Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?
654 A. Yes, sir.
Q. What was the purchase price of that 1936 used Pontiac?
A. $425.
Q. How was payment made?
A. $285 cash and $140 financed.
Q. To whom did you make the cash payment?
A. To Sam.
Q. And who financed the balance?
A. Elgin Acceptance Corporation.
Q. At the time of that transaction, did you get a sales slip?
A. Yes, I did.
Q. Do you have it?
A. No.
Q. Do you know what happened to it?
A. No, I don't.
Mr. Russo: Your witness, Mr. Batter.

655 *Cross Examination by Mr. Batter.*

Q. When did you but that car from Highland Motor Sales?

A. When?

Q. Yes.

A. In January, 1946.

Q. What was that?

A. January, 1946.

Q. How do you fix that date?

A. How do I fix it?

Q. Yes.

A. Because I remember that. It was just before I got out of the Service.

Q. Just before you got out of the Service?

A. Yes.

Q. When did you get out of the Service?

A. January 26.

Q. Is it possible that the car may have been purchased in December of 1945 instead of January of 1946?

A. No.

Q. Why do you definitely determine it to be January, 1946?

656 A. Because I know that.

Q. What brings it to your mind, what event, what happening?

A. Well, as I say, because I know it was three weeks before I got out of the Service, and I happened to be home on leave at the time.

Q. How long were you home on leave?

A. It was approximately two weeks.

Q. Then you were home in December as well as in early January?

A. Yes.

Q. And it was sometime during that period that you purchased the car?

A. I remember it was after New Years too.

Q. What?

A. I remember it was after New Years.

Q. It definitely was after New Years, was it?

A. Yes.

Q. Do you have any document or anything at all by which you can definitely locate that date?

A. No, I don't have.
Mr. Batter: That is all.

657 *Redirect Examination by Mr. Russo.*

Q. Is there any doubt in your mind as to that date, Mr. Hauptly?
A. No, there isn't.
Mr. Russo: Thank you, sir. That is all.
(Witness excused.)

JACK M. GEHRINGER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, and spell your last name, Mr. Gehringer?
A. My name is Jack M. Gehringer, G-e-h-r-i-n-g-e-r.
Q. Where do you live, sir?
A. 710 Kenilworth, Glen Ellyn, Illinois.
Q. What is your business or occupation?
A. I am a sales representative.
Q. For what company?
A. Norman Engineering Company.
Q. Where is that located?
658 A. 2115 West Marquette Road.
Q. Are you acquainted with an automobile sales concern known as Highland Motor Sales?
A. I am.
Q. Where is that company located?
A. In Elgin, Illinois.
Q. Directing your attention to on or about August 15, 1946, did you have a transaction with Highland Motor Sales?
A. I did.
Q. At or about that time?
A. I did.
Q. What was the nature of that transaction?
A. I bought a used automobile from the company.
Q. What kind?
A. It was a 1942 Chrysler Royal.
Q. What was the purchase price of that car?
A. $1585.

Q. Was there a trade-in involved?
A. Yes, I traded in a 1938 Convertible Dodge.
Q. What allowance was made you for the Dodge?
A. I believe it was $285.
Q. What was the total purchase price of the automobile?
659 A. I don't understand what you mean.
Q. What was the total purchase price of the automobile that you bought, the 1942 Chrysler?
A. $1585.
Q. How was payment of the difference between $1585 and $285 made?
A. Well, I gave a check for $100 and then the rest of it was financed through the Elgin Acceptance Corporation.
Q. At the time of the transaction were you given a sales receipt or invoice of any sort?
A. I was given a sales receipt.
Q. Do you have that sales receipt now?
A. No, sir, I do not.
Q. Do you know where it is?
A. I have looked for it and I cannot find it.
Mr. Russo: Your witness.

660 *Cross Examination by Mr. Batter.*

Q. Mr. Gehringer, do you have any document at all that will refresh your recollection as to this transaction as to the time or the amount?
A. No, sir, I don't. I looked for it but my mother wrote the check originally, and I had her look for it and she had destroyed it or it had been thrown away and I do not have any records whatsoever or I would have brought them with me.
Q. Now, when did you buy this car?
A. In August, 1946.
Q. How do you focus that date, or focalize that date?
A. Well, it was just prior to my getting married.
Q. When did you get married?
A. September 7th.
Q. 1946?
A. That's right.
Mr. Batter: That is all.
Mr. Russo: Thank you.
(Witness excused.)

661 JULIA VICKROCK, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Miss Vickrock, will you please state your full name and spell your last name and speak up so everybody can hear you.

A. Julia Vickrock, V-i-c-k-r-o-c-k.

Q. Where do you live?

A. In Elgin, on 621 Algona.

Q. What is your business?

A. I'm retired.

Q. Are you acquainted with an automobile concern known as Highland Motor Sales?

A. I am.

Q. You are?

A. Yes.

Q. Where is it located?

A. In Elgin, on Wellington Avenue.

Q. Did you ever have any transaction with Highland Motor Sales?

A. I bought a car.

662 Q. With whom did you deal?

A. Sam Achilli.

Q. Do you see Sam Achilli in the Court Room?

A. I do.

Q. Will you point him out, please, Ma'am?

A. The third man (indicating).

Q. The third man at the defense counsel table.

A. Yes.

Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?

A. He is.

Q. What kind of a car was it that you bought?

A. '41 Oldsmobile.

Q. Was that new or used?

A. Used.

Q. What was the purchase price of that 1941 Oldsmobile?

A. $1,424.

Q. Is that $1,424?

A. That's right.

Q. How did you make payment for it?
A. I paid $550 down and $874 later.
Q. Was the $874 financed?
A. Well, we were going to, but about a month
663 after that we paid it off in full.
Q. What was the name of the company with which you began to finance it?
A. I just can't recall that right now.
Q. To refresh your recollection, was that the Elgin Acceptance Company?
A. You're right. That's right.
Q. To whom did you deliver the $550 that you paid down?
A. Sam Achilli.
Q. Did you get a sales slip?
A. I did.
Q. Do you have it?
A. No.
Q. Do you know where it is?
A. Well, I turned it in with the car.
Q. You turned it in on another car?
A. Yes.
Q. And you do not have it now?
A. No, I don't.
Mr. Russo: Your witness.
Mr. Batter: No questions.
Mr. Russo: Do I understand you to say no questions?

664 • • • FRANK O. CARLSON, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir, and speak out so everyone can hear you, and spell your last name for the Reporter.
A. Frank O. Carlson, C-a-r-l-s-o-n.
Q. Where do you live?
A. I live in Malta, Illinois.
Q. How do you spell that?
A. M-a-l-t-a.
Q. What is your business?
A. Farmer.

Q. Do you know of an automobile sales company known as Highland Motor Sales?

A. Yes.

665 Q. Where is that company located?

A. In Elgin, Illinois.

Q. Directing your attention to on or about April 5th, 1948, did you have a transaction with Highland Motor Sales at or about that time?

A. Yes.

Q. What was the nature of that transaction?

A. I bought a 1947 Dodge.

Q. Was that new or used?

A. New.

Q. What did you pay for it?

A. $2,340.

Q. $2,3—

A. —40.

Q. —40?

A. Yes.

Q. How was payment made?

A. By check. I had to go to the bank to get a check, because he didn't know and he said he wouldn't take my own personal check.

Q. After you got the money, what did you do with it?

A. I gave it to the salesman.

Q. Do you know the name of the person to whom

666 you delivered the money?

A. Not for sure, no.

Q. Sir?

A. Not for sure.

Q. Not for sure?

A. No. That was the first time I see him, and I haven't seen him since, either.

Q. Do you have that cancelled check any longer?

A. No, I haven't.

Q. Have you looked for it?

A. Yes.

Q. At the time of the transaction, Mr. Carlson, were you given a bill of sale or sales slip?

A. Yes.

Q. Do you have that now?

A. No.

Q. Have you looked for it?

A. Yes.

Q. Were you able to locate it?
A. No.
Mr. Russo: Your witness—one more question, please.
By Mr. Russo:
Q. Do you know Sam Achilli?
667 A. No, I don't.
Q. You don't?.
A. No.
Mr. Russo: Thank you.

Cross Examination by Mr. Batter.

Q. How much did you pay for that Dodge car, Mr. Carlson?
A. Twenty-three forty.
Q. $2,340?
A. Yes.
Q. How do you recall that figure so distinctly?
A. What date? The 5th of April, 1948.
Q. What?
A. I remember that date in 1948, the 5th of April.
Q. I say, how do you recall that figure of $2,340 so distinctly?
A. Oh, I got to see my own check. I got my own check back, see, so I know it that way.
Q. Where is that check?
A. I haven't got it now.
Q. When did you last see it?
A. Oh, I can't tell for sure, see?
668 Q. How do you recall that that is the amount of it?
A. You see, my memory, is all.
Q. Your memory?
A. Yes.
Q. When did you buy that car?
A. The 5th of April, 1948.
Q. How do you fix that exact date?
A. Oh, we come back from a trip, see, so I know we come back the 2nd of April and we was looking around for cars different places and this is the only place we could find one.
Q. You place the date by having come back from a trip?
A. Yes.

Q. Where did you make this trip?
A. Sweden.
Q. Sweden?
A. Yes.
Mr. Batter: That is all.
Mr. Russo: Thank you, sir.
(Witness excused.)

669 FRED ROTH, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir, and speak out loud and spell your last name.
A. My first name is Fred. My last name is Roth, R-o-t-h.
Q. Where do you live?
A. 314 North Harding Avenue, Chicago, Illinois.
Q. What is your business, Mr. Roth?
A. Right now I'm employed.
Q. Right now you are unemployed?
A. Employed.
Q. By whom are you employed?
A. Harig Manufacturing Company.
Q. I didn't get the name.
A. Harig Manufacturing Company.
Q. Harig Manufacturing Company?
A. Yes.
Q. Where is that located?
A. 5757 Howard, West Howard.
670 Q. How long have you been employed there?
A. Three years.
Q. Before you were employed by Harig Manufacturing Company, were you in any business?
A. Yes, I was.
Q. What business were you in?
A. Used cars.
Q. Under what name were you doing business?
A. Roth Motor Sales.
Q. Where was that located?
A. At the last time it was 3242 North Cicero. At one time it was 2435 North Cicero.

Q. How long were you at 3242 North Cicero?
A. About two years.
Q. Are you acquainted with an automobile firm known as Highland Motor Sales?
A. Yes, I do.
Q. Where is that located?
A. Elgin, Illinois.
Q. Directing your attention, Mr. Roth, to on or about June 10th, 1947, did you have a transaction with Highland Motor Sales on or about that time?
A. Yes, I have, please.
Q. What was the nature of that transaction?
671 Mr. Batter: Just a minute. I object, your Honor. This man was in business at the time, the automobile business, and I think his books and records are the best evidence as to what took place.
Mr. Russo: I am going to lay a foundation, if you will just give me time.
The Court: Proceed.
By Mr. Russo:
Q. What transaction did you have?
A. I bought a 1946 Plymouth automobile.
Q. Was that a new car or used one?
A. It was used.
Q. What did you pay for it?
A. $1,800.
Mr. Batter: I object, your Honor. I think we have gone far enough now.
The Court: Objection sustained.
Mr. Batter: I beg your pardon?
The Court: Objection sustained.
By Mr. Russo:
Q. I will ask you, Mr. Roth, if you had more than one transaction with Highland Motor Sales?
672 A. No; that I don't.
Q. Just one?
A. Just one.
Mr. Russo: Will you mark this for identification, please, Mr. Reporter, as Government's Exhibit 60.
(The document was thereupon marked Government's Exhibit 60, for identification.)
By Mr. Russo:
Q. I show you Government's Exhibit No. 60 for identification which purports to be a check—

Mr. Batter: Just a minute. As I look at the document counsel has there I see it is a photostat. We still do not have any understanding or explanation regarding the books of account. I object to the witness identifying or being interrogated on a photostat in the absence of an explanation of the original books.

The Court: The objection is well taken.

673 By Mr. Russo:

Q. Mr. Roth, in connection with the operation of your business did you keep a set of books and records?

A. I did.

Q. Were those books and records kept in the regular course of business?

A. Yes, sir.

Q. Was it the regular course of business for you to keep such books and records?

A. Yes.

Q. Did there come a time when you made those books and records available to anyone connected with the Bureau of Internal Revenue?

A. Yes.

Q. I show you Government's Exhibit 60 for identification and ask you if that is one of the records you so made available?

A. Right. That's the check I made available.

Q. Is that a true and correct photostatic copy of the check you did make available?

A. Yes, sir.

Q. Now, directing your attention to Government's Exhibit No. 60 for identification, which purports to be a

674 check—

Mr. Batter: I object, your Honor. We still do not have any explanation of the originals.

By Mr. Russo:

Q. Do you know where the original is?

A. The original, I believe it should be in your hands, gentlemen.

Q. I don't have it.

A. It was here last time.

Q. Did you produce it here once before?

A. Once before, yes.

Q. Do you know what happened to it?

A. I don't know.

Q. Do you know where it is now?

A. I believe somebody took it here, one of the attorneys.

Q. Do you know where it is now?

A. I don't now.

Q. Is Government's Exhibit 60 for identification a true and correct photostatic copy of the original?

Mr. Batter: If you know.

A. That's the correct copy, as I seen it here, 675 of the original.

By Mr. Russo:

Q. Are you able to account for the presence or absence of the original?

A. Yes; I'll account for it.

Q. Do you know where it is now?

A. I don't know where it is, but it should be around here some place. It must be here, because they kept it in here. It was here at the last hearing we had here.

Q. But you say now if the original is not available, that Government's Exhibit 60 for identification is a true and correct copy, photostatic copy of that check, is that correct?

A. That's correct.

Mr. Batter: We still do not have the original accounted for, your Honor.

The Court: You may proceed.

By Mr. Russo:

Q. Directing your attention now to Government's Exhibit 60 for identification, which purports to be a check drawn on the Maine State Bank dated June 1st, 1947, 676 Check No. 30 payable to the order of Irving Troyke—is that right?

A. Right.

Q. (Continuing)—in the sum of $1,000, and directing your attention to the signature in the lower right-hand corner of that portion of the Exhibit that purports to be the front thereof, whose signature is that?

A. That's my signature right there. (Indicating.)

Q. Was your signature placed on that check—

A. Right.

Q. —at or about the time the check was made?

A. Right.

Q. Now, directing your attention to the rear portion, that portion of the Exhibit that purports to be the back of it, will you examine it, please, and state whether or not it bears any endorsement?

A. (No answer.)

Q. Do you understand my question?

A. You want me to certify that this is the check, the cancelled check that came back on this one?

Q. Yes, sir.

A. That's right.

677 Q. Does it bear an endorsement? Are there any signatures or stamps on the back of it?

A. Well, there's "Highland Motors."

Q. Is there a signature on top of "Highland Motors"?

A. No. It's Mr. Troyke.

Q. Mr. Troyke?

A. Troyke.

Q. Is that Irving Troyke?

A. Irving Troyke, right.

Q. To whom did you deliver this check Mr. Roth, the original?

A. I delivered it to Mr. Achilli and his sales manager, right in his office.

Q. You delivered it to Sam Achilli and to his sales manager?

A. Yes. Both were together right there.

Q. Do you see Sam Achilli in the Court Room?

A. Yes, I do.

Q. Will you point him out, please?

A. The man in the light suit there in the corner. (Indicating.)

Q. The man in the light suit at the far end of the defense counsel table?

678 A. Yes.

Q. Is that the same Achilli to whom you delivered the original of Government's Exhibit 60 for identification?

A. Yes.

Q. What did you deliver the original of Government's Exhibit 60 for identification to Mr. Achilli for?

A. For a 1946 Plymouth.

Q. What was the price that you paid for that Plymouth?

A. $1,800.

Q. In connection with that transaction did you deal with Irving Troyke?

A. No. I think I dealt with Mr. Sam Achilli and his salesman.

Q. Why did you make that check payable to the order of Irving Troyke?

A. I handed the check to him and I says, "Make the check out the way you want it and I'll sign it"—

Q. Speak more slowly, please, and more distinctly so the jury can hear you and understand you.

A. I gave him a blank check and says, "Fill this
679 check out how you want it made out and I'll sign the check.

680 Q. And is that what happened?

A. And that is what happened. I can't describe it, whether Sam Achilli did it or his salesman, one of the two made out the check, and I signed it then and handed it to them.

Q. And the name Irving Troyke in the place on the check that is provided for the legend, "Pay to the order of" was put on there in your presence, was it not?

A. Right, it was put on in my presence.

Q. Now did you buy that automobile from Highland Motor Sales or from Irving Troyke?

A. I bought it from Highland Motor Sales.

Q. In addition to that $1,000 that is represented by that check, Mr. Roth, did you pay anything else?

A. I paid $800 in cash.

Mr. Batter: Just a minute. I object, your Honor. The books are the best evidence.

Mr. Russo: The man can tell whether he paid anything else, your Honor.

The Court: He may answer.

By Mr. Russo:

Q. Did you pay something else in addition to that,
681 Mr. Roth?

A. I paid $800 in cash.

Q. And to whom did you pay that $800?

A. To the both gentlemens who were in the office.

Q. Was Mr. Achilli one of them?

A. Yes.

Q. Now do you know why you were called upon to make payment by check and by cash?

A. Well, at the time it was the only way I could buy hat automobile. They said, "Give us the check and pay us $800 cash." So I did.

Q. And both the $800 cash and the check for $1,000, he original of Government Exhibit No. 60, totaling $1800, vas given in payment for that car, is that correct?

A. Right

Q. Were you directed by anyone to pay by cash and y check?

A. Well, I—

Q. Who told you to make the payment in this fashion?

A. Both gentlemen.

Q. By both gentlemen, whom do you mean?

A. Mr. Sam Achilli and the salesman. They says, well, I said, "Can I pay you the whole thing in check?"

382 And they said, "Well, give us a thousand dollar check and $800 cash."

Mr. Russo: At this time, if your Honor please, we offer in evidence Government Exhibit No. 60.

Mr. Batter: I object to this, your Honor, on the grounds hat the original is still unaccounted for, and on the urther ground that I find in the lower left-hand corner ome penciled notations that obviously are not part and parcel of that check.

The Court: You may inquire about it. Whether it is art of it, I don't know.

By Mr. Batter:

Q. Mr. Roth, I direct your attention to Government Exhibit No. 60, and without stating just what it is that t states there, directing your attention to the lower left-and corner of the check

A. Yes.

Q. Was that notation on there when you issued this heck?

A. When the check came back from the bank I put t on there.

Q. You put it on afterwards?

383 A. That is right.

Mr. Batter: I object to that, your Honor, as not eing the original check.

The Court: It may be admitted with that deleted.

Mr. Batter: Can you arrange to delete that?

Mr. Russo: Sure. This is what you have reference to?

Mr. Batter: Yes. Would you cut out that part?

Mr. Russo: All right.

Mr. Batter: Are you through with this witness?

Mr. Russo: Yes.

We have offered it in evidence, if your Honor please, with the deletion of the material on that check that counsel has objected to.

The Court: It may be received.

(The document previously marked Government Exhibit 60 for identification was thereupon received in evidence as Government Exhibit 60.)

684 *Cross Examination by Mr. Batter.*

Q. Mr. Roth, you testified, I believe, that you were in the used car business in 1947?

A. Yes.

Q. And being in the used car business, you purchased and sold a number of cars throughout the year?

A. Yes.

Q. And you kept regular books of account?

A. I did.

Q. Will you describe the system of accounts that you maintained at that time?

A. I booked it the same as I did any other car, and in 1950 the burglars my whole office and took all the records out.

Q. What is that?

A. In 1950 I got robbed in the office, and they took all the records, my books and everything, and I never got it back.

Q. In other words, they robbed your records in 1950?

A. 1950, that is right.

Q. But this check was not one of the records that was robbed?

A. This particular check came up to the house
685 mailed in from the Court. They picked it up, I believe, in 1948 or '49. So they delivered that to my house, and it was in an envelope in my house.

Q. Where was that check?

A. The check was here the last time I was here, and somebody took the check here last time and I haven't got it back yet. It was here the last court.

Q. All your records were stolen excepting that check?

A. Just that check, that is right.

Q. I see. Do you have a sales slip, or do you have any kind of record that will explain why this check is made out to Irving Troyke?

A. I haven't anything to show for it except I just give them the blank check and said, "Make it out whatever you want to make it out, Highland Motors or whatever it is."

So they made it out to Troyke, and that is when I found out the car belonged to Mr. Troyke.

Q. The car did belong to Mr. Troyke?

A. That is what they say why they made out the check. They mentioned the car came in on a trade, so I took the car.

Q. Mr. Roth, you testified that in addition to this
686 check for $1,000, you made a payment of $800?

A. Right.

Q. In cash?

A. Cash, yes.

Q. Now what independent recollection do you have of that payment of $800?

A. How you mean? What kind of recollection? I have nothing to show because I didn't get no bill of sale or anything.

Q. But can you distinctly remember that at that time you did pay exactly $800 in cash?

A. That is right.

Q. You can remember that?

A. I can remember that.

Q. Out of all the cars you traded in during the year?

A. I wasn't a big dealer.

Q. How many cars would you say you traded in during the course of the year?

A. Between sixty and seventy, maybe.

Q. Between sixty and seventy?

A. Right.

Q. And out of sixty or seventy cars you can remember that on this particular car you paid $800 cash in
687 addition to the check?

A. Yes, because I came in contact in 1948, and that is why I could remember.

Q. Because you what?

A. I got in contact with the Government in 1948, so I could never forget it.

688 Q. And did that cash of $800 show on your books at that time?

A. At that time, yes.

Q. You checked on your books and found you paid $800?

A. $800, right.

Q. Did you get a receipt for it?

A. No, I didn't get a receipt.

Q. You mean you passed out $800 without getting a receipt for it?

A. Just like this—no receipt for it.

Q. Did you ask for one?

A. Well, we didn't get any. He says here is your title.

Q. Did you ask for a receipt?

A. He says we don't give no receipt, just give you the title. The title was good enough at that time. We were glad to receive an automobile at that time. They were hard to get and we were glad to get one.

Q. On your own books, how were you going to prove when your income tax return was examined, that you paid out $1,800?

A. I marked down the $1,000 check and $800 cash.

689 That is the only thing I could put down.

Q. You thought that would be satisfactory for your records?

A. That is the only way I could do it, put the motor number in and the title number.

Mr. Batter: That is all.

Just a moment.

By Mr. Batter:

Q. Now, since you have a vivid recollection of this transaction by its being checked up in 1948, let's explore it a little bit further and let me ask you in whose name was the title of the car on the title you received?

A. Mr. Troyke.

Q. Mr. Troyke?

A. Right.

Q. Then you bought the car from Mr. Troyke, did you not?

A. They left the title open, because they got the car.

Q. But the car was in Mr. Troyke's name?

A. In Troyke's name, right.

Mr. Batter: That is all.

Mr. Russo: Just a moment.

690 *Redirect Examination by Mr. Russo.*

Q. On your direct examination, Mr. Roth, did I understand your testimony to be that you bought this car from Mr. Achilli?

A. I bought it from Mr. Achilli, right.

Q. And Mr. Achilli is the person to whom you delivered that check?

A. Right.

Q. And the cash?

A. And the cash.

Mr. Russo: Any further questions?

Recross Examination by Mr: Batter.

Q. Why do you say you bought the car from Mr. Achilli when the title you received was in the name of Mr. Troyke?

A. I didn't get that.

Q. Why do you say you bought the car from Mr. Achilli or Highland Motor Sales, when the title you received was in the name of Mr. Troyke?

A. Well, because the car was around there, they showed me the car. I didn't know whether it belonged to them or not.

691 Q. The title showed you who it belonged to, didn't it?

A. After, yes.

Q. So you bought the car that was the property of Mr. Troyke, did you not?

A. Well, I bought it, in my estimation I bought it from Highland Motors—whether they got it from somebody else, but when we buy it, it had the title name of Mr. Troyke. You just took those chances.

Q. But you didn't make out your check to Highland Motors, did you?

A. I didn't make the check out for anybody. Mr. Sam Achilli made out the check with Mr. Troyke's name on. I just signed the check.

Q. Mr. Achilli, you say, inserted that name?

A. He wrote the check out.

Q. Do you know Mr. Achilli's handwriting?

A. Well, I don't know. I say Sam Achilli or his salesman, one of the two. There were two of them.

Q. But you can't identify that as Mr. Achilli's handwriting can you?

A. I couldn't do that, no.

692 Mr. Batter: Will you let me have Government's Exhibit 1.

By Mr. Batter:

Q. Now, Mr. Roth, I hand you Government's Exhibits 1, 2 and 3, which are Mr. Achilli's individual income tax returns, and the signature on which the Government vouches for and relies upon, and ask you whether that signature is the same handwriting as there is on that check?

Mr. Russo: I object to that question, if your Honor please. This witness have never been qualified as a handwriting expert.

The Court: Objection sustained.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Roth. That is all.

(Witness excused.)

Mr. Russo: If your Honor please, at this time we have just had called to our attention the original of the check, concerning Mr. Roth has testified, and we would like to substitute it for the photostat.

693 Mr. Batter: Your Honor, I object to this check as a substitution. I have no objection at all to it as an additional exhibit, and I base that on these grounds: The photostat that was submitted to us had in the lower left-hand corner some notations which I asked be deleted.

Now, the original does not have any such notions at all. There has been some tampering or fooling around somewhere.

Mr. Russo: If your Honor please, you will recall on the prior occasion that that was before your Honor that the matter concerning which Mr. Batter objected to was deleted at his request at that time. The deletion was made on the original, but it was not made on the photostat.

Mr. Batter: I have no such recollection. I have no objection, your Honor—

The Court: If it is agreeable, we will admit both of them.

694 Mr. Russo: Thank you. We will have that marked as Government Exhibit No. 60-A.

(The check was thereupon marked Government's Exhibit 60-A, for identification and received in evidence as Government's Exhibit 60-A.)

695-698 • • •

699 IRVING TROYKE, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Irving Troyke.
Q. How do you spell your last name?
A. T-r-o-y-k-e.
Q. Where do you live, Mr. Troyke?
A. 830 Park Avenue.
Q. Will you please speak up so that the Court and Jury may hear you too, please.
830 Park Avenue?
A. That is right.
Q. Is that in Elgin?
A. Yes, sir.
Q. Elgin, Illinois?
A. Yes, sir.
Q. What is your business, Mr. Troyke?
A. I am shop foreman mechanic.
Q. By whom are you employed?
A. At the present time?
Q. Yes, sir.
700 A. Highland Motor Sales.
Q. And where is Highland Motor Sales located?
A. 192 Wellington Avenue, Elgin.
Q. How long have you been employed there?
A. Nine years.
Q. That would be about since 1945 or 1946?
A. 1945, that is right.
Q. Do you know Sam Achilli?
A. Yes, sir.
Q. Do you see him in the court roomo?
A. Yes, sir.
Q. Will you point him out, please?
A. Sitting over there at the table.

Q. Which one?
A. The one on the extreme right, from my right.
Q. The third man at defense counsel table?
A. That is right, sir.
Q. Do you know his connection with Highland Motor Sales?
A. Yes, sir.
Q. What is his connection?
A. Right now he is the owner.
Q. Directing your attention to on or about September 12, 1946, Mr. Troyke, did you have any transaction
701 with Highland Motor Sales?
A. Yes, sir.
Q. What was the nature of that transaction?
A. I bought a 1946 Plymouth.
Q. How much did you pay for it?
A. $1020, something, $1027, I believe.
Q. Is that $1027?
A. That is right, sir.
Q. How did you pay for it?
A. By cash.
Q. To whom did you deliver the money?
A. To the office.
Q. Is that the office of Highland Motor Sales?
A. That is right, sir.
702 Q. Was there a trade-in involved in the purchase of that car?
A. No, sir.
Q. Directing your attention to on or about June 1, 1947, did you have another transaction with Highland Motor Sales?
A. Well, right in there somewhere, yes.
Q. Tell the Court and jury, please, how that transaction was handled.
A. You mean when I bought my '47, sir?
Q. Yes. Is that the type and model of car that you purchased?
A. Yes, sir.
Q. A '47?
A. Yes.
Q. Plymouth?
A. Yes, sir.
Q. Was that a four-door sedan?

A. Yes, sir.

Q. Tell us how that transaction came about.

A. Well, sir, as far as I can remember, somewhere in there they come out—I don't remember whether it was Mr. Cirrincione or one of the salesman came out and asked me if I wanted to sell my car, a '46. I says,
703 "Yes, if I can get another one."

That was the last I heard of it for a few days, and then they said my car was sold. Then a couple—a week or ten days later I got the '47.

Q. You mentioned Mr. Cirrincione. Who is he?

A. Well, he was the head salesman at that time, I believe, and I think he is General Manager now.

Q. Was there a trade-in involved in that car; in that transaction?

A. No, sir, not as far as I know. They just told me my car was sold.

Q. Your car was sold?

A. That is right.

Q. And you received a car?

A. Which car, sir?

Q. You received the '47 Plymouth four-door sedan?

A. Well, after mine was gone for a week or ten days, yes.

Q. Yes. What was the purchase price of the '47 four-door sedan?

A. Well, sir, I think it was around thirteen hundred, or something like that. I wouldn't know, sir.

Q. To refresh your recollection, was it $1,332.70?

A. Truthfully, I couldn't say. I don't remember.

704 Mr. Russo: Mr. Reporter, mark this Government's Exhibit No. 61 for identification.

(The document was thereupon marked Government's Exhibit 61, for identification.)

By Mr. Russo:

Q. Mr. Troyke, I show you Government's Exhibit No. 61 for identification and ask you if you have ever seen that before.

A. Well, I don't remember, unless—it has been a long time ago.

Q. Do you know whether you have ever seen it before?

A. That is my signature on there. That is all I can say. I must have seen it somewhere.

Q. Directing your attention to the signature in the lower right-hand corner thereof, is that your signature?

A. It is mine.

Q. Was your signature placed on there on or about the date the document bears, the 5th day of April, 1950?

A. That is right. Possibly, yes.

705 Q. Is it possible, or was the signature put on there on or about that date?

A. That is my signature, yes.

Q. That is your signature.

Will you examine Government's Exhibit No. 61, please, and see if it refreshes four recollection as to the purchase price of the 1947 Chrysler four-door sedan that you testified that you purchased from Highland Motor Sales on or about June 1st?

A. I didn't purchase no Chrysler from him, sir.

Mr. Russo: A Plymouth.

Mr. Batter: What was that answer?

Mr. Russo: He said he didn't purchase a Chrysler.

By Mr. Russo:

Q. It was a Plymouth?

A. That is right.

Q. Does it refresh your recollection?

A. Yes, sir. That is the exact amount I paid him, a hundred dollars, and got another car.

Q. What was the total purchase price of the Plymouth that you bought?

A. Truthfully, I don't know.

706 Q. Does this refresh you recollection (indicating)?

A. That is all I paid, was a hundred dollars, and I got a new '47 car.

Q. Will you answer my question, please? Did your examination of Government's Exhibit 61 refresh your recollection?

A. I paid in '46—I paid—that's right, ten-twenty-seven. And the '47—my car was sold, and then when I got the '47 I paid $100.00 and I got the '47 for that.

Q. At the time you paid the $100.00 what if anything else did you receive?

A. Just the title.

Q. Directing your attention to on or about April 26th,

1948, did you at that time have another transaction with Highland Motor Sales?

A. In 1948, yes, sir.

Q. How did that transaction come about?

A. At one time or another I was sitting around during the noon hour—

Q. Keep your voice up please.

A. One noon hour we were just sitting around there waiting for time to go back to work and I talked to the salesman there and I says, "Well, I'd like to
707 have another new car."

Q. With what salesman were you talking?

A. Well, truthfully, there was two of them sitting around there.

Q. What were their names?

A. Mr. Elfring and Mr. Cirrincione.

Q. All right, sir. When you made that remark what did Mr. Cirrincione or Mr. Elfring, the other gentleman, say?

A. "We will see what we can do."

Q. Then what happened?

A. A couple of weeks later they sold my car.

Q. Do you know how much it was sold for?

A. No, I do not.

Q. But you were told that the car was sold?

A. That is right, sir.

Q. Who told you that?

A. Mr. Cirrincione, I believe.

Q. After Mr. Cirrincione told you that your car had been sold, what happened?

A. Well, I waited until another one came in, a new one, and paid him $100.00 and took that one out.

Q. How much did you pay?

A. $100.00, or thereabouts.

708 Q. What did you do with the title that you had to the car that was sold?

A. What did I do with the title, sir?

Q. Yes.

A. When they told me it was sold he told me to get the title. I signed it and give it to him.

Q. You signed the title and to whom did you deliver it?

A. Mr. Cirrincione.

Q. Then what if anything happened?

A. Truthfully, I don't know. It seems to me somewhere along the line there there was one check I had to sign. That is all I know.

Q. Mr. Troyke, I show you Government's Exhibit No. 60-A for identification and ask you if that is the check to which you refer.

A. Yes, sir.

Q. Were you present when that check was filled out?

A. No, sir.

Q. Were you present at the time that Mr. Roth signed that check?

A. No, sir.

Q. The check appears to be drawn payable to the order of Irving Troyke. Whose handwriting is that, if
709 you know?

A. I do not know, sir.

Q. Directing your attention to the back of Government's Exhibit 60-A for identification whose endorsement, if any, does that bear?

A. That is mine, sir.

Q. Is that a handwritten endorsement?

A. Yes, sir.

Q. Is there another endorsement on there?

A. No, sir, not an endorsement. I don't see any in handwriting.

Q. A stamped endorsement? Is there a stamped endorsement on there?

A. Yes, sir.

Q. What stamped endorsement appears on there?

A. Highland Motor Sales.

Q. What were the circumstances under which you were requested to endorse that check?

Mr. Batter: Just a moment. There is no evidence, your Honor, that the witness was requested to endorse that check.

By Mr. Russo:

Q. Were you asked to endorse that check?

A. Yes, sir.

710 Q. Who asked you?

A. Mr. Cirrincione.

Q. When did he ask you?

A. After telling me that my car was sold and getting my title.

Q. After you endorsed it, what did you do with the check?

A. I gave it back. He took it right back with him.

711 Q. Did you have any conversation with Mr. Cirrincione as to how the proceeds of this check would be applied in connection with your transaction?

A. Yes, sir. He said it would be put toward my car that I had coming.

Q. I didn't understand you. Keep your voice up, please.

A. He said that would be put towards the car that I was purchasing.

Q. How long did you have to wait for the new car?

A. Oh, I don't remember, a week or ten days.

Q. When the car came in, what if anything happened?

A. The 1947, sir?

Q. Yes.

A. They just told me the car was there, and I went to the office and paid them $100, and I got my title, or the title certificate to apply for it.

Q. Now the title for the car that you had endorsed and transferred to Mr. Cirrincione, as I believe you testified, to whom did you deliver that?

A. He took that right with him.

Q. Do you have any recollection now as to what the total purchase price of the new car, the 1948 Plymouth four-door sedan, was?

712 A. No, sir, I do not, offhand.

Q. Your recollection is that you traded in your 1947 and got a 1948 and gave $100 to boot?

A. That is right.

Mr. Russo: Your witness, Mr. Batter.

Mr. Batter: No cross.

Mr. Russo: Thank you. That will be all, Mr. Troyke.

(Witness excused.)

Mr. Batter: Are you ready for Clark now?

Mr. Russo: Yes.

HANLEY CLARK, a witness heretofore called on behalf of the Government, and having been heretofore first duly sworn, resumed the stand and testified further as follows:

Cross Examination (Ctd.) by Mr. Batter.

Q. Mr. Clark, I hand you Government Exhibit No. 34 and ask you to look at it to refresh your memory.

A. Yes, sir.

Q. You are the same Mr. Clark who testified last Thursday?

A. Yes, sir—not Thursday, it was Wednesday.

713 Q. Wednesday?

A. That is right.

Q. Mr. Clark, you heretofore testified that this summary was handed to you by Mr. Coddington, a Government Agent, is that correct?

A. Yes, sir.

Q. You are sure it was Mr. Coddington?

A. Yes, sir.

Q. And was this entirely prepared by the time he handed it to you?

A. Yes, sir.

Q. Just when did he hand you this document, do you recall?

A. No, I don't, sir. I don't exactly remember the date.

Q. Was it in your possession for any length of time?

A. No, just long enough to sign it.

Q. Where was it that Mr. Coddington handed you this document?

A. At my office in Rockford.

Q. Again directing your attention to Government Exhibit No. 34, is that your signature in the upper right-hand corner?

714 A. Yes, sir.

Q. Is there a date under that signature?

A. Yes, sir, May 2, 1950.

Q. Is that date in your handwriting?

A. Yes, sir.

Q. Is that the date you signed that document?

A. Yes, sir.

Q. And Mr. Coddington handed you that document just long enough for you to sign, did you say?

A. As well as I can remember, yes, sir.

Q. Where was Mr. Coddington when he handed you that document?

A. As I said before, in my office, 425 Chestnut, Rockford.

Q. In your office?

A. That is right.

Q. How long had he been in your office that day?

A. I couldn't say, sir. I don't know.

Q. Was he there very long?

A. I just don't remember.

Q. What type of man was Mr. Coddington? Can you describe him?

A. Well, I would say probably middle-aged, a medium built man. That is about all I remember of him.

715 I didn't know him real well.

Q. Was he tall?

A. No, I would say probably five-eight or five-ten something like that.

Q. What is that?

A. Probably 5 foot 8, 5 foot 10, something like that; medium built man.

Q. Heavy?

A. I wouldn't say so, no.

Q. Medium?

A. Medium built, yes.

Q. What did Mr. Coddington say to you when he asked you to sign this document?

A. Well, I couldn't tell you that, sir. I don't remember. It has been five years.

Q. How much time elapse approximately between the time he handed you that document and you handed it back to him signed?

A. Well, probably a very short time. I don't remember, but it doesn't take too long just to sign your name and put a date on a piece of paper.

Q. When he handed you that document, that is all you did, was sign it and hand it back to him?

A. As far as I remember, yes, that is what I did.

716 Q. Now, Mr. Clark, on direct examination, you testified that you verified every item on this summary?

A. Yes, sir.
Q. When did you do that?
A. Well, that was before—well, when he was taking it out, I mean, I remembered most of the cars on there.
Q. You remembered most of the cars?
A. That is right.
Q. You don't remember all of them?
A. Well, he took—what he took off of my records is on there, and I could verify on that.
Q. Did he take this off your records or did he come in with this list compiled?
A. That was taken off our records to my knowledge.
Q. What do you mean, to your knowledge? Was it or wasn't it?
A. Well, what we turned over to him. After all, we turned it over to him and he took it from our records.
Q. You didn't watch him while he was doing so, did you?
A. No.
717 Q. And the only sight and access you have had to this document was the short time it was necessary for him to give it to you to sign?
A. If I remember right, that is right.
Q. Then as a matter of fact you did not and could not have verified the items on here from your books, could you?
A. I turned the books over to him and I presumed that he took it off accurate. I mean, that was his job. I don't know why he wouldn't take anything that wasn't his job.
Q. Now, Mr. Clark, I am asking you whether or not you wish to change your testimony. On direct examination you testified, last week when you were on the stand, and the record reads as follows:

"Q. Will you state, please, whether or not Government Exhibit No. 34 for identification correctly reflects the books and records of Clark & Omark as of May 2, 1947?"

Then I made an objection and Mr Russo said:

"Q. Answer the question.
"A. This was taken from our records.
"Q. Now at the time that that data was taken from your records, did you verify Government Ex-

718 hibit 34 with the books and records of Clark & Omark?

"A. Yes, sir.

"Q. Will you tell us, please, from whom all the cars that are listed on Government Exhibit No. 34 were purchased?

"A. From Highland Motor Sales."

This morning you testified that you turned your books over to Mr. Coddington and you assume he made his compilation from them; that you had this document in your hands only long enough to sign it and date it.

What is correct?

A. Well, I don't see that there is any discrepancy there at all. I merely told you exactly as well as I can remember what happened.

Q. Did you or did you not verify each item by date, by car make, by price, by motor number, on this list with your books independently yourself?

A. You mean at the time that they were checked through?

Q. Did you or did you not?

A. At the time the agent took them from our records and put them on that piece of paper?

719 Q. I am not concerned about what the agent did. I am asking what you did.

A. I didn't put them down there. The agent put them down there.

Q. The agent put them down there?

A. Sure.

Q. And you made no independent check for the accuracy of these records after it was made?

A. I didn't think that was any concern of mine.

Q. What was that?

A. I didn't think it was any concern of mine. After all, a Government Agent took it out of my records.

Q. Then your testimony this morning is the correct testimony?

A. Well, I don't know as it conflicts with anything I said the other day.

Q. Now, Mr. Clark, you testified on page 482 of the record—

Mr. Russo: Let's correct that statement. Your Honor, he didn't testify on the record. He testified on the stand.

By Mr. Batter:

Q. You testified on the stand, as reported on the record, at page 482, as follows:

720 "Q. Now, at the time that Government's Exhibit 34 for identification was made and verified with your records, were you also asked to produce all checks of Clark & Omark relating to those purchases?

"A. Yes, sir.

"Q. Were you able to find all those checks?

"A. I think nearly all of them, to the best of my knowledge."

Now, Mr. Clark, directing your attention to Government Exhibit 34, how many different purchases are reflected on that sheet?

A. How many different?

Q. Yes. Will you count them, please?

A. Thirty-five cars.

Q. Thirty-five?

A. Yes, sir.

Q. I wonder whether you would check that and be certain of that because I think some purchases include more than one car. How many purchases are included?

A. Oh, thirty-five automobiles.

Q. Yes.

A. Thirty-two purchases.

721 Q. In connection with those thirty-two purchases you were interrogated with respect to Government Exhibit No. 34, Exhibits 35, 36, 37 and 38, which I show you and which represent four different checks, is that correct?

A. As far as I can see, it is.

Q. Now in view of the fact that you made thirty-two different purchases and that you testified that you found nearly all the checks, that only four have been produced, can you account for the missing checks?

A. No, I can't, sir.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. Directing your attention, Mr. Clark, to Government Exhibit No. 34, did you assist Mr. Coddington in the compilation of that exhibit?

A. Well, he asked me for what records we had and I produced them, and if he wanted to know anything and I could help him, I merely answered the questions he would ask me. I wouldn't say I was of much assistance to him.

Q. He would ask you questions and you would
722 answer him, is that right?

A. That is right, sir.

Q. Now, did you check the data that is reflected on there with the records prior to the time that you signed Government Exhibit No. 34?

A. I don't think I checked it item for item, no, sir.

Q. Did you verify the items at the time that your books were examined?

A. That is awfully hard to remember. After all, that has been five years.

Q. What is your best recollection?

A. I just would rather say I just don't remember because I don't wholeheartedly. I know some of the items went through, we checked them out together, and probably not all of them. I just don't remember how we done it.

Q. But you did check them out, some of them out, with Mr. Coddington, you do say that?

A. Yes, I would say I did, yes, sir.

Q. You don't have any recollection as to which items on there you did not check out?

A. No, sir.

Q. I believe you testified that some of those purchases were made by check and some by cash, is that cor-
723 rect?

A. That is right, sir.

Q. And do you have any way of associating the payments that were made for the purchases reflected on Government Exhibit No. 34 with those that were made by check and those made by cash other than by reference to Government Exhibits 35, 36, 37 and 38?

A. No, sir, I do not.

724 Q. So that for those transactions other than those reflected on Government's Exhibits 35 through 38, inclusive, you have no record of whether those purchases were made—you have no recollection as to whether those purchases were made by check or by cash?

A. No, sir.

Q. Other than the checks, the original checks that were made available to Mr. Coddington at the time of his examination of your records, as they are reflected by Government's Exhibits 35 through 38, inclusive, you don't have the original checks—

A. No, sir.

Q. (Continuing)—associated with any of the other purchases?

A. No, sir.

Q. They may well have been made by cash?

A. Well, that is possible, yes, sir.

Mr. Russo: No further questions.

Recross Examination by Mr. Batter.

Q. Mr. Clark, counsel asked you whether you verified any of the items on Government's Exhibit No. 34. What did you understand him to mean by "verified"?

725 A. Well, when you verify it I imagine you would have to go right down the list and verify every transaction that went through.

Q. Did you actually take that list and check it back in detail as to car price and motor number on your record?

A. No, not the complete list, no, sir.

Q. You did not?

A. No, sir.

Mr. Batter: Your Honor, I now move that Government's Exhibit No. 34 be stricken from the record and that the entire evidence of the witness be stricken from the record, because it is all based upon Government's Exhibit No. 34. I ask that the jury be instructed to disregard all of that testimony. It is definitely established now that the record was not prepared by the witness: It was not verified by him. It was not checked by him. He is unable to state that it is a correct record of his books and transactions.

The Court: The motion will be denied. Proceed.

Mr. Batter: That is all.

726 Mr. Russo: At the time the Government offered Exhibits 35 through 38 for identification, if your Honor please, the Court reserved its ruling. At this time I will reoffer them.

The Court: These are the checks?

Mr. Russo: The four checks, yes, your Honor.
The Court: They may be received in evidence.
(The checks previously marked for identification Government's Exhibits Nos. 35 through 38, inclusive, were thereupon received in evidence as Government's Exhibits 35 through 38, inclusive.)
Mr. Russo: Are there any further questions?
Mr. Batter: No.
Mr. Russo: Thank you, Mr. Clark. That will be all.
(Witness excused.)

727 WILLIAM C. HOPPE, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is William C. Hoppe?
A. Yes, sir.
Q. That is spelled H-o-p-p-e?
A. Correct.
Q. Where do you live, Mr. Hoppe?
A. Route 3, Elgin, Illinois.
Q. What is your business or occupation, please?
A. I am in the feed business.
Q. What is the name of the business?
A. Ralston Purina Company.
Q. Sir?
A. Ralston Purina Company.
Q. What is your capacity there?
A. Chicago District Manager.
Q. Are you acquainted with an automobile sales company called Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
728 A. In Elgin.
Q. Directing your attention to on or about July 25, 1946, did you have a transaction with Highland Motor Sales at or about that time?
A. Yes, sir.
Q. What was the nature of that transaction?
A. I bought a Plymouth car.
Q. What model Plymouth did you buy?
A. I do not remember.

Q. What year model was it?
A. A current model.
Q. 1946?
A. Yes, a new car.
Q. A new car.
Was there a trade-in involved in that transaction?
A. Yes, sir.
Q. What kind of car did you trade in?
A. A 1942 Dodge.
Q. In addition to turning in the 1942 Dodge, did you make any additional payment towards the purchase price of the 1946 Plymouth?
A. Yes, sir.
Q. How much?
729 A. $713.75.
Q. To whom did you make that payment?
A. Sam Achilli.
Q. Do you see Sam Achilli in the Court Room?
A. Yes, sir.
Q. Will you point him out, please?
A. Over there. (indicating).
Q. The second man at the end of the defense counsel table?
A. The one with the glasses.
Q. Is he the same man to whom you delivered the money?
A. That is right.
Q. Directing your attention to October 16th, 1947, did you have a transaction with Highland Motor Sales at or about that time?
A. Yes, sir.
Q. What was the nature of that transaction?
A. I traded in a Packard car and bought a Chrysler.
Q. What year model Packard did you trade in?
A. I don't remember the model.
Q. What model Chrysler—what year model Chrysler did you buy?
A. A current model. A new car.
730 Q. It was a new car?
Q. Yes. In addition to the Packard that you traded in did you make any other—did you pay any other consideration?
A. $663.00.
Q. How did you make that payment, Mr. Hoppe?

A. By check.
Q. Do you have that check?
A. Yes, sir.
Q. May I have it, please?
A. Yes, sir.
Mr. Russo: Mr. Reporter, mark this Government's Exhibit No. 62 for identification.
(The document was thereupon marked Government's Exhibit 62, for identification.)
By Mr. Russo:
Q. I show you Government's Exhibit No. 62 for identification, Mr. Hoppe, which purports to be a check dated October 16, 1947, No. 1830, payable to the order of Highland Motor Sales, in the amount of $663.00, and purporting to be signed by W. C. Hoppe.
Directing your attention to the signature in the
731 lower right-hand corner thereof, whose signature is that?
A. My signature.
Q. Was it placed on there on or about the date the check bears?
A. That is right.
Q. After you signed that check, Mr. Hoppe, what if anything did you do with it?
A. I gave it to pay for the car.
Q. Who did you deliver the check to?
A. To Sam Achilli.
Q. Directing your attention to November 6th, 1947, did you have a transaction with Highland Motor Sales at or about that time?
A. Yes, sir.
Q. What was the nature of that transaction?
A. I traded in the Chrysler which I had bought for a nineteen forty—for the same model. I mean, for the same year, but an eight rather than a six.
Q. How did you make payment for the '47, the later car? That is, the one that you purchased.
A. I traded back the other one I had bought a month previously and paid $601.50.
Q. How did you make payment of that $601.50?
732. A. By check.
Q. Do you have that check?
A. Yes, sir.
Q. May I have it, sir?

A. Yes, sir.

Mr. Russo: Mr. Reporter, mark this Government's Exhibit No. 63 for identification, please.

(The document was thereupon marked Government's Exhibit No. 63 for identification.)

By Mr. Russo:

Q. I show you Government's Exhibit No. 63 for identification, a check of W. C. Hoppe, 469 River Bluff Road, Check No. 1841, dated November 6th, 1947, payable to the order of Highland Motor Sales, in the sum of $601.50, and purporting to be signed by W. C. Hoppe.

Directing your attention to the signature in the lower right-hand corner of that check, whose signature is that?

A. It is my signature.

Q. Was your signature placed on that check on or about the date it bears, November 6th, 1947?

733 A. Right.

Q. After you signed that check what if anything did you do with it?

A. Gave it in payment.

Q. To whom did you give the check?

A. Mr. Achilli.

Q. Directing your attention to the reverse side of Government's Exhibit No. 62, what endorsement, if any, does that check bear?

A. "For Deposit Only, Highland Motor Sales."

Q. Directing your attention to Government's Exhibit No. 63 for identification, whose endorsement, if any, does that check bear?

A. "For Deposit Only, Highland Motor Sales."

Mr. Russo: At this time, if your Honor please, I offer in evidence Government's Exhibits 62 and 63.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked for identification Government's Exhibits Nos. 62 and 63, were thereupon received in evidence as Government's Exhibits Nos. 62 and 63.)

734 Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Hoppe, I have two checks here, Government's Exhibits 62 and 63. I understood from your testimony that there were three items.

A. That is right.
Q. What about the first one?
A. I have the stub here. I do not have the cancelled check here on the first one.
Q. You do not have the cancelled check?
A. No.
Q. What was the amount of that check?
A. $713.75.
Q. What happened to that check?
A. I had it as evidence when I was questioned the first time. Since that time I have moved, and I haven't looked for it too much. It still might be in the place. I don't know.
Q. In any event, you don't have it here?
A. I don't have it here.
Q. Do you have any sales receipts or invoices on these three cars when you purchased them?
A. I don't know. I haven't looked for them.
735 Q. You haven't looked for them?
A. No.
Q. You wouldn't say that you did not get a sales invoice?
A. I did get sales invoices on the last two cars.
Q. Do I understand you to mean that you did not get one on the first one, or you don't remember?
A. I got a sheet of paper, but I didn't get the regular form. I got a slip of paper. I got an invoice on it, a specified invoice, but not a regular bill of sale.
Q. How do you distinguish between an invoice and a bill of sale?
A. One is a regular form, the bill of sale, and the other one is one that is merely written on a sheet of paper. That is what I would say.
Q. These cars, when you purchased them—taking first the first one, when you traded the 1942 Dodge plus the $713.75, you acquired what?
A. I acquired a Plymouth.
Q. A 1946 Plymouth?
A. The current model. That just was factory new.
Q. Did that include any accessories?
736 A. Yes.
Q. What form of accessories?
A. I don't remember.
Q. Was there a heater in it?

A. I don't remember.
Q. Was there a radio in it?
A. I don't remember. That is too long ago.
Q. But there were accessories?
A. Yes, there were some accessories.
Q. When you purchased the second car, on which you traded in a Packard and gave your check for $663.00, did that car include accessories?
A. I don't remember.
Q. When you purchased the third car, trading in the Chrysler for a Chrysler, and paying the $601.00, did that car that you received at that time include any accessories?
A. It included a heater and radio.
Q. A heater and radio?
A. Yes, sir.
Mr. Batter: That is all.

737 *Redirect Examination by Mr. Russo.*

Q. The prices that you have testified about, Mr. Hoppe, were they the complete and full prices of the automobiles concerning which you have testified?
A. That is right.
Mr. Russo: That is all. Thank you very much, Mr. Hoppe.
(Witness excused.)

ELMER KAMHOLZ, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Elmer Kamholz?
A. Yes.
Q. That is spelled K-a-m-h-o-l-z?
A. That is right.
Q. Mr. Kamholz, will you keep your voice up, please, so that the Court and the jury may hear you.
Where do you live?
738 A. Belvidere, Illinois.
Q. By whom are you employed?
A. Donald Bodey.
Q. What is the nature of Mr. Bodey's business?
A. Garbage Collector.

Q. What do you do, drive a truck for him?
A. Yes, sir.
Q. Directing your attention to September 4—strike that question.
Mr. Kamholz, do you know of an automobile sales company known as Highland Motor Sales?
A. Yes, I do.
Q. Where is that located?
A. Elgin, Illinois.
Q. Directing your attention to September 4th, 1946, did you have a transaction with Highland Motor Sales at or about that date?
A. Yes, I did.
Q. What was the nature of that transaction?
A. Trading automobiles.
Q. Trading automobiles?
A. That is right.
Q. What kind of car did you get?
A. A '41 Plymouth two-door.
739 Q. What was the purchase price of that '41 two-door?
A. $900.00.
Q. Who fixed that price?
A. Sam Achilli.
Q. What was the consideration that you gave for the car?
A. I gave my car and $300.00 down.
Q. What kind of car did you give?
A. A '36 Oldsmobile four-door.
Mr. Batter: What?
The Witness: A '36 Olds.
Mr. Russo: Will you keep your voice up so that we can get above the building noise that is going on, please?
By Mr. Russo:
Q. That was a '36 Oldsmobile, as I understand you. Is that right?
A. Yes.
Q. How much were you allowed for that?
A. I give him that and $300.00. I don't know what he allowed me.
Q. You gave him the Oldsmobile and $300.00?
A. That is right.
740 Q. In what form was the $300.00? Was that cash or check?

A. Cash.
Q. Cash?
A. Cash.
Q. To whom did you deliver that money?
A. Sam.
Q. With whom did you finance the balance?
A. Elgin Acceptance Company.
Q. How much was that balance?
A. $600.00.
Q. Mr. Kamholz, do you have any sales receipts or bills that were delivered to you at or about the time this transaction took place?
A. No, I haven't,
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. What documents were you given at the time you made this transaction?
A. You mean in writing, or—
Q. Yes.
A. Well, I imagine I had a sales slip and title and stuff like that, but since then I have gotten rid of
741 all that.
Mr. Batter: That is all.
Mr. Russo: Thank you, sir. That will be all.
(Witness excused.)

HENRY SIEMS, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Henry Siems?
A. Yes.
Q. That is spelled S-i-e-m-s?
A. Right.
Q. Where do you live, Mr. Siems?
A. 616 South Second Street, Dundee.
Q. Mr. Siems, there is a lot of noise going on out here. So that the Court and jury may hear you, will you keep your voice up, please?
A. Yes, sir.
Q. Where do you live?

A. 616 South Second Street, Dundee, Illinois.

742 Q. What is your business?

A. Used car dealer.

Q. Where?

A. Dundee, Illinois.

Q. Do you know of an automobile sales company known as Highland Motor Sales?

A. Yes.

Q. Where is that located?

A. In Elgin.

743 Q. Directing your attention to the early spring of 1946, April 20, 1946, did you at or about that time have a transaction with Highland Motor Sales?

A. Yes, sir.

Q. With whom did you deal?

A. Mr. Achilli.

Q. Do you see Mr. Achilli in the court room?

A. Yes, sir.

Q. Will you point him out, please?

A. The gentleman sitting over there to the right (indicating).

Q. The third man at the far end of defense counsel table?

A. Right.

Q. Is he the Sam Achilli with whom you dealt on this occasion?

A. Yes.

Q. What was the nature of the transaction that you had there?

Mr. Batter: I object, your Honor. The man was in business, a used car dealer, and obviously kept books. I think the books are the best evidence of what transpired.

744 Mr. Russo: He can testify as to whether or not he had a transaction, and then we can develop whether it is one of those cases where books and records are necessary.

The Court: He may answer.

By Mr. Russo:

Q. What was the nature of the transaction that you had with Highland Motor Sales?

A. Well, I had a 1937 Dodge tow truck, and I traded him even up for a 1939 LaSalle four-door sedan. No cash involved, just an even transaction.

Q. No cash involved, just an even transaction?
A. Yes, sir.
Q. What value did you place on the Dodge tow truck?
Mr. Batter: I object to that, your Honor. What value he placed on the Dodge truck is of no concern of ours.
The Court: Well, I don't think the ground-work has been laid as to whether or not he can establish values.
Mr. Russo: Your witness.

745 *Cross Examination by Mr. Batter.*

Q. Mr. Siems, did you keep regular books of account in 1946?
A. I didn't hear you.
Q. Did you keep regular books of account in the year in which you made this trade, which was 1946?
A. Yes, I believe so.
Q. Do you have those books of account here?
A. No, I don't have them.
Q. They are not in existence?
A. No.
Q. What happened to them?
A. Well, we had a flood at home here a short while back in the basement, in the last year, and they are disposed of. They were water-soaked and thrown out. I didn't throw them out. I didn't have them at the time. They were next door in a house we used to live, and I had them in the basement, and my dad threw them out unbeknown to me.
Q. So your books and records for the year 1946 are no longer in existence, are they?
A. That is right.
Mr. Batter: That is all.

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746 WALTER BRAWNER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Walter Brawner.
Q. Will you spell your last name, please?
A. B-r-a-w-n-e-r.

Q. Mr. Brawner, will you keep your voice up so the Court and Jury may hear you too.
A. All right.
Q. What is your address, Mr. Brawner?
A. 1615 North 121st, Wauwautosa, Wisconsin.
Q. What is your business?
A. Salesman.
Q. By whom are you employed?
747 A. Coles Chemical Company.
Q. Where is that located?
A. Cleveland, Ohio.
Q. Mr. Brawner, are you acquainted with an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that company located?
A. Elgin, Illinois.
Q. Directing your attention to March 30, 1946, did you at or about that time have a transaction with Highland Motor Sales?
A. Yes, sir.
Q. With whom did you deal there?
A. With Sam Achilli.
Q. Do you see Sam Achilli in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. The man on the end there (indicating).
Q. The third man on the far side of defense counsel table?
A. Right.
Q. What was the nature of your transaction at Highland Motor Sales?
A. Well, I bought a 1946 Plymouth from him, and
748 I traded in a 1941 Buick, sedanette.
Q. What allowance were you given for the 1941 Buick?
A. I think it was about $674.
Q. How did you pay the difference?
A. I gave him a check for $437.
Mr. Russo: I will ask that this be marked Government Exhibit No. 64 for identification.
(The document was thereupon marked Government Exhibit No. 64 for identification.)
By Mr. Russo:
Q. I show you Government Exhibit No. 64 for iden-

tification, and ask you if that is the check to which you refer.

A. That is right.

Q. Directing your attention to Government Exhibit No. 64 for identification, which purports to be a check drawn on the First National Bank in Wauwautosa, payable to the order of Highland Motor Sales, in the amount of $437.51, dated March 30, 1946, and purporting to be signed by W. G. Brawner, directing your attention to the signature on Government Exhibit No. 64 for identification, whose signature is that?

749 A. It is mine.

Q. Did you place your signature on Government Exhibit 64 for identification on or about the date the check bears, March 30, 1946?

A. On the same day.

Q. On the same day?

A. Yes.

Q. After you signed that check, what if anything did you do with it?

A. I gave it to Sam.

Q. You gave it to Sam Achilli?

A. Yes.

Q. Directing your attention to the reverse side of Government Exhibit 64 for identification, what if any endorsements does it bear?

A. Highland Motor Sales, Ken Carlson, Cashier, I guess it is.

Q. Will you speak out loud so the Court and the Jury may hear you too?

A. Signed Highland Motor Sales, Ken Carlson, Cashier.

Q. So if I understand your testimony correctly, you were allowed $674 for the 1941 Buick and you gave Mr. Achilli this check for $437.51, making the total purchase price of the 1946 Plymouth car that you purchased

750 $1,111.51, is that correct?

A. Right.

Q. Was that a new Plymouth car that you purchased?

A. Yes.

Mr. Russo: At this time, if your Honor please, I offer in evidence Government Exhibit No. 64.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government Exhibit No. 64 for identification was thereupon received in evidence as Government Exhibit 64.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Brawner, when you entered into this transaction or consummated it, did you get a sales slip?

A. Yes.

Q. Do you have it?

A. No.

Q. What has become of it?

A. Well, we destroyed it.

751 Mr. Batter: That is all.

The Witness: As a matter of fact, I was lucky to have the check.

Mr. Russo: Thank you, sir. That will be all.

(Witness excused.)

DALE BOOSE, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Dale Boose?

A. That is right.

Q. And your last name is spelled B-o-o-s-e?

A. Yes, sir.

Q. Where do you live, Mr. Boose?

A. Elgin, Illinois.

Q. Is there a route or street number?

A. Route 2, Box 353.

Q. What is your business or occupation?

A. Automobile salesman.

Q. By whom are you employed?

752 A. Elgin Motors.

Q. And what was your business or employment in 1946, Mr. Boose?

A. I believe I was a factory foreman.

Q. For what company?

A. Batavia Metal Products.

Q. Where is that located?

A. Batavia, Illinois.

Q. Do you know an automobile sales company known as Highland Motor Sales?

A. I do.

Q. Where is that located?

A. On Wellington Avenue in Elgin.

Q. Elgin, Illinois?

A. Yes.

Q. Directing your attention to on or about October 9, 1946, did you have a transaction with Highland Motor Sales at or about that time?

A. I did.

Q. With whom did you have your transaction?

A. With Mr. Achilli.

Q. Do you see Mr. Achilli in the court room?

A. I do.

Q. Will you point him out, please?

753 A. Yes, sir, (indicating).

Q. The third man sitting at the far side of defense counsel table?

A. That is right.

Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?

A. Yes.

Q. What was the nature of the transaction that you had there?

A. Well, I bought a new 1946 Plymouth and I paid $1345, the selling price, to the best of my memory, and I traded a 1937 Chevrolet pickup truck.

Q. What were you allowed for the 1937 Chevrolet pickup truck?

A. To the best of my memory, $228.

Q. How did you make payment?

A. $1,000 check and I paid $117.10, I believe, in cash.

Mr. Russo: I will ask that this be marked Government Exhibit 65.

(Said document was thereupon marked Government Exhibit 65 for identification.)

By Mr. Russo:

754 Q. I show you Government Exhibit No. 65 for identification and ask you if that is the check to which you refer?

A. That is right.

Q. Directing your attention to Government Exhibit No. 65, which purports to be a check drawn on the Union National Bank and Trust Company of Elgin, dated October 9, 1946, payable to the order of Highland Motor Sales in the sum of $1,000, and purporting to be signed by Dale Boose, directing your attention to the signature, whose signature is that?

A. That is mine, sir.

Q. Was your signature placed on Government Exhibit No. 65 on the date it bears, October 9, 1946?

A. I would say so, yes, sir.

Q. Now after you signed that check, Mr. Boose, what if anything did you do with it?

A. Well, I gave it to Mr. Achilli, I believe.

Q. Directing your attention to the reverse side of Government Exhibit No. 65 for identification, state please whether or not any endorsement appears on there?

A. It does, sir.

Q. What endorsement appears on there?

755 A. Highland Motor Sales, K. H. Carlson.

Mr. Russo: At this time, may it please the Court, I offer in evidence Government Exhibit No. 65 for identification.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government Exhibit 65 for identification was thereupon received in evidence as Government Exhibit 65.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Boose, did you receive a sales invoice at the time that you bought that car?

A. I did, but I don't have it.

Q. You don't have it?

A. No, sir, I don't. I lost it.

Mr. Batter: That is all.

Mr. Russo: That is all. Thank you.

(Witness excused.)

756 NORBERT KOSCHNICK, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Norbert Koschnick?
A. Yes, sir.
Q. And Norbert is spelled N-o-r-b-e-r-t?
A. Yes, sir.
Q. And your last name is spelled K-o-s-c-h-n-i-c-k?
A. Yes, sir.
Q. Where do you live, Mr. Koschnick?
A. South Elgin.
Q. Do you have a street address?
A. 22 Lafox Street.
Q. What is your business, please?
A. Tavern owner.
Q. Where is your business located?
A. 22 Lafox Street.
Q. What is the name of your business?
A. Norb's Lounge.
Q. And that is located in—
A. South Elgin.

Q. Do you know of an automobile company known
757 as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. Wellington Avenue in Elgin.
Q. Elgin, Illinois?
A. Yes, sir.
Q. Directing your attention, Mr. Koschnick, to on or about Christmas time in 1946, did you have a transaction with Highland Motor Sales at or about that time?
A. I did.
Q. With whom did you deal there?
A. Sam Achilli.
Q. Do you see Mr. Achilli in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. The person on the end there (indicating).
Q. The third man at the far end of defense counsel table?

A. Yes, sir.

Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?

A. Yes, sir.

Q. What was the nature of the transaction that
758 you had there?

A. I bought a used car.

Q. What kind of used car did you buy?

A. A 1936 Plymouth.

Q. How much did you pay for it?

A. $400.

Q. How was payment made?

A. $150 cash and $250 financed.

Q. To whom did you deliver the $150 in cash?

A. Well, it was in Sam's office there, in his room.

Q. You paid it in Sam's office, in his room?

A. In the office there, in that little room.

Q. With what company did you finance the $250?

A. Elgin Acceptance Corporation or Company, I don't know which.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Koschnick, do you have a receipt for the $150 you paid?

A. No, I have no receipt left, no nothing.

Q. Did you get one at the time?

A. Well, I don't think I would have walked out of
759 there without a receipt.

Q. Do you have an invoice for the car?

A. No.

Q. Did you get one?

A. You mean—?

Q. A bill.

A. A bill of sale?

Q. Yes.

A. That I don't know.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Koschnick. That is all.

(Witness excused.)

HOWARD V. SEYLLER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Howard V. Seyller.
Q. Is Seyller spelled S-e-y-l-l-e-r?
A. Yes, sir.
760 Q. Where do you live, Mr. Seyller?
A. Elgin.
Q. Whereabouts?
A. 407 South Edison.
Q. What is your business?
A. I have a trailer court.
Q. What is the name of it?
A. Laurel Trailer Court.
Q. Is that your own business?
A. Yes.
Q. Where is that located, Mr. Seyller?
A. On Laurel Street, 765 Laurel Street, in Elgin.
Q. Do you know an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. I don't know the correct address, but I believe it is on Wellington Avenue.
Q. In what city?
A. Elgin.
Q. Elgin, Illinois?
A. Yes.
Q. Will you speak up, Mr. Seyller, please, so the Court and Jury may hear you too.
761 A. Yes.
Q. What was the nature of that transaction?
A. Of the car?
Q. Did you have a transaction with Highland Motor Sales on or about December 21, 1946?
A. Yes, I did.
Q. What was the nature of that transaction?
A. Well, I bought a 1946 Chrysler, Windsor Club Coupe.
Q. Was that a new or used car?

A. That was new.
Q. What was the total purchase price of that car?
A. I believe it was $2230 some odd, but that included, I believe, license and a few incidentals.
762 Q. Was there a trade-in involved?
A. Yes. I had a '36 Plymouth.
Q. In addition to the '36 Plymouth, what consideration did you give for the '46 Chrysler club coupe?
A. Well, that is the—what I gave is the figure that I just quoted there before, twenty-two hundred and thirty some dollars.
Q. $2,230.00?
A. I believe it is thirty-two dollars, or something like that.
Q. How did you make payment of the $2,232.00?
A. I gave a check at that time.
Q. Do you have that check, Mr. Seyller?
A. Well, no. That is quite a while ago. I don't believe I have that any more.
Q. Did you search for it?
A. Oh, I could look, but I don't know if I could find it. I doubt it.
Q. To whom did you give the check?
A. To Sam Achilli.
Q. What year model was the Plymouth that you traded in?
A. That was a '36.
Q. What type of car was it?
763 A. A four-door.
Q. Sedan?
A. Sedan. Four-door sedan.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Seyller, when you purchased this car did you receive an invoice or bill of sale?
A. Yes, I did.
Q. Do you have it?
A. No, I don't have it.
Mr. Batter: That is all.
(Witness excused.)

JAMES JERVEY, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is James Jervey?
A. Yes.
764 Q. Is your last name spelled J-e-r-v-e-y?
A. Yes, sir.
Q. Where do you live, Mr. Jervey?
A. Bartlett.
Q. Bartlett?
A. Yes.
Q. What State?
A. Illinois.
Q. What is your business?
A. Machinist.
Q. By whom employed?
A. Set Screw Manufacturing Company.
Q. Where is that located?
A. In Bartlett.
Q. Mr. Jervey, are you acquainted with an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. Elgin, Illinois.
Q. Directing your attention to the month of June, 1946, did you sometime during that month have a transaction with Highland Motor Sales?
A. Yes, sir.
Q. With whom did you deal there?
765 A. Mr. Achilli.
Q. Do you see Mr. Achilli in the Court Room?
A. Yes, sir.
Q. Will you point him out, please?
A. He is the third man on the right over there. (Indicating.)
Q. The third man on the far side of the defense counsel table?
A. Yes, sir.
Q. What was the nature of the transaction that you had with Mr. Achilli?
A. I was trading a car and buying one.

Q. What kind of car did you buy?
A. A '40 Ford.
Q. What was the total purchase price of that Ford?
A. About $1,100.00.
Q. Was that a new car or a used one?
A. A used car.
Q. What kind of car did you trade in?
A. A '36 Nash.
766 Q. What allowance, if any, were you given for the '36 Nash?
A. $125.00.
Q. How did you make payment of the Ford that you purchased?
A. By the month.
Q. What was the amount that you financed?
A. About a little over $900.00.
Q. In addition to the Ford that you traded in, state whether or not you paid any cash payment, down payment, at that time?
A. No, sir, I didn't.
Q. You did not?
A. No, sir.
Q. How much was it that you said you financed?
A. About $900.00.
Q. With whom did you finance it?
A. With the Elgin Acceptance Corporation.
Q. At the time of the transaction were you given a sales slip or a bill of sale?
A. No, sir, I wasn't.
Mr. Russo: Your witness, Mr. Batter.

767 *Cross Examination by Mr. Batter.*

Q. You purchased that car in June of 1946?
A. Yes, sir.
Q. And you traded just with Sam Achilli?
A. Yes.
Q. What day of the week was it?
A. That I couldn't say.
Q. Was it a rainy day or a sunshiny day?
A. I couldn't—that is a long time ago. I couldn't remember that.
Q. Then how do you remember the exact price of $1,100.00?

A. Well, because I can.
Q. What?
A. Because I remember the kind of—the condition the car was in, and all that.
Q. Can you very definitely remember that you did not get a sales slip?
A. That I didn't get one.
Q. You did not?
A. I did not.
Q. What did you get?
A. To the best of my knowledge, I didn't get
768 anything. All I got was a coupon book to make the payments on it. That is all I got.
Q. You got a coupon book?
A. Yes.
Q. That coupon book called for $900.00 in payments?
A. Yes.
Q. That included the finance charges, then, did it?
A. It probably did.
Q. Did it include the insurance?
A. No.
Q. It didn't? Didn't the finance company carry the insurance?
A. No, they did not.
Q. You paid for the insurance yourself?
A. I paid the insurance myself.
Q. But it did include whatever financing there was?
A. It probably did.
Mr. Batter: That is all.

769 *Direct Examination by Mr. Russo.*

Q. Let me ask you, Mr. Jervey—you have testified that the amount that you financed was $900.00. Now, you had to pay a finance charge on top of that $900.00, did you not?
A. Yes, sir.
Q. The $900.00 did not include the finance charges as such; is that correct?
A. I wouldn't say so.

Recross Examination by Mr. Batter.

Q. In 1946, when you purchased this car, did you go to the OPA to get a gas coupon book?
A. No.

Mr. Russo: I object, if your Honor please. That is beyond the scope of direct examination.

Mr. Batter: It is going to show that he had to have the title and bill of sale for that car in order to get them.

The Court: He may answer it.

By Mr. Batter:

Q. Did you?

770 A. No, I didn't need gas coupons then.

Q. In 1946?

A. No, I did not.

Mr. Batter: That is all.

Mr. Russo: That is all. Thank you, sir.

(Witness excused.)

GEORGE N. SAUM, called as a witness on behalf of the Government, herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. George N. Saum.

Q. Where do you live, Mr. Saum?

A. In Wayne.

Q. Is there a street address?

A. Powis Road.

Q. What is your business or occupation?

A. I am with Taylor Forge and Pipe Works.

Q. Where is that located?

A. 14th and Cicero.

771 Q. Mr. Saum, do you know of an automobile sales company known as Highland Motor Sales?

A. I do.

Q. Where is that located, please, sir?

A. In Elgin.

Q. Directing your attention to March 8th, 1947, did you on or about that date have any transaction with Highland Motor Sales?

A. Yes, I did.

Q. With whom did you deal, sir?

A. Sam.

Q. Sam Achilli?

A. I don't know his last name. I know it now.

Q. Do you see Sam in the Court Room now?

A. Well, I think so.

Q. Will you point him out, please?

A. I think he is the last man on that side, (indicating) but that was eight years ago, and I only saw him once, so I am not positive.

Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?

A. I am sure he is, yes.

Q. What was the nature of the transaction that you had with Mr. Achilli on March 8th, 1947?

772 A. Well, I bought a car.

Q. What kind of car did you buy?

A. A Chrysler convertible.

Q. Was that new or used?

A. New.

Q. What was the total purchase price of that car?

A. I don't remember the exact amount. About $2,800, I think.

Q. Was there a trade-in involved?

A. Yes, there was.

Q. What kind of car did you trade in?

A. A Cadillac.

Q. What allowance were you given for the Cadillac?

A. I think it was $1,300.

Q. How did you make payment for the difference between the allowance of $1,300 and the approximately $2,800 you say you paid for the '47 new Chrysler?

A. By check.

Q. Was that paid by more than one check?

A. Yes, it was.

Mr. Russo: Mark these Government's Exhibits Nos. 66 and 67, please.

773 (The documents were thereupon marked Government's Exhibits Nos. 66 and 67, for identification.)

By Mr. Russo:

Q. I show you Government's Exhibits Nos. 66 and and 67, Mr. Saum, and ask you if those are the checks to which you have referred?

A. Yes, they are.

Q. Directing your attention to Government's Exhibit No. 66, purporting to be a check drawn on the La Salle National Bank on March 8, 1947, in the sum of $235.00, and purporting to be signed by George N. Saum, is that your signature in the lower-right-hand corner?

A. Yes, it is.

Q. Was your signature placed on there on or about the date the check bears?

A. Yes, it is.

Q. Directing your attention to Government's Exhibit No. 67 for identification, purporting to be a check drawn on the La Salle National Bank on March 8th, 1947, in the sum of $1,530, payable to the order of Highland Motor Sales, and purporting to be signed by George N. Saum, directing your attention to the signature in the lower right-hand corner, whose signature is that?

774

A. That is mine.

Q. Was it placed on Government's Exhibit No. 67 on or about the date the check bears, March 8th, 1947?

A. That is right.

Q. What did you do with Government's Exhibits 66 and 67 after you signed them?

A. I gave them to Highland Motor Sales.

Q. To whom did you deliver them?

A. Well, Sam.

Q. Directing your attention to the fact that Government's Exhibit No. 66 is drawn payable to the order of cash and Government's Exhibit No. 67 is drawn payable to the order of the Highland Motor Sales Company, can you state why both checks—why one check was drawn payable to the order of cash and the other payable to the order of Highland Motor Sales?

A. Well, as I recall it, I was asked to do it that way.

Q. By whom were you asked?

A. Well, it would have been by Sam. He is the only one I did business with.

775

Q. Directing your attention to the reverse side of Government's Exhibit No. 66, will you state whether or not it bears an endorsement?

A. Yes, it does.

Q. Whose endorsement does it bear?

A. It says, "Sam Achilli".

Q. Directing your attention to the back of Government's Exhibit No. 67 for identification, will you state, please, whether or not that bears an endorsement?

A. Yes.

Q. Directing your attention to Government's Exhibit No. 66, is Sam Achilli's endorsement a stamped endorsement or handwritten endorsement?

A. 66? This one (indicating)?
Q. Yes, sir.
A. That is handwritten.
Q. And the endorsement on the back of Government's Exhibit No. 67; is that a written endorsement or a stamped endorsement?
A. That is stamped.

Mr. Russo: At this time, your Honor, we offer in
776 evidence Government's Exhibits 66 and 67.

Mr. Batter: No objection.

The Court: They may be received in evidence.

(The documents previously marked for identification Government's Exhibits Nos. 66 and 67, were thereupon received in evidence as Government's Exhibits Nos. 66 and 67.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Saum, do you have a bill, receipt, invoice, or whatever you choose to call it, covering this transaction?
A. No, I don't.
Q. Have you ever had one?
A. If I did, I don't recall it.
Q. Mr. Saum, you testified that the allowance on the Cadillac, if I understood you correctly, was $1,300; is that correct?
A. I think that is correct. That is the way I recall it.
Q. How do you recall that figure?
777 A. Well, it just sticks in my mind.
Q. Have you had your memory refreshed recently on it?
A. Yes.
Q. How was your memory refreshed?
A. This morning, upstairs in the Attorney's Office. An affidavit that I had some time ago, I think in 1950, was shown to me. That showed the $1,300, and that is the way I recall it, too.

Mr. Batter: May I have that affidavit?

Mr. Russo: Here it is.

Mr. Batter: Mark this Defendant's Exhibit No. 3 for identification.

(The document was thereupon marked Defendant's Exhibit 3, for identification.)

By Mr. Batter:

Q. Mr. Saum, I hand you Defendant's Exhibit 3 for identification and ask you if you have seen that document before.

A. Yes, I have.

Q. Is that your signature on it?

A. Yes, it is.

778 Q. Is the document in your handwriting?

A. No.

Q. It is not?

A. No.

Q. When was that document prepared?

A. Well, I think on this date, but of course, I can't say for sure.

Q. What is that date?

A. That is the 11th day of August, 1950.

Q. Tell me the circumstances under which this document was prepared.

A. As well as I can recall them, I think it was the Treasury Department that asked me to come into their office in the Loop. I don't remember exactly where it is. I was interviewed at that time and asked about the transaction that I have been asked about here.

I was instructed at the time, prior to the interview, to have with me whatever papers might pertain to the purchase of the car. It was the outgrowth of that interview that resulted in that statement.

Q. Did you have any papers with you at the time?

A. As I recall it, I did.

779 Q. What did you have?

A. I think the two checks, and to the best of my knowledge that was all. That is all I can recall.

Q. So that nothing you had with you at that time in any way refreshed your recollection as to the allowance on the Cadillac, did it?

A. Well, that was much closer to the time of the transaction, and I am quite sure at that time I remembered with certainty what the amount was.

Q. Did you remember the amount, or was it suggested to you by the interviewer?

A. It was not suggested to me.

Q. Since 1950 when have you seen this document?

A. I believe this morning, I think, is the first time.

Q. Did you see it about six months ago?

A. I don't recall seeing it. I remember discussing the matter about that time, but I don't recall reviewing the statement.

Q. Mr. Saum, on November 17, 1954, you testified as follows:—

Mr. Russo: Just a moment, if your Honor please. I object to that.

780 The Court: The objection is sustained.

Mr. Batter: Your Honor, I am impeaching the witness' testimony. This is in direct conflict with what he is testifying now. I think I have the right to show the conflict in his testimony.

Mr. Russo: He can ask him in some other fashion.

The Court: That is right.

Mr. Russo: He can ask him without referring to anything that happened prior to this trial.

By Mr. Batter:

Q. Did you, as recently as November, 1954, testify under oath that you did not know the amount of the allowance on the Cadillac car?

Mr. Russo: I object to the form of the question, if your Honor please.

The Court: Objection sustained.

By Mr. Batter:

Q. Did you in November of 1954, under oath, make a statement that you did not know the amount of the allowance on the Cadillac car?

A. I don't recall exactly. I may have.

781 Q. I show you a document that purports to cover your statements under oath and ask you to refresh your recollection from that document.

Mr. Russo: I object to it, your Honor. I object to the reference to the document.

The Court: Objection sustained.

By Mr. Batter:

Q. This morning when you were shown Defendant's Exhibit No. 3 for identification, did that document in fact refresh ~~your~~ recollection—

A. I think—

Mr. Russo: If your Honor please, —

By Mr. Batter:

Q. (Continuing)—as to the amount involved in the 1946 transactions?

Mr. Russo: If your Honor please, at this time I would like to point out that this document was shown to the witness by Defense counsel. It was not shown to him by Government counsel. It is beyond the scope of the direct examination, and I object to any further cross examination as to Defendant's Exhibit 3 for identification.

782

Mr. Batter: The witness testified that this was shown to him this morning in the witness room by the prosecution.

Mr. Russo: Only as a result of questions asked by defense counsel. It did not come out in the Government's direct, your Honor.

Mr. Batter: Counsel did not interrogate the witness before—

The Court: What is the question?

Mr. Batter: Whether, in fact, this document refreshes his recollection.

The Court: He may answer it.

The Witness: Well, I thought I had testified before that that had refreshed my memory. The answer is yes.

By Mr. Batter:

Q. It very definitely refreshed your recollection?

A. That is correct.

783 Q. Mr. Saum, sometime in the past in response to a question which read:

"What was the allowance you were given on the Cadillac?"

did you respond:

"I don't remember what the allowance was"?

A. Very possibly.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. Mr. Saum, I hand you Defendant's Exhibit No. 3 for identification, and referring to that exhibit I will ask you to state the motor number of Cadillac that was traded in by you.

Mr. Batter: That, your Honor, is not proper redirect.

The Court: He may answer it.

By the Witness:

A. 1941 Cadillac, Motor No. 5367564.

Mr. Russo: No further questions.

Mr. Batter: Let me have that document, please.

784 *Recross Examination by Mr. Batter.*

Q. Mr. Witness, you just testified as to the motor number of the Cadillac. Do you have any independent recollection of that motor number?

A. No.

Q. Irrespective of this document?

A. No.

Q. And does this document in fact refresh your memory as to what that motor number was from your own knowledge?

A. Well, no.

Mr. Batter: That is all.

Mr. Russo: No further questions. Thank you, sir.

The Witness: All right.

(Witness excused.)

785 HARVEY KAPPEN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please sir?

A. Harvey Kappen.

Q. How do you spell your last name?

A. K-a-p-p-e-n.

Q. Where do you live, Mr. Kappen?

A. Hampshire, Illinois.

Q. What is your business, sir?

A. I am a plasterer.

Q. Are you in business for yourself, or are you employed by someone?

A. I am employed by a contractor.

Q. What is the name of the contractor?

A. Louis Flinchey, 71 South Dubois, in Elgin.

Q. Are you acquainted with an automobile sales company known as Highland Motor Sales?

A. I am.

Q. Where is that company located?

A. 192 Wellington, in Elgin, Illinois, Wellington Street.

786 Q. Will you keep your voice up so the Court and Jury may hear you too, please.

A. Yes, sir.

Q. Directing your attention to October 4, 1946, did you at or about that time have a transaction with Highland Motor Sales?

A. No, sir.

Q. Directing your attention to June 8, 1946, did you at or about that time have a transaction with Highland Motor Sales?

A. I did, sir.

Q. What was the nature of that transaction?

A. I bought a used automobile, a 1932 Pontiac.

Q. What was the agreed purchase price?

A. $280.

Q. How did you make payment?

A. I paid $100 cash down payment and the rest was financed.

Q. With whom was the balance financed?

A. The Elgin Acceptance Company.

Q. To whom did you make the $100 down payment?

A. To the salesman at the company.

Q. Do you recall his name?

A. Only by nickname, Consie or Cons.

787 Q. Would that be Constantine Cirrincione?

A. It could be very well, yes, sir.

Q. Did you testify that you made the down payment by cash?

A. Yes, sir.

Q. Is that what you said?

A. I did.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Did you get a receipt for the cash payment you made?

A. Sir, I imagine I did. I don't have it.

Q. You don't have it any more?

A. No, I don't, sir.

Q. Did you get an invoice for the car?

A. Pardon?

Q. Did you get an invoice for the car?

A. An invoice?

Q. A bill, a statement of bill.

A. Well, I would imagine, but I don't have any of that. That would be in the transaction, I would imagine.

• • •

788 DOROTHY STEVENS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Dorothy Stevens.
Q. Miss or Mrs.?
A. Mrs. John Stevens.
Q. Will you spell your last name?
A. Stevens, S-t-e-v-e-n-s.
Q. Where do you live, Mrs. Stevens?
A. 9200 Lubeck, Downey, California.
Q. How long have you lived at Downey, California?
A. Oh, two years in January.
Q. Before you lived in California, where did you live?
A. In Riverside, at 418 Kent Road.

789 Q. Mrs. Stevens, would you be good enough to keep your voice up so the Court and the last member of the jury may hear you too.

How long did you live at Riverside?
A. About fifteen years.
Q. Do you have any business other than a homemaker?
A. No, sir.
Q. Just a housewife?
A. Yes, sir.
Q. Directing your attention to April 3, 1947—Strike that question.

Do you know of an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that company located?
A. In Elgin, Illinois.
Q. Directing your attention to April 3, 1947, did you at or about that time have a transaction at Highland Motor Sales?
A. Yes.
Q. With whom did you deal there?

A. With Sam Achilli.
Q. Do you see Sam Achilli in the court room?
A. I think so.
790 Q. Will you point him out, please?
A. The third gentleman there (indicating).
Q. The third man at the far end of defense counsel table?
A. Yes, sir.
Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?
A. Yes, sir.
Q. What was the nature of the transaction that you had there?
A. I purchased a car.
Q. What kind of a car did you purchase?
A. A 1947 Chrysler.
Q. What was the full purchase price of that 1947 Chrysler Windsor?
A. $2,786.50.
Q. How did you make payment?
A. By check and the trade-in.
Q. What kind of a car did you trade in?
A. A 1942 Oldsmobile sedan.
Q. What allowance if any were you given on the 1942 Oldsmobile sedan?
A. $800.
Q. How did you pay the balance?
791 A. By check.
Q. In what amount was the check?
A. $1,986.50.
Q. To whom did you deliver the check?
A. To Mr. Achilli.
Q. Do you have the check with you, Mrs. Stevens?
A. No, sir.
Q. Do you know what happened to it?
A. I destroyed it when I moved to California.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mrs. Stevens, do you have a sales slip on that car?
A. I do not.
Q. And you don't have the check?
A. No, sir.

Q. How do you recall the amount so distinctly of the check?

A. I have my check book stubs and it is the first car I purchased in my own name.

Q. Do you have that check stub book with you?

A. Yes, I have that right here.

792 Q. May I see it?

A. Yes, sir.

(Witness handed document to Mr. Batter.)

By Mr. Batter:

Q. Does that check stub book refresh your recollection as to how much allowance you got for the Oldsmobile?

A. No, it doesn't, excepting I remember the purchase price of the car because—

Q. You remember what?

A. The purchase price, the list price of the car because it was the first car I purchased and the first time I ever bought a car. That is why I do remember the allowance on the old car.

Q. Then you arrive at the $800 by the difference between that check stub and the amount that you remember to be the list price of the car?

A. Yes, sir.

Mr. Batter: I see. That is all.

The Witness: Am I excused?

Mr. Russo: Just a moment, ma'am.

793 *Redirect Examination by Mr. Russo.*

Q. By list price, Mrs. Stevens, do you mean the total purchase price as it was given to you by Sam Achilli?

A. Yes, which was on the bill of sale.

Recross Examination by Mr. Batter.

Q. How do you recall what the purchase price was on that car?

A. Mostly because it was the first car my husband purchased for me for an anniversary present, and I thought it was nice of him to spend that kind of money.

Q. And you remember it to the penny?

A. I knew it was $786, and I didn't remember the 50¢, but this did refresh the amount of the check I made out.

It was my own checking account. I also checked with the Riverside Bank because I know one of the cashiers there.

Mr. Batter: That is all.

Mr. Russo: Thank you, ma'am. That will be all.

(Witness excused.)

794-795 • • •

796 SYLVESTER PLAPP, JR., called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name, sir, and spell your last name?

A. Sylvester Plapp, Jr., P-l-a-p-p.

Q. Where do you live, Mr. Plapp?

A. 5 Caton Drive, East Syracuse, New York.

Q. What is your business or occupation?

A. Salesman.

Q. For whom do you work?

A. McGraw Electric.

Q. Where is that located?

A. That is located at Elgin, Illinois.

Q. Directing your attention to the year 1946, where were you living at that time?

A. Sycamore, Illinois.

Q. What street address?

797 A. It could have been 451 West Exchange. I am not sure about that number. Or East Exchange.

Q. To refresh your recollection, was it 107 West Exchange?

A. That is what it was, sir.

Q. Mr. Plapp, were you acquainted with an automobile sales company known as Highland Motor Sales?

A. Yes, sir.

Q. Where was that company located?

A. Elgin, Illinois.

Q. Directing your attention to August 13th, 1946, did you have any transaction with Highland Motor Sales at or about that time?

A. Yes, sir.

Q. With whom did you deal there?
A. Mr. Achilli.
Q. Do you see Mr. Achilli in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. Over there (indicating).
Q. The third man sitting on the far side of the defense counsel table?
A. Yes, sir.
Q. Is he the same Sam Achilli with whom you
798 dealt at that time?
A. Yes, sir.
Q. What was the nature of the transaction which you had?
A. I bought a 1942 Dodge business—or sedan, or car. A coupe, I think it was.
Q. What was the full purchase price that you paid for the 1942 Dodge club coupe?
A. I think it was $1,329.
Q. How did you make payment?
A. I made a down payment of $400.00, by check, and I gave Mr. Achilli $44.00, I think it was, in cash, to make the down payment. It was paid off through the finance company.
Q. What was the name of the company that financed the transaction for you?
A. I think it was Elgin Acceptance Corporation, or something like that.
Q. Was the balance that you financed $885.37?
A. That seems like it.
Mr. Russo: Mark these Government Exhibits Nos. 68 and 69 for identification.
(The documents were thereupon marked Govern-
799 ment's Exhibits 68 and 69 for identification.)
By Mr. Russo:
Q. Mr. Plapp, I show you Government's Exhibit No. 69 for identification, and ask you if that is the check you referred to.
A. Yes, sir.
Q. Directing your attention to Government Exhibit 69, which purports to be a check drawn on the National Bank & Trust Company dated August 12th, 1946, payable to the order of Highland Motor Sales, in the sum of

$400.00, and further directing your attention to the signature in the lower right-hand corner thereof, whose signature is that?

A. That is mine.

Q. Was your signature placed on Government's Exhibit No. 69 at or about the date it bears, August 12th, 1946?

A. Yes, sir.

Q. Directing your attention to the reverse side thereof, will you state whether or not it bears any endorsement?

A. Yes, it does.

Q. What endorsement does it bear?

800 A. Shall I read it?

Q. Yes.

A. "For Deposit Only, Highland Motor Sales, K. H. Carlson."

Q. To whom did you deliver Government's Exhibit No. 69 for identification?

A. To Mr. Achilli.

Q. At the time you received the 1942 Dodge club coupe, what if anything else did you receive?

A. I received a bill of sale. I think that is what it is called.

Q. I show you Government's Exhibit No. 68 for identification, and ask you if that is the bill of sale you referred to.

A. Yes, sir.

Q. Who gave you that?

A. Mr. Achilli.

Mr. Russo: At this time, if your Honor please, we offer in evidence Government Exhibits 68 and 69.

Mr. Batter: No objection.

The Court: They may be received in evidence.

801 (The documents previously marked for identification Government's Exhibits Nos. 68 and 69, were thereupon received in evidence as Government's Exhibits Nos. 68 and 69.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

(Witness excused.)

WARREN PHILLIPS, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. What is your name, sir?
A. Warren Phillips.
Q. Where do you live, Mr. Philips?
A. 938 Augusta.
Q. What city?
A. Elgin, Illinois.
Q. What is your business or occupation at the present time?
A. Manager of the I. G. A. Store in Elgin.
802 Q. Do you know of an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that located?
A. On Wellington Street, Elgin.
Q. Elgin, Illinois?
A. Yes.
Q. Directing your attention to July 24th, 1946, did you have a transaction with Highland Motor Sales at that time?
A. Yes.
Q. What was the nature of the transaction that you had?
A. I bought a 1936 Chevrolet.
Q. Was that new or used?
A. Used.
Q. What was the purchase price of that car?
A. $700.00.
Q. How did you make payment?
A. I paid $400, and the rest in monthly payments.
Q. The balance of $300.00, through whom did you finance it, if you did?
A. I don't remember.
Q. To refresh your recollection, was that the Elgin
803 Acceptance Company?
A. Yes, sir.
Q. Where did you make payments on the balance that you financed?
A. In the office of Sam Achilli.

Q. At Highland Motor Sales?
A. Yes.
804 Q. Do you recall now, Mr. Phillips, to whom it was that you delivered the check for $400?
A. Mr. Achilli himself.
Q. Mr. Phillips, do you have that check?
A. No, I haven't.
Q. Do you know where it is?
A. I think Phillips Auto Parts has got it, in Elgin.
Q. Phillips Auto Parts?
A. Yes, sir.
Q. Who is Phillips Auto Parts?
A. They sell parts for cars and that, on Brooks Street, in Elgin.
Q. Why would they have it?
A. I borrowed the $400 from them.
Q. I see, and they gave you the check?
A. Yes, sir.
Q. And that i the check that you delivered to Mr. Achilli?
A. That is right, sir.
Q. At that time do you recall now whether or not you were given an invoice or a sales slip?
A. No, I don't recall.
Q. You don't recall?
805 A. No, sir.
Q. Do you have a sales slip with respect to that purchase now?
A. No, I haven't.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Phillips, you have no writing of any kind to indicate that you did pay $700 for that car, do you?
A. Not now, I haven't, sir.
Mr. Batter: That is all.
Mr. Russo: Thank you, Mr. Phillips. That will be all.

(Witness excused.)

806 A. N. LUDWIG, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination.

Q. Mr. Ludwig, will you state your full name, please?
A. Dr. A. N. Ludwig, L-u-d-w-i-g.
Q. Mr. Ludwig, will you keep your voice up so that the Court and the Jury may hear you clearly.
A. Yes, sir.
Q. What is your business or profession, Doctor?
A. Veterinarian.
Q. What is your address?
A. 850 Oakley, Elgin, Illinois.
Q. How long have you been a veterinarian?
A. Since 1943.
Q. Do you know of an automobile sales company known as Highland Motor Sales?
A. Pardon me?
Q. Do you know of an automobile sales company known as Highland Motor Sales?
A. Yes, sir.
Q. Where is that company located?
A. Elgin, Illinois.
Q. Directing your attention to July 26, 1947, did
807 you at or about that time have a transaction with Highland Motor Sales?
A. Yes, sir.
Q. What was the nature of that transaction?
A. I bought an automobile.
Q. What kind of an automobile did you buy?
A. Plymouth.
Q. What year model?
A. 1947.
Q. Was that new or used?
A. New.
Q. Was there a trade-in involved in that transaction?
A. Yes, sir.
Q. What kind of car did you trade in?
A. 1941 Plymouth sedan.
Q. What allowance were you made for the 1941 Plymouth sedan?
A. $697.50, I think it was.

Q. $697.50?
A. If I recall.
Q. $697.50?
A. Yes, sir.
Q. In addition to the car that you traded in, what
808 if any other consideration did you give?
A. I endorsed over two checks and there was a balance, carried a balance of $1,000.
Q. What was the total of the two checks that you endorsed over to Highland Motor Sales?
A. $250.
Q. Whose checks were those, Doctor?
A. One was from Harry Bernstein and one from the State Department, the Illinois State Department.
Q. And they were made payable to you?
A. Yes, sir.
Q. And did you endorse them over to Highland Motor Sales?
A. Yes, sir.
Q. I believe you testified the two checks totatled $250?
A. Yes, sir.
Q. How did you pay the balance?
A. Monthly payments.
Q. Was that financed?
A. Yes, sir.
Q. What was the name of the company through which you financed that automobile?
A. Elgin Acceptance Company, I believe was the
809 name of it.
Q. Where did you make the payments?
A. Highland Motor Sales.
Q. To whom did you deliver the two checks that totaled $250?
A. I can't recall for sure.
Q. With whom did you deal with respect to that transaction?
A. Sam Achilli.
Q. Do you see Sam Achilli in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. At the end of the table there.
Q. The third man sitting at the far end of defense counsel table?
A. Yes, sir.

Q. Is he the same Sam Achilli concerning whom you have been testifying?

A. Yes, sir.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, sir. That will be all.

(Witness excused.)

810 WILTON DOERGE, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir, and then spell it?

A. Wilton, W-i-l-t-o-n, Doerge, D-o-e-r-g-e.

Q. Where do you live, Mr. Doerge?

A. 15 South Worth Avenue, Elgin, Illiois.

Q. Will you keep your voice up, please, sir, so the Court and Jury may hear you.

What is your business or occupation?

A. Assistant foreman at McGraw Electric.

Q. Where is that located?

A. Elgin, Illinois.

Q. Do you know of an automobile sales company known as Highland Motor Sales?

A. Yes, sir.

Q. Where is that located?

A. On Wellington Avenue.

Q. In what city?

A. Elgin, Illinois.

Q. Directing your attention to June 1, 1946, did
811 you at or about that time have a transaction with Highland Motor Sales?

A. Yes, sir.

Q. What was the nature of that transaction?

A. I bought a 1946 Plymouth.

Q. Was that a new Plymouth or an old one?

A. A new Plymouth.

Q. Was there a trade-in involved in that transaction?

A. A 1939 LaSalle.

Q. What allowance were you given for the LaSalle?

A. $600.

Q. What was the price that you paid, the total purchase price of the 1946 Plymouth?
A. $1331.82.
Q. What allowance were you given on the LaSalle?
A. $600.
Q. How did you make payment on the balance?
A. By check and cash.
Q. How much did you pay by check?
A. $300.
Q. How much did you pay by cash?
A. $400.
Q. With whom did you deal there, Mr. Doerge?
A. Sam Achilli.
812 Q. Do you see Sam Achilli in the court room?
A. Yes.
Q. Will you point him out, please?
A. Right over there (indicating).
Q. The third man sitting at the far side of defense counsel table?
A. That is right.
Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?
A. Yes, sir.
Mr. Russo: I will ask the Reporter to mark this document as Government Exhibit 70 upon identification.
(The document was thereupon marked Government Exhibit 70 for identification.)
By Mr. Russo:
Q. I now show you Government Exhibit 70 for identification, purporting to be a check drawn on the Union National Bank and Trust Company, dated June 1, 1946, payable to the order of Highland Motor Sales in the sum of $300, and directing your attention to the signature in the lower right-hand corner, whose signature is that, please, if you know?
813 A. That is my signature.
Q. Was your signature placed on Government Exhibit No. 70 on or about the date the check bears?
A. Yes, sir.
Q. Directing your attention to the reverse side of the check, will you state, please, whether or not it bears any endorsement?
A. Highland Motor Sales.
Q. Is that a stamped endorsement or written endorse-

ment?

A. Stamped endorsement.

Q. To whom did you deliver Government Exhibit No. 70 for identification?

A. Sir?

Q. To whom did you deliver the check, Government Exhibit No. 70?

A. Sam Achilli.

Q. Now at the time that this transaction took place, were you given any other papers in connection with this transaction?

A. Well, a bill of sale.

Mr. Russo: I will ask that this document be marked Government Exhibit 71 for identification.

814 (The document was thereupon marked Government Exhibit 71 for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit No. 71 for identification, and ask you if that is the bill of sale that you have referred to?

A. That is correct.

Mr. Russo: At this time, if your Honor please, we offer in evidence Government Exhibits 70 and 71.

Mr. Batter: No objection.

The Court: They may be received.

(Said documents, previously marked Government's Exhibits 70 and 71 for identification, were thereupon received in evidence as Government Exhibits 70 and 71, respectively.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Doerge. That is all.

(Witness excused.)

815 HENRY A. GORDER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Henry A. Gorder.

Q. Where do you live, Mr. Gorder?

A. 10 Kenilworth, Mt. Prospect Heights, Illinois.

Q. What is your business or occupation?

A. Manager of the trading department of Stone-Webster Securities Corporation.

Q. Where is that located?

A. 33 South Clark Street, Chicago.

Q. Do you know of an automobile sales company known as Highland Motor Sales?

A. Yes, I do.

Q. Where is that located?

A. Elgin, Illinois.

Q. Directing your attention to October 24, 1946, did you at or about that time have any transaction with Highland Motor Sales?

A. Yes.

Q. With whom did you deal there?

816 A. Mr. Achilli.

Q. Do you see Mr. Achilli in the court room?

A. Yes.

Q. Will you point him out, please?

A. The gentleman at the end of that table (indicating).

Q. The third man at the far end of defense counsel table?

A. Yes.

Q. He is the man with whom you dealt at Highland Motor Sales, the same Sam Achilli?

A. Yes.

Q. What was the nature of that transaction?

A. I bought a new Plymouth.

Q. What year model?

A. 1946.

Q. What was the total purchase price?

A. About $1385.

817 Q. Was there a trade-in involved in that transaction?

A. Yes. I turned in a 1942 Ford.

Q. What allowance, if any, were you given for the Ford?

A. I believe it was around $500.00.

Q. How did you pay the balance of $885.00?

A. The balance was paid in two checks, one for $500.00, an odd amount of $500, and one for $300.00.

Q. How were each of these checks made out, if you recall?

A. One check was payable to Highland Avenue Motor Sales. The other was payable to cash.

Q. To whom did you deliver those checks?
A. Mr. Achilli.
Q. Do you have those checks, Mr. Gorder?
A. No, they have been destroyed.
Q. Did you look for them?
A. Yes.
Q. You weren't able to locate them?
A. That is correct.
Q. Will you state why you drew one of those checks payable to the order of cash and the other payable to the order of Highland Motor Sales?
818 A. Well, that is the way he would prefer to have it.
Q. That is the way who would prefer to have it?
A. Mr. Achilli.
Q. Sir?
A. Mr. Achilli.
Q. Do you recall at this time which of the two checks was made payable to the order of Highland Motor Sales?
A. The one for five hundred and some odd dollars.
Q. And the other one, in the amount of—what was the amonut of the other one?
A. $300.00.
Q. That was made payable to the order of cash?
A. Yes.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Do you still have a bill of sale on that transaction?
A. No, that has been destroyed also.
Q. When was the bill of sale and check destroyed?
A. Oh, about six or seven—about seven or eight years ago. Seven years ago.
819 Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. For the purpose of clarifying my recollection, will you state again, please, to whom the $500.00 check was drawn?
Mr. Batter: I object, your Honor. The examination has been completed. There has been nothing here on cross to bring up on redirect.

The Court: The objection is—

Mr. Russo: Your Honor, I just want to clarify it. I think I misunderstood him, and I just want to clarify in my own mind whether I did or not. He stated that he drew two checks, one payable to the order of Highland Motor Sales and the—

Mr. Batter: I object to counsel testifying.

Mr. Russo: (Continuing)—other to cash. I am not testifying. I want to find out which one he drew payable to the order of cash and which one he drew payable
820 to Highland Motor Sales, and the amounts of each.

Mr. Batter: The Reporter can read that back.

The Court: The objection is sustained.

Mr. Batter: No further questions.

Mr. Russo: I have no further questions. Thank you very much.

(Witness excused.)

FRANK RIPPBERGER, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name, please, sir?
A. Frank Rippberger.
Q. What is your address, sir?
A. 109 Phillipa, Waukegan, Illinois.
Q. What is your business?
A. At the present time?
Q. Yes, sir.
A. Sales Director, North Shore Garden of Memories.
Q. Mr. Rippberger, do you know of an automobile
821 sales company known as Highland Motor Sales?
A. I do.
Q. Where is that located?
A. Elgin, Illinois.
Q. Directing your attention to October 8th, 1946, did you at or about that time have a transaction with Highland Motor Sales?
A. I did.
Q. What was the nature of that transaction?
A. Purchasing a new car.
Q. What kind of car did you purchase?

A. A Chrysler New Yorker.
Q. What year model?
A. 1946.
Q. Was that a new or used car?
A. A new car.
Q. Was there a used car involved in that transaction?
A. Yes, I traded my used car in.
Q. What kind of used car did you trade in?
A. Either a 1936 or 1937 Dodge. I don't recollect.
Q. In addition to the Dodge, what if any other consideration did you give?
A. $2,000.00.
822 Q. With whom did you deal at Highland Motor Sales?
A. Mr. Achilli.
Q. Do you see Mr. Achilli in the Court Room?
A. I do.
Q. Will you point him out, please?
A. The gentleman to the right (indicating).
Q. The third man at the far end of the defense counsel table?
A. That is correct, sir.
Q. Is he the same Sam Achilli with whom you dealt at Highland Motor Sales?
A. That is correct.
Q. How did you make payment of that $2,000.00?
A. In full. I paid cash.
Q. Cash or check?
A. Check.
Q. Check?
A. Yes, sir.
Q. To whom did you deliver that check?
A. To Mr. Achilli.
Q. Did you get a receipt or bill of sale at the time of that transaction?
A. All I got is a receipt for $2,000.
Q. Do you have that receipt now?
823 A. I am sorry, sir. It must have gotten lost.
Q. Do you know where it is?
A. No, sir.
Q. Do you know what happened to it?
A. Yes.
Q. What happened?

A. It was destroyed in 1951. I had my papers—through a flood my papers were destroyed at that time, in 1951.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. You have no documents of any kind by which you could establish the payment of that $2,000, have you?

A. No.

Mr. Batter: That is all.

Mr. Russo: That is all. Thank you very much, sir.

(Witness excused.)

824 WALTER SCHWAB, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name, please?

A. Walter Schwab.

Q. Where do you live, Mr. Schwab?

A. 1021 Center, Elgin, Illinois.

Q. Will you keep your voice up so that the Court and jury may hear you, sir?

A. Yes, sir.

Q. What is your business or occupation?

A. Sign business. Active Neon.

Q. Is Active Neon the name of the business?

A. Yes.

Q. Is that an individual proprietorship?

A. A partnership.

Q. A partnership?

A. Yes.

Q. You are one of the partners?

A. That is right.

Q. Do you know of an automobile sales company 825 known as Highland Motor Sales?

A. Yes, I do.

Q. Where is that located?

A. On Wellington Avenue, Elgin, Illinois.

Q. Directing your attention to October 8th, 1946, did you have a transaction with Highland Motor Sales at or about that time?

A. Yes, I did.
Q. What was the nature of that transaction?
A. Purchasing a 1938 Dodge.
Q. Was that a new Dodge or an old one?
A. Used.
Q. What was the purchase price?
A. $600.00.
Q. How did you make payment?
A. Cash.
Q. With whom did you deal?
A. With Cons Cirrincione.
Q. Cons Cirrincione?
A. Yes.
Q. In whose name was the title to that car taken?
A. My wife, Marian Schwab.
Mr. Russo: Your witness.

826 *Cross Examination by Mr. Batter.*

Q. Did you get a sales slip when you bought that car?
A. Yes, I did.
Q. Do you have it?
A. No, I don't.
Q. What became of it?
A. It has been a long time ago.
Q. What became of it?
A. I don't have it at the present time.
Q. What?
A. I don't have it.
Q. You don't have it any more?
A. No.
Mr. Batter: That is all.
Mr. Russo: That is all. Thank you, sir.
(Witness excused.)

HARRY BENDES, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

827 *Direct Examination by Mr. Russo.*

Q. Doctor, will you state your full name and address, please?
A. Harry Bendes.

Q. What is your profession?
A. I am a physician and surgeon.
Q. How long have you been a physician and surgeon?
A. Since 1914.
Q. Doctor, are you acquainted with an automobile sales company known as Highland Motor Sales?
A. I am.
Q. Directing your attention to January 15, 1948, did you have a transaction with Highland Motor Sales at or about that time?
A. I did.
Q. With whom did you deal, Doctor?
A. Well, I dealt with a gentleman who represented himself as a Sam Illio.
Q. Do you see him in the Court Room?
A. I don't think I could recognize him.
Q. What was the nature of the transaction that you had with Highland Motor Sales?
828 A. I bought an automobile from him.
Q. What kind of automobile did you buy?
A. A Chrysler.
Q. What year model?
A. 1948.
Q. Was there a trade-in involved in that transaction?
A. There was.
Q. What kind of car did you trade in?
A. A De Soto.
Q. What year model?
A. 1946.
Q. What allowance were you given on the De Soto?
A. $1,397.90.
Q. How did you pay the balance between $1,397.90 and the amount that the car cost you?
A. I paid it by check and by cash.
Q. How much did you pay by cash?
A. $400.00.
Q. How much did you pay by check?
A. $622.00.
Q. To whom did you deliver the cash and the check?
A. To the man who represented himself as the owner of the Highland Motor Car Company.
829 Q. To refresh your recollection, was that Sam Achilli?
A. It was.

Q. Doctor, do you have the check that you delivered to Mr. Achilli at that time?
A. No, sir, I have not.
Q. Do you know what happened to it?
A. It was lost.
Q. You are not able to locate it now?
A. I wasn't able to locate it.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Did you get a receipt for the $400.00 you paid in cash?
A. I don't remember.
Q. Do you have such a receipt now?
A. I do not.
Q. Did you get a bill of sale on the car?
A. I did not.
Mr. Batter: That is all.
Mr. Russo: That is all. Thank you very much, Doctor.
(Witness excused.)

830 TRUMAN WINTERS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?
A. Truman Winters, W-i-n-t-e-r-s.
Q. Where do you live, Mr. Winters?
A. Eddyville, Illinois.
Q. Mr. Winters, there is a lot of noise outside, an air hammer apparently, and I would like you to speak up so the Court and Jury may hear you too. What is your business, please?
A. At the present time I am a guard.
Q. Foreman?
A. Guard.
Q. Oh, a guard?
A. Yes, sir.
Q. By whom are you employed?
A. The State of Illinois.
Q. Mr. Winters, are you acquainted with an automobile sales company known as Highland Motor Sales?

A. Yes, sir.

Q. Where is that company located?

831 A. Elgin, Illinois.

Q. Directing your attention to the month of October, 1946, did you have a transaction with Highland Motor Sales sometime during that month?

A. I did.

Q. What was the nature of that transaction?

A. I bought a Chevrolet pickup truck.

Q. What size truck was it?

A. A half ton.

Q. What year model?

A. 1937.

Q. Was there a trade-in involved in that transaction?

A. No, sir.

Q. What did you pay for the half-ton truck that you bought?

A. $700.

Q. How was payment made?

A. Check to a friend of mine by the name of Joe Brown, and he went down the street and cashed the check and brought it back and gave them the money.

Q. He gave who the money?

A. The salesman of this Highland Motor Sales.

Q. Do you know the name of the salesman that

832 you bought the car from?

A. No, the only time I ever saw him was that one day.

Q. Why did you make the check out to Joe Brown, Mr. Winters?

A. The salesman refused the check, the Highland Motors salesman.

Q. So you had to have a check cashed and you paid by cash?

A. He requested cash.

Mr. Russo: Thank you. Your witness.

Cross Examination by Mr. Batter.

Q. Did you get a receipt for the cash?

A. I got a bill of sale for the truck.

Q. Do you have that bill of sale?

A. No.

Q. What happened to it?

A. Well, I sold the truck since then and I don't know

what I did with it. I have misplaced it or thrown it away or something. I don't know.

Mr. Batter: That is all.

Mr. Russo: That is all. Thank you.

(Witness excused.)

833 JOSEPH J. INGRASSIA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Joseph J. Ingrassia?

A. Yes.

Q. Is that spelled I-n-g-r-a-s-s-i-a?

A. Yes, sir.

Q. Where do you live, Mr. Ingrassia?

A. Rockford, Illinois.

Q. What is your business?

A. Packard dealer.

Q. What is the name of the company?

A. Winnebago Motor Sales.

Q. Where is that located?

A. Rockford, Illinois.

Q. Mr. Ingrassia, are you acquainted with an automobile sales company known as Highland Motor Sales?

A. Yes.

Q. Where is that located?

A. Elgin, Illinois.

Q. Directing your attention to December 13, 1947, did you at or about that time have a transaction with

834 Highland Motor Sales?

A. Yes, sir.

Q. With whom did you deal there?

A. With Mr. Achilli.

Q. What was the nature of that transaction?

A. I purchased a used tow truck.

Q. What did you pay for it?

Mr. Batter: Just a moment. I object, your Honor. A man in business ought to have books and records, and I think the books and records are the best evidence.

Mr. Russo: I shall produce in just a minute. Just let him answer the question.

Mr. Batter: I think it ought to come first.

The Court: He may answer.

The Witness: What did you say?

By Mr. Russo:

Q. How did you make payment?

A. I wrote out a check.

Q. Do you have the original check that you wrote out?

A. I have. Well, I can't find the check, but I have a record of it.

835 Mr. Russo: I will ask that this be marked Government Exhibit 72 for identification.

(Said document was thereupon marked Government Exhibit 72 for identification.)

By Mr. Russo:

Q. Mr. Ingrassia, I show you Government's Exhibit No. 72 for identification, purporting to be a photostatic copy of a check of the Winnebago Motor Sales Company, Check No. 4041, dated December 13, 1947, payable to the order of Highland Motor Sales in the sum of $1,000.

Directing your attention to the signature in the lower right-hand corner, whose signature is that, please?

A. Mine.

Q. Was your signature placed on Government Exhibit No. 72 on or about the date the check bears?

A. Yes, sir.

Q. December 13, 1947?

A. Yes, sir.

Q. Now directing your attention to that portion of the exhibit that purports to be the reverse side there-
836 of, will you state whether or not it bears any endorsement?

A. Yes.

Q. What endorsement does it bear?

A. Highland Motor Sales, Sam Achilli.

Q. Is that endorsement stamped or handwritten?

A. Handwritten.

Q. Is Government Exhibit No. 72 a true and correct copy of the original?

A. Yes.

Q. Now to whom did you deliver the original of this check?

A. I gave it, I think, to either Sam or Cons, I don't know which.

Q. By Sam, do you mean Sam Achilli?

A. Yes.

Q. Do you see Sam Achilli in the court room?
A. Yes.
Q. Will you point him out, please?
A. Sitting over there, the second fellow to the right (indicating).
Q. The second man at the far side of defense counsel table?
A. Yes.
837 Q. Is he the same man with whom you dealt at Highland Motors, the same Sam Achilli?
A. Yes.
Q. Now directing your attention to another time in 1947, did you have any other transaction with Highland Motor Sales?
A. Yes, I think we did.
Q. What was the nature of that transaction?
A. There was a trade made.
Q. What did that trade involve?
A. I traded a Chevrolet for a Packard?
Q. What year Chevrolet did you trade and what year model Packard did you trade it for?
A. I traded a 1946 Packard for a 1947 Chevrolet.
Q. Was there any money involved in that transaction?
A. No, sir.
Q. Was that an even trade?
A. An even exchange, yes.
Q. Now directing your attention to July 15, 1948, did you have a transaction with Highland Motor Sales on or about that date?
A. Yes.
Q. What was the nature of that transaction?
A. I purchased a 1941 Cadillac.
838 Q. Was that a new Cadillac or an old one?
A. An old one, used.
Q. What was the purchase price of that car?
A. $1750.
Q. $1750?
A. Yes.
Q. How did you make payment for the 1941 used Cadillac?
A. There was a check issued for it.
Mr. Russo: I will ask that this be marked Government Exhibit No. 73 for identification.
(The document was thereupon marked Government Exhibit 73 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 73 for identification, and ask you if that is the check to which you refer?

A. Yes.

Q. Directing your attention to Government Exhibit No. 73 for identification, which purports to be a check drawn on the Third National Bank of Rockford, Illinois, No. 5647, dated July 15, 1948, payable to the order
839 of Sam Achilli, $1,750, and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that?

A. Mine.

Q. Was it placed on Government Exhibit No. 73 on or about the date it bears, July 15, 1948?

A. Would you repeat that again, sir?

Q. Was your signature placed on the check on or about the date the check bears, July 15, 1948?

A. Yes.

Q. Directing your attention to the reverse side of Government Exhibit No. 73, will you state whether or not it bears any endorsements?

A. Yes.

Q. What endorsements does it bear?

A. Sam Achilli and a William J. Biehl.

Q. How is that name spelled?

A. B-i-e-h-l.

Q. Are those endorsements handwritten or stamped?

A. Handwritten.

Q. Both of them?

A. Yes.

Q. Now after you signed this check, Mr. Ingrassia, to whom did you deliver it?

840 A. I am not sure, sir, whether we mailed it because that check is made out to Sam Achilli, and I think in one of my bookkeeper's handwriting, and it might have been mailed or it might have been handed to him. I just noticed that it had been made out by one of my bookkeepers.

Q. At any rate, it was mailed to Highland Motor Sales or delivered to someone there?

A. Yes.

Q. In payment for the 1941 Cadillac concerning which you have testified?

A. Yes.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 72 and 73.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 72 and 73 for identification were thereupon received in evidence and marked Government Exhibits 72 and 73, respectively.)

Mr. Russo: Your witness.

841 *Cross Examination by Mr. Batter.*

Q. Mr. Ingrassia, what has become of your books and records?

A. Well, we have them in storage above our garage.

Q. You didn't bring them to court with you?

A. No, sir.

Q. On what do you base your testimony of that second transaction as to an even trade?

A. Through records we have in our washout sheets.

Q. When did you last inspect those records?

A. Oh, I think it was in 1951.

Q. And you are able to testify today from an examination of that record in 1951 that that is what happened?

A. Well, I was reviewed before I came in here.

Q. You were reviewed before you came in here today?

A. I mean, to refresh my memory on the documents that they had.

Q. What documents did they have?

A. Those that they showed me.

Q. But that trade-in doesn't involve these two checks?

A. No.

842 Q. Then what document did they have to refresh your memory on that even trade?

A. It was a questionnaire that they had filled out.

Q. Does that questionnaire bring back to you distinct and separate recollection that such a transaction took place even?

A. Yes.

Q. How many cars did you trade during the course of a year in your business?

A. Now.

Q. No, back in 1946, '47 and '48.

A. New cars or used, or both?

Q. Both.
A. Oh, around seven hundred.
Q. About seven hundred?
A. Yes.
Q. And you can recall distinctly this one transaction out of seven hundred transactions as being an even trade?
A. Well, when I looked in my books, yes.
Q. Do you have any independent recollection of it now?
A. Very faintly, but I do. It is kind of on the faint side, but it must have been done, I mean—
843 Q. I am not interested in what must have been done. Do you have a distinct and definite recollection of that transaction?
A. Very faintly.
Q. I don't quite understand what you mean by faintly. You either do or you don't.
A. Well, gosh, I trade so many cars it just doesn't come to me just like that.
Q. I imagine not. That is exactly what I think.
Now then, what is there about this check, Government's Exhibit No. 73, for $1750, that refreshes your recollection that that was in payment of a Cadillac?
A. Because we looked it up.
Q. Who is we?
A. My girl and I, my bookkeeper.
Q. When?
A. Back in 1951.
844 Q. And you recall now that in 1951 you traced this transaction and it applied to a 1941 Cadillac?
A. Yes. The check number traces it down to the dealer.
Q. Why didn't you bring those books to Court to support these transactions?
A. I didn't think they were necessary.
Q. You weren't asked to bring them, were you?
A. Well, probably the subpoena I got probably had it in there to bring all records, and I figured they had them here and that was sufficient.
Q. So you didn't bring them?
A. That is right.
Q. What has happened to the original check of Government Exhibit No. 72 for identification?

A. This check here has been misplaced because I have changed bookkeepers since this took place.
Q. The original is missing?
A. Yes.
Q. Do you know who William J. Biehl is?
A. No, sir, I don't.
Mr. Batter: No objection.
The Court: Is that all?
Mr. Russo: Yes, your Honor. They have been of-
845 fered in evidence and I don't know whether your Honor has ruled.
The Court: Yes, they have been received.
Mr. Russo: Do you have any further questions?
Mr. Batter: Wait a minute.
The Court: Is that all from this witness?
Mr. Batter: No, your Honor.
By Mr. Batter:
Q. In connection with this purchase of this Cadillac, do you recall the title the car was in when you acquired it?
A. No, sir, I don't.
Q. You do not?
A. No.
Mr. Batter: That is all.
Mr. Russo: Thank you, Mr. Igrassia. That is all.
(Witness excused.)

846 SIDNEY E. READ, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Sidney E. Read?
A. That is right.
Q. And the Read is spelled R-e-a-d?
A. Right.
Q. Where do you live, Mr. Read?
A. St. Charles, Route 1.
Q. Mr. Read, do you know of an automobile sales company known as Highland Motor Sales?
A. I do.
Q. Where is that located?
A. In Elgin, Illinois.

Q. Directing your attention to August 9, 1947, did you at or about that time have a transaction with Highland Motor Sales?

A. I did.

Q. What was the nature of that transaction?

A. Well, I bought a new Plymouth.

Q. What year model?

847 A. 1947.

Q. What was the full purchase price?

A. Well, I traded in a 1939 Chevy. I don't remember what the allowance was on that, but it was approximately $1430 in cash, I guess.

Q. Did you give $1430 in cash in addition to the 1939 Chevrolet that you traded in?

A. That is right.

Q. How was that payment made?

A. Well, there was two checks. I don't remember the amount of each individual check, but I paid one the day I made the deal, and then paid the other the day I got the delivery.

Q. Do you recall the amount of the first check and the date that you made the deal?

A. No, I don't.

Q. Do you recall the amount of the second check at the time that you took delivery?

A. No, the only thing is that it was around $1,430 altogether.

Q. With whom did you deal there, Mr. Read?

A. Well, mostly with a man they call Cons.

Q. Would that be Constantine Cirrincione, do you know?

848 A. I suppose it would.

Q. Was there anyone else present at the time that this transaction took place besides Mr. Cirrincione or Cons?

A. Well, Sam o.k.'d the deal.

Q. Sam o.k.'d the deal?

A. Yes.

Q. Do you see Sam in the Court Room?

A. I do.

Q. Will you point him out, please?

A. The gentleman over there.

Q. The second man at the far end of the defense counsel table?

A. That is right.
Q. And is he the same Sam Achilli with whom you dealt at Highland Motor Sales?
A. That is the same.
Mr. Batter: The witness didn't testify he dealt with him.
Mr. Russo: He certainly did.
Mr. Batter: He did not. He said Sam o.k.'d it. He dealt with Constantine.
By Mr. Russo:
Q. Is he the same Sam Achilli that o.k.'d this
849 transaction, Mr. Read?
A. Yes, he is the same man.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Do you have those two checks with you, Mr. Read?
A. No, sir, I don't.
Q. What has happened to them?
A. Well, I lost them somewheres, misplaced them.
Mr. Batter: That is all.
Mr. Russo: That is all. Thank you, sir.
(Witness excused)

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850-851 * * *

852 CHARLES H. JACOBS, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Charles H. Jacobs?
A. That is right.
Q. Where do you live, Mr. Jacobs?
A. 252 North Gifford Street, Elgin.
Q. That is in Illinois?
A. That is right.
Q. What is your business or occupation?
A. I am a salesman.
Q. By whom are you employed?
A. E. H. Schick Distributing Company, Elgin.
Q. How long have you been employed there?
A. I believe it's eight years this May.

Q. Before you were employed by the E. H. Schick Distributing Company, were you employed by anyone else?

A. I worked three or four months for the Tax Bureau at Elgin, and before that for Sam Achilli.

Q. You worked for three or four months for whom?

853 A. For the Tax—the Assessor's Office.

Q. Prior to your employment there you worked for Sam Achilli?

A. That is right.

Q Where were you employed by Sam Achilli?

A. At 117 Douglas Avenue, Barney's Snooker, they called it. It was a pool room.

Q. How long were you employed there?

A. I believe it was from December of '42 until about September of '46.

Q. In what capacity were you employed there, Mr. Jacobs?

A. Well, I ran the pool room end of it, the downstairs.

Q. For whom did you run it?

A. Sam Achilli.

Q. Do you see Mr. Achilli in the Court room?

A. Yes, sir.

Q. Will you point him out, please?

A. Yes, sir. Over there at the end of the table. (Indicating.)

Q. The third man at the far end of the defense counsel table?

A. Sir?

854 Q. The third man at the far end of the defense counsel table?

A. That's right.

Q. Is he the same Sam Achilli who employed you at Barney's Snooker Hall?

A. Yes.

Q. In connection with your employment in the operation of Barney's Snooker Hall, what were your duties?

A. Well, I opened up and ran the downstairs part of it from noon until six in the afternoon, took care of the pool tables and sold the merchandise.

Q. What merchandise did you sell?

A. Well, naturally he had cigars, cigarettes, candy and pop.

Q. Was there any other merchandise that you sold?

A. Yes. We had weather board tickets.

855 Q. Weather board tickets?

A. Yes, sir.

Q. Will you explain for the Court and Jury, Mr. Jacobs, what a weather board ticket is?

A. Well, I suppose it is similar to a lottery. There was, I believe, a hundred tickets on a card, and they sold for 60¢ apiece outright, or you could win them on a punchboard, and if you won you stood, well, it paid from $2 to $250 if you hit a winner.

Q. Did Mr. Achilli operate any other business in connection with the premises at Barney's Snooker Hall, at 117 Douglas Street in Elgin?

A. There was a poker game on the deck, the mezzanine floor there, which they called the deck.

Q. You called the mezzanine floor a deck?

A. Yes.

Q. What was on the deck, Mr. Jacobs?

A. A pool table—I mean, a poker table and chairs.

Q. Was there anything else?

A. No.

Q. Was there an office up there?

A. No.

Q. Where was the office?

A. On the main floor.

856 Q. On the main floor?

A. Yes.

Q. Now how long did Mr. Achilli operate that poker table?

A. Well, all the time I was there.

Q. How long was that?

A. A little over three years.

Q. And during what years was that?

A. Well, that was 1943, '44, '45, part of '46.

Q. Now tell the Court and Jury, please, what the equipment in the pool room consisted of.

A. Well, there was, I believe, five pool tables and a cigar counter, candy case, pop coolers.

Q. Sir?

A. Pop coolers.

Q. Was there anything else?
A. Yes, there was a pinball machine.
Q. Who owned that equipment?
A. Well, the pool table and the rest of it belonged to Sam Achilli, but the pinball machine naturally didn't belong to him.
Q. What was the average in so far as the pinball machine was concerned, so far as you know?
A. Well, that paid a certain percentage of the in-
857 take to the house.
Q. He got paid a certain percentage of the intake?
A. That is right, yes.
Q. Now did you have any income from your employment at the pool hall?
A. Yes, I got $40 a week for working in the afternoons.
Q. What hours did you work?
A. 12:00 to 6:00.
Q. 12:00 noon to 6:00 p.m.?
A. That is right.
Q. Now in connection with your work in the operation of the pool room for Mr. Achilli, did you keep any books and records?
A. Yes, I keep books and records of sales made and the amount of money taken in from the pool tables.
Q. Sales from what sources, Mr. Jacobs?
A. Well, the merchandise that we sold, candy, cigarets, pop, tobaccos, pipes, whatever it was.
Q. And the pool tables?
A. Yes.
Q. And the weather tickets?
A. Well, that was kept separate.
Q. Who kept that?
858 A. What do you mean?
Q. How was it kept separate?
A. Well, that money went in a cigar box.
Q. In a cigar box?
A. Yes.
Q. To whom did the cigar box with the money go?
A. Well, it went to Mr. Achilli.
Q. Now did the books and records that you kept reflect any income from the weather board tickets?
A. No.

Q. Did the books and records that you kept reflect any income from the pinball machines?

A. No.

Q. So far as you know, did the pool hall operate at a profit?

A. Well, it paid the overhead, I will say that.

Q. At least the overhead?

A. Just about paid the overhead, yes.

Q. Now do you know the extent of the profit either per day, per week, per month or per year for the year 1946 in the operation of the pool hall?

Mr. Batter: Just a moment.

By the Witness:

A. No.

859 Mr. Batter: The witness has not testified that Mr. Achilli owned the place in 1946. He testified he was employed in 1942, and Mr. Achilli had the place for three years.

Mr. Russo: I will leave that to the jury, your Honor, but my recollection of the witness' testimony is that he operated there, worked there up until September of 1946, if my memory serves me correctly.

Mr. Batter: He has not testified that Mr. Achilli operated the pool room in 1946. We can the testimony read.

The Court: I think he said he worked there in 1946, but he didn't indicate how long. The objection is well taken.

By Mr. Russo:

Q. How long did you work—When did you leave Mr. Achilli's employment at Barney's Snooker Hall?

A. September of 1946.

Q. Now who owned or operated Barney's Snooker Hall during the year 1946?

A. You mean during the months I was there?

Q. Yes, sir.

A. Mr. Achilli.

860 Q. Now can you tell us, if you have any recollection, the extent of the profit, either per day, per week or per month to Mr. Achilli during the time that you were there in connection with the operation of the pool room?

A. No, I wouldn't have any idea. There wasn't much profit from the pool end of it.

Q. Was there a profit from the sale of the weather board tickets?

A. A slim profit.

Q. How much was the profit per book?

A. Well, they were supposed to pay out $15 a book. If you realized on all the books you would make $15 a book, but it didn't work out that way.

Q. How did it work out, Mr. Jacobs?

A. Well, like I say, Mr. Achilli came in sometimes and took a couple of books himself, so there was no profit on that. The ones we sold outright, they would get $15 profit per book.

Q. If I understand your testimony, Mr. Achilli came and took some of those books himself?

A. Yes.

Q. From those books there was no profit, is that right?

861 A. That is right.

Q. But the books that were sold to others and not taken by Mr. Achilli, there was a profit?

A. That is right.

Q. What was the extent of the profit on those books?

A. $15 a book.

Q. How many books per week did you sell?

A. Well, that run three or four.

Q. In 1946 during the period of time that you were employed by Mr. Achilli?

A. Well, now wait a minute. You are getting a little ahead of me. In 1946, I believe, we had a little difficulty with the city at that time, and these weather boards weren't running so regular as they did in other years.

Q. How regularly were they running in 1946?

A. Well, I really don't remember.

Q. Do you recall when it was that the trouble developed with the city authorities?

A. Well, I believe it was early in the summer of 1946.

Q. In the summer?

A. Yes.

Q. Well, up until the summer when the trouble

862 developed, what was the average number of weather tickets sold per week?

A. Well, three or four books.

Q. And after the trouble developed, what would be the average number of weather board tickets sold per week?

A. Well, while the trouble was on, there weren't any. We couldn't get them.

Q. Did there come a time before you left that the trouble was settled or blown over and the sale of weather tickets was resumed?

A. I really don't remember.

863. Q. Now, tell the Court and Jury, Mr. Jacobs, what happened to the money that you took in from the pool tables.

A. Well, that went in the cash register and at night it was locked up in the steel cabinet.

Q. Where was the cash register?

A. That was back of the cigar counter.

Q. On the first floor?

A. That's right.

Q. And where was the safe?

A. We had no safe. We had a steel cabinet.

Q. That is just what you have described?

A. Yes.

Q. What happened to the money that was taken in from the sale of cigars and cigarettes?

A. Well, that all went in the cash register and was locked up in the steel cabinet at night.

Q. And is your answer the same with respect to the money that was taken in on the weather tickets?

A. Yes. That money was in the cigar box. That was locked up, too.

Q. Now, how often would Mr. Achilli come in for the cash that you took in each day?

A. Oh, sometimes every day, sometimes I didn't

864 see him for two or three days. In fact, he might— sometimes he came in in the evening after I was gone.

Q. And when he came in in the evenings after you were gone, the next morning when you came to work did you find the cigar box with the money there, or was it gone?

A. Well, it had been checked over and the money taken out.

Q. And the money taken out?

A. Yes.

Q. Do you know, Mr. Jacobs, where the books and records that were kept in connection with the operation of the pool hall for Mr. Achilli are now?

A. No. I wouldn't know. I left those in the desk when I left there.

Q. I believe you testified that you left there some time in September, 1946?

A. That is right.

Q. Now, when you left, where did you leave them?

A. The books?

Q. When you left Mr. Achilli's employment; yes, where did you leave the books?

A. I locked them up on the desk in the office.

865 Q. Now, with respect to the poker games concerning which you have testified were held on the premises at 117 Douglas Street, how many tables were operated?

A. One.

Q. How often was that table operated?

A. Well, usually every evening.

Q. Every evening during the week?

A. That's right.

Q. What hours was it operating?

A. Well, sometimes it would start at seven-thirty or eight o'clock and run to midnight or one o'clock.

Q. Now, during the year 1946 over the period of time you were employed there, who was the houseman?

A. A man by the name of Weaver, Ralph Weaver.

Q. Did anyone other than Ralph Weaver act as houseman?

A. I believe there was another boy there temporarily for a month or two.

Q. Do you recall his name?

A. I believe it was Coyne.

Q. Sir.

A. Coyne, I believe his name was.

Q. Coyne?

A. Yes. I have forgotten his first name.

866 Q. Now, in connection with the operation of the poker tables did you have any duties?

A. Well, my only duty connected with that was in the morning, when I opened up—

Q. Mr. Jacobs, will you keep your voice up so the Court and Jury may hear you?

A. Yes.

Q. And so I may hear you, too.

A. Yes. When I would open up in the morning I would remove the chips from the bottom of the poker table where they had been dropped down the slot on the top of the table at night during the game.

They would go down to a box at the bottom of the table with a padlock on it, and I would take that out and put that stuff in the cigar box and lock it up downstairs in the steel cabinet.

Q. Did you count the chips?

A. No.

Q. You did not have to account for anything?

A. No. I didn't have anything to do with the poker end of it.

Q. Where would you put the chips after you had taken them out?

A. In the cigar box.

867 Q. In the cigar box?

A. Yes.

Q. Would there be any money in the cigar box?

A. Yes. There would be some change in there, too.

Q. Where would you put the box?

A. In the steel cabinet.

Q. In the steel cabinet?

A. Yes.

Q. Where was that cabinet located again, please?

A. That was in the office on the first floor.

Q. Now, during the course of your employment there in the year 1946, over that period, until you left the employment in September, did you ever see anyone remove the money from the steel cabinet where you had placed it.

A. Well, I can't say that I did. That was usually done at night when I wasn't there.

Q. Who else besides you had access to that steel cabinet?

A. Mr. Achilli.

Q. Is he the only one?

A. That's right.

Mr. Russo: Will the Court indulge me just a moment?

868 (There was a short interruption, after which the following further proceedings were had herein:)

By Mr. Russo:

Q. I will ask you, Mr. Jacobs; was the money that was taken in on the sale of weather tickets put in the cash register?

A. No.

Q. Where was that put?

A. The cigar box.

Q. The cigar box?

A. Yes.

Q. And the cigar box was placed in the steel cabinet?

A. Right.

Q. Was the money that was taken in on the pin ball machines put in the cash register?

A. No.

Q. Where was that put?

A. The cigar box.

Q. And the money that was taken in on the poker games—was that put in the cash register?

A. No.

Q. Now, was it all mixed together in the cigar
869 box, or did you have to account for it in any fashion to show that it came either from pin balls or—

A. They were kept separate.

Q. Always kept separate?

A. That's right.

Q. At whose direction did you do all things concerning which you have testified?

A. Well, that's the way the situation was when I started there, so I just continued that way.

Q. Mr. Achilli did not give you any directions to the contrary?

A. No.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Jacobs, when did you become employed at the Snooker Hall Pool Room?

A. In December of 1942.

Q. How do you recall that date?

A. Well, it was right after my forty-fifth birthday, which was the 14th of December. That's the reason I recall it so well.

Q. And you worked there about three years, you
870 testified?

A. Yes, sir.

Q. Three years from December, 1942, would bring you to December, 1945.

A. Well, it was a little over three years.

Q. A little over three years?

A. Yes.

Q. How much over?

A. Well, from the first of the year to the first part of September. That would be about nine months.

Q. How do you fix the date of September, 1946?

A. Well, because I believe that's when I left there.

Q. What makes the year 1946 stay in your mind?

A. Well, because the following spring I went to work on the job I'm on today.

Q. Could it have been 1945 when you left there, September?

A. No. It couldn't have been.

Q. What other event happened in 1946 that makes that year stick in your mind?

A. Well, like I say, I left there in September and I didn't do anything until around February of the following year, and then I went to work for the Tax Assessor's Office for a couple or three months and then I went to work for the E. H. Schick Distributing Company on the 1st of May.

871

Q. The first of May of what year?

A. 1947.

Q. Did you at any time work for Chuck Malloy?

A. No, sir, I didn't. I understand that—well, I know he took the place over shortly after I left there, probably within a week or ten days.

Q. If the record showed that Chuck Malloy took the place over prior to January 1st, 1946, would that affect your testimony?

Mr. Russo: I object, your Honor please. There has been no record here showing anything whatever.

Mr. Batter: I am checking the witness' recollection. He says it was ten days before Chuck Malloy took it over.

The Court: He may answer.

A. Well, I said as far as I knew he took it over probably about ten days or a couple of weeks after I left the place.

By Mr. Batter:

Q. And if the record discloses he took over in 1945
872 would that affect your testimony with respect to the time when you ceased working there?

Mr. Russo: Unless Defense counsel points out what record he has reference to, I object to the question.

The Court: Objection sustained.

Mr. Batter: No further questions.

Mr. Russo: That will be all, Mr. Jacobs. Thank you.

(Witness excused.)

JOSEPH J. KATZ, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo,

Q. Will you state your full name, please, and spell your last name.

A. Joseph J. Katz, K-a-t-z.

Q. What is your address?

A. Business address or—

Q. Your home address.

A. Home address, 1254 Ravenswood Drive, Evans-
873 ville, Indiana.

Q. What is your business or occupation now?

A. The automobile business.

Q. What is the name of your business?

A. Joe Katz Motors.

Q. Where is that located?

A. It's located at 1602 South Kentucky Avenue at Evansville.

874 Q. How long have you been operating as Joe Katz Motors?

A. Since September of 1952.

Q. Were you engaged in any business prior to September, 1952?

A. Yes, sir.

Q. What business were you engaged in?

A. In the coal business, retail coal business.

Q. Were you engaged in any other business?

A. Yes, in the automobile business.

Q. What was the name of the automobile business?

A. Central Hudson Company.
Q. And where was that company located?
A. That was located at 116 Southeast 5th Street at Evansville.
Q. How long did you operate as Central Hudson Company?
A. August, 1950, through August 31, 1952.
Q. Now prior to August, 1952, were you engaged in any business?
A. Yes, sir.
Q. What business?
A. Retail coal business and the automobile business.
Q. How long have you been engaged in the coal
875 business?
A. Since August, 1930.
Q. What was the automobile business that you were engaged in?
A. That was Central Motors, Incorporated.
Q. Central Motors, Incorporated?
A. Yes, sir.
Q. Where was that business located?
A. That was located at 1602 South Kentucky Avenue in Evansville.
Q. When was that business incorporated?
A. That was incorporated, I think, in 1946.
Q. Did you have any official capacity in Central Motors, Incorporated?
A. Yes, I was Vice President.
Q. In the conduct of the business of Central Motors, Incorporated, did you keep and maintain books and records?
A. Yes, sir.
Q. Were those books and records kept in the regular course of business?
A. Yes, sir.
Q. Was it the regular course of business to keep such books and records?
876 A. Yes, sir.
Q. Were those books and records kept under your supervision and custody?
A. Yes.
Q. Mr. Katz, were you served with a subpoena duces tecum to bring with you the books and records of Central Motors, Incorporated?

A. Yes, sir.
Q. Did you bring those documents with you?
A. I brought one.
Q. Why did you bring only one?
A. That was all I could locate right now.
Q. Did you make a search for others?
A. I sure did. I made an extensive search.
Q. That is all the documents that were called for by the subpoena duces tecum?
A. Yes, sir.
Q. And you say now that you can't locate any of those records except the one that you have produced here?
A. That is right.
Q. Now did there come a time, Mr. Katz, when the books and records of Central Motors, Incorporated, were made available to a representative of the Bureau of Internal Revenue?
877 A. Yes, sir.
Q. And did the records that you made available to such representative relate to the transactions had by Central Motors, Incorporated, with Highland Motor Sales?
A. Yes, sir.
Q. When was it that you made those books and records available to a representative of the Government?
A. I think it was somewhere in July or August of 1950.
Q. Did you get those records back?
A. Yes.
Q. Now you say you can't find them?
A. I can't find them.
Mr. Russo: I will ask that these documents be marked Government Exhibits 74 through 78, inclusive, for identification.
(The documents were thereupon marked Government Exhibits 74 through 78, inclusive, for identification.)
By Mr. Russo:
Q. Now, Mr. Katz, I show you Government Exhibit No. 74 for identification, purporting to be a photostatic copy of a check of Central Motors, No. 679, dated
878 November 19, 1946, payable to the Citizens National Bank to Highland Motor Sales, in the amount of $2,050, and purporting to be signed by Joseph Katz.

I will ask you, Mr. Katz, if you have ever seen the original of that exhibit.

A. Yes.

Q. Is Government Exhibit No. 74 a true and correct copy of the original?

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner of the front of the check, whose signature is that?

A. That is my signature.

Q. And was your signature placed on there on or about the date the check bears?

A. It was.

Q. Now what was the purpose for which that check was issued?

A. For the purpose of buying an automobile.

Q. From whom?

A. From Highland Motors.

Q. Did you have a transaction with Highland Motors at or about the date of that check?

879 A. On or about that date, yes, through a telephone conversation.

Q. With whom did you have that telephone conversation?

A. Mr. Achilli.

Q. What was the substance of that conversation?

A. Purchasing this 1941 car.

Q. And as a result of that conversation, did you agree on a price?

A. Yes, sir.

Q. What car was it that you agree to purchase?

A. A 1941 Cadillac.

Q. Did you purchase that 1941 Cadillac?

A. Yes, sir.

Q. Relate to the Court and Jury, please, just how that transaction was consummated.

A. Well, I called him on the telephone and told him I was looking for particular cars, and he mentioned this particular automobile, and we arrived at a price on the phone, and I made out a cashier's check and sent that up with one of our men, and he drove it back. That was the whole transaction.

Q. After your employee drove the Cadillac back, what if anything did you do or cause to be done?

880 A. Well, when we got a car, a fresh automobile, you might say, to your stock, why, we immediately record it and set it up in our books so we know how much we paid for it and so we know how much we can sell it for.

Q. I hand you Government Exhibit No. 76 for identification, and ask you if that is the record that you have referred to that you caused to be made in connection with the purchase of the Cadillac.

A. Yes, sir, this is it.

Q. Directing your attention to on or about December 24, 1946, did you have any other transactions with Highland Motors Sales?

A. Yes.

Q. How did that transaction come about?

A. It came through a telephone conversation.

Q. Who originated the telephone call?

A. I did.

Q. Whom did you call?

A. Mr. Achilli.

Q. Did you talk to Mr. Achilli?

A. Yes, sir.

Q. And as a result of that telephone conversation, what if anything happened?

881 A. I bought an automobile from him.

Q. Did you purchase the car, or did you send an employee to pick it up?

A. I purchased the car and I—

Q. What kind of car did you agree to purchase?

A. A 1946 Chrysler.

Q. What was the agreed purchase price?

A. $3300.

Q. Was the Chrysler delivered to you?

A. I came after it myself, yes.

Q. Where did you go to get it?

A. At Elgin, Illinois.

Q. When you reached Elgin, whom if anyone did you see?

A. Mr. Achilli.

Q. Did you pay for the car?

A. Yes, sir.

Q. How did you make payment?

A. By check.

Q. Now, Mr. Katz, I show you Government Exhibit

No. 77 for identification, purporting to be a check of Central Motors No. 847, dated December 12, 1946, drawn on the Citizens National Bank, payable to the order of Cash in the sum of $3,300.

882 I will ask you, Mr. Katz, if you have ever seen the original of that check.

A. Yes, I have.

Q. Is Government Exhibit No. 77 a true and correct photostatic copy of the original?

A. It is.

Q. Directing your attention to the signature in the lower right-hand corner of Government Exhibit No. 77, whose signature is that?

A. That is my signature.

Q. Was your signature placed on Government Exhibit No. 77 on or about the date the check bears, December 12, 1946?

A. It was.

Q. To whom did you deliver this check?

A. To Mr. Achilli.

Q. After you received the automobile, where did you go? What did you do with the car?

A. I drove it back to Evansville, Indiana.

Q. And after you returned to Evansville, Indiana, what if anything did you do or cause to be done?

A. Oh, we recorded it in the usual manner, recorded it in our books.

883 Q. Mr. Katz, I show you Government Exhibit No. 78, purporting to be a photostatic copy of a dealer's used car record. I will ask you if you have ever seen the original?

A. Yes, I have.

Q. Is Government Exhibit No. 78 a true and correct photostatic copy of the original?

A. It is.

Q. Does Government Exhibit No. 78 correctly reflect the information that was recorded on there concerning that 1947 Chrysler?

A. It was.

Q. And I believe you said that you don't know where the original is, but that you have looked for it and can't locate it.

A. That is right.

Q. Mr. Katz, I direct your attention to the fact that on Government Exhibit No. 77, the check is payable to the order of Cash.

A. Yes, sir.

Q. Will you tell the Court and Jury the reason why that was done?

A. Why, at that particular time, is conducting a new car franchise dealer, it was just customary that the money or the checks or whatever be made out to
884 Cash so it wouldn't show to the factory that he was selling his automobiles to a used car dealer. It was more or less protection of the franchise.

Q. Now in whose name was title to the 1947, I believe you said, Chrysler taken?

A. The 1946 Chrysler.

Q. The 1946 Chrysler, in whose name was title taken?

A. The name was put under my stepbrother which lives here in Chicago. Under the name of Hyman Hackley, I think it is spelled.

Q. At whose request did you supply the name of Hackley to Mr. Achilli?

A. Mr. Achilli's.

Q. At his own request?

A. Yes, sir.

Q. Now I show you Government Exhibit No. 75 for identification, purporting to be a check drawn on the Citizens National Bank of Evansville, dated November 19, 1946, No. 12729, payable to the order of Highland Motor Sales, in the amount of $2,500. Have you seen the original of that check?

A. This is a cashier's check for $2050, and that particular cashier's check, Mr. Achilli and I weren't very well acquainted, so in order for him to receive true
885 cash for the automobile, we made a cashier's check whereby we issued another check of our own to the Citizens National Bank of Evansville.

Q. And the other check of your own to which you have referred, is that Government Exhibit No. 74 for identification?

A. That is it. That is made payable to Citizens Bank for Highland Motor Sales. The original check was this cashier's check which was paid for that particular car.

Q. Directing your attention again, Mr. Katz, to Government Exhibit No. 75 for identification, and directing

your attention to that portion of the exhibit that purports to be the reverse side of the check, will you state, please, what if any endorsements it bears?

A. Is this the reverse side of this Citizens National Bank check? Is that it?

Q. That purports to be.

A. Well, it says Highland Motor Sales—I will have to put on my glasses—Fourth Street Motor Sales by Jess A. Chamberlin—I don't know whether I read the signature correct or not, but that is the way it reads there.

886 Q. Is this the check that you delivered to Highland Motor Sales?

A. The face of it is the check that I delivered, that is, my driver delivered. I didn't deliver that. I didn't come after that automobile.

Q. That relates to the Cadillac?

A. The 1941 Cadillac, yes, sir. But the reverse side of it, I don't know. I mean, I can read it for you, but that wasn't on our own check.

Q. Directing your attention to Government Exhibit No. 77, that portion of the check that purports to be the reverse side thereof, will you state, please, whether or not it bears an endorsement?

A. Yes, it does.

Q. What endorsement does it bear?

A. Sam Achilli.

Q. Is that a handwritten endorsement or a stamped endorsement?

A. Handwritten.

887 Mr. Russo: If the Court please, we offer in evidence Government's Exhibits 74, 75, 76, 77 and 78.

Mr. Batter: May I ask the witness a few questions, your Honor?

The Court: All right.

By Mr. Batter:

Q. Do you have with you a copy of the subpoena duces tecum that was served on you?

A. Do I have the—

Q. The subpoena that was served upon you.

A. I don't have it with me, sir. I left it at home, but I had that last one. I have got it on my desk. The card is upstairs, though.

Q. What books did that subpoena ask you to produce?

A. Well, all the documents that pertained to business with Mr.—Highland Motors and myself.

Q. As a result of that you produced only this one document, Government's Exhibit 76?

A. That's right.

Q. What has happened to the other documents?

A. Well, they're misplaced. The other documents—you mean the originals from the other ones?

888 Q. Yes.

A. Well, they were misplaced.

Q. How do you know they were misplaced? Have you looked for them?

A. Yes, we have. See, that was taken from us back in 1950 and when they returned them—we changed bookkeepers since then, too, and some way or another they got lost in the exchanges that were made.

Q. When they were taken from you in 1950 were they returned to you?

A. Yes, they were, at some later date, but I don't know exactly—

Q. What?

A. I wouldn't know the exact date when they were returned.

Q. Was a receipt given to you when they were taken from you?

A. Yes, sir.

Q. Do you have that receipt?

A. I don't have it with me. The chances are that's probably gone with it, too.

Q. That's probably what?

A. That's probably disappeared also.

Q. Did you give a receipt when they were re-
889 turned to you?

A. I signed—I'm pretty sure I signed something for Mr. Schrier, this man—one of the Government Agents.

Mr. Batter: May I ask the Government whether it has a receipt for the return of those documents?

Mr. Russo: The Government has no receipts.

By Mr. Batter:

Q. Mr. Katz, did you at any time in the past under oath state as follows:

"Q. Did you get those books and records back?

"A. Well, if I did, I can't recall where—either they have been misplaced, or I don't know exactly where they are."

A. Yes, sir.

Q. Now, what happened since you made that statement and your testimony this morning that they were returned, to refresh your recollection that such is the case?

A. Well, I asked my new bookkeeper whether or not he had seen them once and he told me he had, and
890 that was the answer I got from him. However, he did make an extensive search—as a matter of fact, just before I was to come up here, we made another extensive search and we couldn't find any documents at all other than what I have there.

Q. Then your testimony that the documents were returned to you is based upon the hearsay of your present bookkeeper that he had seen them?

Mr. Russo: That is not what the witness answered at all, your Honor please. I object to that question.

The Court: Objection sustained.

By Mr. Batter:

Q. Will you state what the facts are?

A. Sir?

Q. Will you state what the facts are?

A. Well, the fact is we had another party by the name of Martin that worked for us, and he's been here—he's been in Evansville, he came to pay us a visit the other day, and he had broken in this other new bookkeeper I have got working for me now, and they said they have seen them, both of them said they have seen the documents. However, they are unable to locate that par-
891 ticular document that pertains to those particular deals.

I believe, if I remember correctly—I think I brought the original check with me on one of those, I think the check for $2,050, or something like that, or the original $2,300 check—or the $3,300 check, rather.

Q. Do you have it with you?

A. I don't have it with me now, but I think I did bring it along the last time I was here, unless I took it back with me.

Q. When was the last time you were here?

A. In November.

Q. And you did bring it back?

A. I brought that with that particular document that you have there, yes, sir.

Q. Do I understand correctly you did not get it back or you did get it back?

A. I did get it back.
Q. You did get it back?
A. Yes, because they didn't need it.
Q. But now you can't find it?
A. No. I just imagine it's destroyed now. I don't know, maybe I can find that check, that's about all, but I don't need it now. I mean, I thought I didn't any-
892 how.

Q. But you are unable to account for the disappearance of the originals of these documents, is that right?

Mr. Russo: He has asked that question and had it answered.

The Court: Objection sustained.

By Mr. Batter:

Q. Directing your attention to Government's Exhibit 75, did I understand your testimony correctly or not, that you could not identify the back of that check?

A. The back of the check, the signature?

Q. Yes.

A. No, because that wasn't placed before me. I don't know anything about that.

Q. You do not know whether that appeared—

A. I can identify the face of it, sir, but I can't identify the reverse side of it.

Q. Then you do not know whether that appears on the reverse side of the original?

A. No, I do not.

Mr. Russo: Well, if the Court please—

893 Mr. Batter: Your Honor, I object to Government's Exhibit No. 75 for identification. We have no objection to the others.

Mr. Russo: We will withdraw that portion of Government's Exhibit 75 purporting to be the reverse side of that check.

The Court: Under those circumstances they all may be admitted.

(The documents previously marked for identification Government's Exhibits 74 to 78, both inclusive, were thereupon received in evidence as Government's Exhibits 74 to 78, both inclusive, with the exception of the reverse side of Government's Exhibit 75.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Katz, directing your attention to Government's Exhibit 77, a check in the amount of $3,300 made out to cash—

A. Yes.

894 Q. (Continuing)—why was that check made out to cash?

A. Well, that was the way Mr. Achilli wanted it made out. That way the way he asked me to write it.

Q. That is what I understood your testimony on direct was. Now, Mr. Katz, did you at some time in the past under oath make the following statements with reference to that same check and that purchase:

"Q. Well, start at the time before you purchased it.

"A. Well, I called him on the telephone and asked him if he had a 1946 Chrysler. He said he did. I told him I would like to purchase one. He said he would be glad to sell me one if I would come up to Elgin and buy it.

"Q. Did you discuss the price?

"A. Yes, sir.

"Q. What was that discussion.

"A. The price was $3,300.

"Q. All right. Did you have any further discus-

895 sion about how payment was to be made?

"A. Yes.

"Q. What was that conversation?

"A. Well, it was too late to get a cashier's check, and I told him I would just write the check out for cash.

"Q. What did he say to that?

"A. He said that would be all right."

Did you make a statement in that form under oath?

A. I probably have, yes, sir.

Q. Then which is correct, the statement you made that I have just read to you or the statement you made now that Mr. Achilli asked you to make that check out to cash?

A. Well, I was under the impression that we have to make a cashier's check for it, the same as cash. I could have said that, yes, sir. I could have said I made a check

for cash, but that's just a mutual understanding, I presume. That's the way it would have been.

Q. Then your testimony to the effect that Mr. Achilli requested you to make that check out to cash is based on what you call a mutual understanding, rather than
896 a distinct recollection of what happened?

A. Well, I imagine I would, yes. It's been a long time ago. This took place in 1946.

Q. In fact, you do not have any distinct recollection at all of what happened, do you?

A. Regarding that transaction?

Q. Any independent recollection.

A. Yes, I have; I have got that much of a recollection.

Q. Do you have an independent recollection of why that check was drawn to cash?

A. Well, for the simple reason that the other car was purchased on a cash basis, on a cashier's check.

Q. But this was not purchased with a cashier's check, was it?

A. No, it wasn't.

Q. Do you have any distinct, definite recollection as to why that check was made out to cash?

A. Well, yes. I did say the first time I did make a check out for cash due to the fact the other check was a cashier's check.

Q. Then you may have said that?

897 A. I may have, yes.

Q. Instead of Mr. Achilli stating so?

A. Well, that's right. I could have.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. Now, the transaction concerning which Mr. Batter has been examining you, Mr. Katz, relates to the 1946—

Mr. Batter: I object to counsel testifying. Let the witness give his testimony.

Mr. Russo: All right.

By Mr. Russo:

Q. Is the automobile concerning which Mr. Batter has been examining you the Chrysler automobile, the 1946 Chrysler, that you purchased on or about December 24th, 1946?

A. Yes.

Q. Is Government's Exhibit 77 the Exhibit concerning which Mr. Batter asked you those questions?

A. Yes, it is.

Q. Now, at the time that you made that purchase
898 did you have a conversation with Mr. Achilli as to whom the application for license and title was to be made out—in whose name it was to be made out?

A. Yes, I did.

Mr. Batter: Your Honor, that is improper redirect examination.

Mr. Russo: That is exactly the matter concerning which Mr. Batter inquired on cross examination.

The Court: He may answer.

Mr. Batter: I did not inquire about title.

The Court: He may answer. Proceed.

Mr. Russo: Will you read the question to the witness, please, Mr. Reporter?

Q. (Read by the Reporter.)

A. Yes, I did.

By Mr. Russo:

Q. Relate to the Court and the Jury your best recollection of what that conversation was.

A. Well, the conversation was that the title was to be made to a stepbrother of mine who lives here in Chicago by the name of Hyman Hackley.

899 Q. At whose suggestion was that done?

A. At Mr. Achilli's.

Q. There is no doubt in your mind about that?

A. That's correct.

Q. And that is your best recollection as of this moment?

A. That's right.

Mr. Russo: No further questions.

Recross Examination by Mr. Batter:

Q. Mr. Katz, did you at any time in the past with reference to this very car make a statement containing the following, under oath:

"Q. At whose suggestion was your step-brother's name shown on the application for license?

"A. My suggestion.

"Q. It was your suggestion?

"A. Yes, sir."

A. Well, that's right.

Q. Well, that is contrary to what you just told counsel, is it not?

A. I don't know whether it is or not. He asked me the same, or practically the same question there.

900 Q. Counsel just asked you whether that was done on Mr. Achilli's suggestion.

A. Of course, he asked me whose name should I put it on, and I told him—my suggestion was to put it on Hyman Hackley's name. That was the only relative I had here in Evansville—I mean, in Chicago, rather.

Q. Then the truth of the matter is that you made the suggestion of the name in which the car was to be purchased?

A. Yes, I did make the suggestion to put it in his name. That's correct.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. The request for a name came from whom?

A. Came from Sam Achilli.

Q. The suggestion for the name—

A. Came from me.

Q. —came from you?

A. That's right.

Q. The name "Hinckley" came from you?

A. Hackley.

Q. The request for the name came from Mr. Achilli?

901 A. Yes.

Q. Right?

A. Yes.

Mr. Russo: Thank you.

Recross Examination by Mr. Batter.

Q. Is it unusual on the purchase of a car to ask what name the title is to be made out in?

A. No. A lot of franchised dealers—as a matter of fact, it goes on even today, Mr. Attorney. A lot of franchised dealers just like to have their automobile registered in some person's name so it can be titled to show

that the car was sold to an individual instead of an automobile dealer.

Q. Well, then, it is not unusual, is it?

A. No, it isn't. You are right.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Katz. No further questions.

The Court: That will be all, sir. Thank you.

(Witness excused.)

(Thereupon a short recess was taken after which the hearing of the above-entitled cause was resumed, as follows:)

902 EMIL M. BENDER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name in full, Mr. Bender?

A. Emil M. Bender.

Q. Where do you live, Mr. Bender?

A. Elgin, 183 South Alfred.

Q. I didn't get that.

A. 183 South Alfred.

Q. Will you keep your voice up so the Court and Jury may hear you too.

A. Yes, sure.

Q. By whom are you employed?

A. Elgin Paper Company.

Q. And in what capacity are you employed?

A. Salesman.

Q. How long have you been a salesman?

A. Twenty-five years, about.

Q. Mr. Bender, have you ever heard of a place called Barney's Snooker Hall?

A. Yes, sir.

Q. Where is that located?

903 A. It was located on Douglas Avenue.

Q. In what city?

A. Elgin.

Q. Did you ever have occasion to go there?

A. Yes, sir.

Q. During what period of time did you have occasion to go to Barney's Snooker Hall?

A. Oh, I would say around 1945, 1946.

Q. And what was the purpose for which you went there?

A. To play cards.

Q. Do you know who ran or operated Barney's Snooker Hall in 1946?

A. Sam Achilli.

Q. How many poker tables were operated?

A. Generally one.

Q. Generally how many players played at that table?

A. From six to eight.

Q. In the play of the game of poker, did you use money, coins or chips?

A. Chips.

Q. What was the value of the chips?

A. As I recall they were 25¢.

Q. Were they all 25¢, as you recall?

904 A. No, I think there were some other colored ones. The white ones, it seems to me, were 25, and there were two colors, but I can't recall what they were worth, what the value of them was.

Q. Now at the time that you played in 1946, who dealt those poker games?

Mr. Batter: Just a minute. The witness didn't testify he played in 1946. He said 1945 or '46.

The Court: No, he testified in 1946.

By Mr. Russo:

Q. Will you answer the question, Mr. Bender, please?

A. Will you repeat the question?

Mr. Russo: Read the question, please.

(Question read.)

By the Witness:

A. Well, it seems to me we all dealt, as I recall it.

By Mr. Russo:

Q. Was there a dealer for the house?

A. I wouldn't say that, no, not a dealer for the house.

Q. Was there a drag for the house?

A. Yes.

905 Q. What is a drag, Mr. Bender?

A. Well, the little I know about it, they take one chip out and that chip is used to pay for the expense of the house, I guess.

Q. Did you see anyone else—I believe you testified that Mr. Weaver was one of the dealers, am I wrong?

A. I didn't say one of the dealers. He was in there, yes.

Q. He was in there?

A. Yes.

Q. Did you ever see Mr. Achilli play there?

A. Not to my knowledge, no.

Q. Did you ever see him act as a dealer?

A. No, sir.

Q. About how many games would be played per hour average?

A. That is hard for me to estimate. I can't tell you. I don't know.

Q. Do you recall what the average drag per pot was?

A. One chip.

Q. Of what value?

A. I would say 25¢, a white chip. I think that is what it was.

906 Q. What kind of poker was played, Mr. Bender?

A. Stud poker, I think, as they call it.

Q. How many cards were dealt to each player?

A. It seems to me it was seven.

Q. Seven cards?

A. Yes.

Q. Who was in charge of the game?

A. Well, when I was there it was a man by the name of Weaver.

Q. And from whom did you buy your chips?

A. From him, as I recall it.

Q. When did the games start and when would they end?

A. I don't know when they started. I got down there occasionally. I wasn't there very much. I got down occasionally about nine o'clock, and they played until one.

Q. Do you know how many games a week were played, how many nights per week Barney's Snooker Hall operated?

A. I wasn't there every night, but I have heard that it was every night.

Q. Who took the drag for the house?

A. Weaver, when I was there.

Mr. Russo: Your witness.

907 *Cross Examination by Mr. Batter.*

Q. Mr. Bender, I believe you testified that Mr. Achilli operated Barney's Snooker Hall, is that correct?

A. That is right.

Q. When you were acquainted with it.

A. Yes.

Q. What years, or when was it that you attended some of the games at Barney's Snooker Hall?

A. I think it was in 1945 and '46. It is pretty hard for me to tell you exactly.

Q. Was it definitely during the time that Mr. Weaver was there?

A. Yes, sir.

Q. How do you allocate the date as 1945 and 1946?

A. That is the best I can remember. I can't give you the exact reason why, but I knew it was around that time in 1945 and 1946.

Q. Could it have been earlier by a year or so?

A. I don't think so, no, sir.

Q. Could it have been later by a year or so?

A. No.

Q. What definitely pins it in your mind as 1945 908 or 1946?

A. Well, that was the time that I was playing cards and I didn't play before that or after.

Q. What makes you recall that it was 1945 and 1946 that you played cards instead of 1944 and '45, or 1947 and '48?

A. I can't give you that answer. I don't know.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Bender. That will be all.

(Witness excused.)

JERRY McFARLAND, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Jerry McFarland?

A. Yes, sir.

Q. That is spelled M-c-F-a-r-l-a-n-d?

A. Yes, sir.

Q. Where do you live, Mr. McFarland?

A. I live at 337 Orchard Street, Elgin.

909 Q. Mr. McFarland, will you please keep your voice up so the Court and Jury may hear you too.

What is your business, please?

A. I work for the State as a fireman at the Elgin State Hospital.

Q. How long have you been employed there?

A. It will be eight years the first of June.

Q. Mr. McFarland, did you ever hear of Barney's Snooker Hall?

A. Yes, sir.

Q. Where is that located?

A. It is on Douglas Avenue in Elgin.

Q. Elgin, Illinois?

A. Yes, sir.

Q. Who operated Barney's Snooker Hall?

Mr. Batter: I object, your Honor, until we allocate the time this witness is talking about.

The Court: Objection sustained.

By Mr. Russo:

Q. Directing your attention to the year 1946, Mr. McFarland, did you ever have occasion to visit Barney's Snooker Hall?

A. Yes, sir.

910 Q. For what purpose did you go there?

A. To play cards.

Q. Who operated Barney's Snooker Hall in 1946?

A. Well, I don't know who operated the place, but it was talked that Sam Achilli operated it.

Q. You testified that you went there for the purpose of playing poker. What kind of poker did you play?

A. Well, we played stud poker.

Q. Any other kind?

A. The best I remember we played some draw poker.

Q. How many card were used in playing stud poker, per player?

A. Well, there was five-card stud poker and a seven-card stud poker.

Q. Did you play both kinds?

A. Yes, sir.

Q. How many tables were in operation at Barney's Snooker Hall in 1946?

A. One.

Q. In playing the game, did you use coins, chips, or any other device or—

A. We used chips.

Q. From whom did you buy the chips?

911 A. Well, from the one that run the game.

Q. Who ran the game at Barney's Snooker Hall in 1946?

A. Well, to the best of my knowledge, it was Ralph Weaver.

Q. Did anyone else run it at any time in which you played?

A. Well, I have seen other fellows run the game.

Q. Who?

A. Well, a fellow they called Chuck.

Q. Anyone else?

A. A fellow they called Cons.

Q. Do you know Cons' full name?

A. Constantina, I believe.

Q. Would that be Constantine Cirrincione?

A. Pardon?

Q. Would it be Constantine Cirrincione?

A. I don't—I am not sure. I just know him by "Cons."

Q. All right, sir.

What was the value of the chips that you purchased and utilized in playing poker?

A. Well, they had three. They was white ones, blue ones and red ones.

912 Q. What was the value of each color?

A. The white ones was 5¢, and the blue ones was 25¢, and the red ones was 50¢.

Q. Was there a drag for the house?

A. Yes, sir.

Q. Who played for the house?

A. Well, the one that run the game.

Q. I believe you testified that was Ralph Weaver, and on some occasions someone that you have identified as Chuck, and on other occasions someone that you have identified as Cons, is that correct?

A. Yes, sir.

Q. Generally what was the drag?

A. Well, it varied.

Q. What did it vary from, from what to what?

A. Well, I would say from a nickel to fifty cents.

Q. When would the game start and when would they end?

A. Well, I—

Q. How long would the games last?

A. Well, the best I remember, they would start from eight to nine o'clock and run until one o'clock in the a.m.

Q. Now generally, approximately, how many hands
913 would be played in an hour?

A. I wouldn't know.

Q. How long would it take to play one hand?

A. Well, just—I would say some place around three minutes on an average.

Q. On an average one hand every three minutes, is that correct?

A. To the best of my knowledge.

Q. And if it took an average of three minutes to play one hand, how many hands would be played in an hour generally on an average?

A. Well, I guess that would add up to twenty, I guess.

Q. And you say you played from about eight o'clock in the evening until about midnight or one o'clock in the morning?

A. Yes, I would say midnight or one o'clock.

Q. Now what would be the average drag per night in those poker games?

A. Per night?

Q. Yes, sir.

A. Why, I wouldn't know.

Q. Would you have any conception of what the drag per game would be?

914 A. Well, I never did try to figure it out.

Q. How many nights a week was poker played at Barney's Snooker Hall?

A. Well, that I don't know.

Q. How many nights a week did you play in 1946 on an average?

A. Well, I would say from one to four nights a week.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. McFarland, was the game going constantly each night?

A. Well, I have went up there when there wasn't a game.

Q. At all times when you were there, was Mr. Weaver in charge?

A. I would say most of the time.

Q. But there were times when the person you referred to as Chuck was in charge?

A. Well, I don't remember about this 1946. I went up there once in a while and played poker, and I don't remember just if this Chuck was a running there in
915 1946 or not, running that game.

Q. Over what period of time did you go up to Barney's Snooker Hall?

A. Oh, I went up there—you mean in the length of years?

Q. Yes.

A. I went up there from around 1934 to—I don't remember just what years.

Q. But it was for a period of years?

A. Yes, sir.

Q. And you did not discontinue prior to 1946, did you?

A. No, sir.

Q. During the period of years that you were up there, were you in a position to know that there was some change of owners?

A. Well, that I didn't pay any attention to.

916 Q. And is it a fact or not, that you do not know who in fact operated the place in 1946?

A. Personally, I don't know.

Mr. Batter: That is all.

Mr. Russo: Thank you. That is all.

(Witness excused.)

HAROLD H. ANDRESEN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mr. Andresen, will you state your full name and spell your last name, please?

A. Harold H. Andresen, A-n-d-r-e-s-e-n.

Q. Where do you live, sir?

A. At Elgin.
Q. What is your address?
A. 244 North Worth Avenue, Elgin, Illinois.
Q. What is your business?
A. I am in the cosmetics business.
Q. By whom are you employed?
A. Myself.
917 Q. What is the name of your business?
A. Del-Rose Products.
Q. Did you ever hear of Barney's Snooker Hall?
A. I did.
Q. Where is that located, Mr. Andresen?
A. On Douglas Avenue in Elgin.
Q. That is Elgin, Illinois?
A. Illinois, yes.
Q. During the year 1946 did you ever have occasion to go to Barney's Snooker Hall?
A. Yes, I did.
Q. What was the purpose for which you went there?
A. Well, we played poker.
Q. Who was the owner of Barney's Snooker Hall in 1946, as far as you know?
A. As far as I knew, I understood that Sam Achilli was.
Q. How often did you go there to play poker at Barney's Snooker Hall?
A. Possibly once or twice a week; whenever I had occasion to.
Q. At what time did the game start?
A. Usually around nine o'clock if they could get enough to start a game.
918 Q. How long would the games last?
A. Until twelve or one o'clock. Usually one o'clock.
Q. What kind of poker games did you play, Mr. Andresen?
A. Well, what they called dealer's choice. It was—whoever it was his turn to deal, whatever he preferred to deal.
Q. In the game was there someone acting for the house?
A. Yes.
Q. How many tables were there?

A. One.

Q. How many players would sit in the game including yourself? Generally, on an average.

A. There would be,—

Q. Sir?

A. There would usually be from six to eight. Not over eight, of course, in a poker game.

Q. Who in the game was acting for the house?

A. At the time that I played there, Weaver was the dealer or—

Q. Is that Ralph Weaver?

A. Ralph Weaver, yes.

919 Q. This is the year 1946?

A. Right.

Q. Now, as the game progressed was there a drag for the house?

A. Yes. They took a chip or two out of the game.

Q. Would that be taken out in the play of each hand?

A. Yes.

Q. Can you tell us generally the number of games that would be played in an hour?

A. Well, I figure a game would take about possibly three minutes to run off. I would say fifteen to twenty games per hour.

Q. How many games per night, then?

A. Well, if the game lasted three or four hours, I would imagine possible sixty to seventy, something along that line.

Q. Now, in playing the games, Mr. Andresen, did you use coins, money, chips or some other device?

A. They used poker chips.

Q. Poker chips?

A. Yes.

Q. And you say there was a drag for the house.

A. Yes.

920 Q. What would happen to the drag, if you recall?

A. They had a hole in the table and it went down through the hole, and then they also used to give us tins, and we got cigarettes with them—you know what I mean—but they had a hole in the table and they dropped the chips down in the hole.

Q. What was the value of the chips that were employed in the game?

A. It seems to me like they were 5 and 10 cents chips. As near as I can remember, that's the only denomination I can remember.

Q. What was the amount of the drag per game generally?

A. Usually they would take one or two chips out of each hand.

Q. Would they be 5 cent chips or—

A. Well, it was pretty hard to tell. They would reach in there and get a chip and you wouldn't know whether it was a 5 or 10 cent chip that they would take out.

Q. Who took out the drag?

A. The houseman.

Q. Mr. Weaver?

A. Weaver, yes.

921 Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Was Mr. Weaver the houseman at all times when you were—attended Barney's Snooker Hall?

A. At one time Chuck Molay was there, and he handled the game, too, at times.

Mr. Batter: That is all.

Mr. Russo: Thank you, sir. That will be all.

(Witness excused.)

The Court: We have a short matter, gentlemen, that we will have to interrupt for. It will take just a minute.

(Whereupon the Court gave attention to another matter on the call, after which the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

The Clerk: The case on trial.

922 ARTHUR MITCHELL, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Arthur Mitchell?

A. Correct.

Q. Where do you live, Mr. Mitchell?

A. 184 South Worth, Elgin.

Q. Please keep your voice up so the Court and Jury may hear you, too, please.

A. All right.
Q. What his your business?
A. Coal and oil.
Q. The coal and oil business?
A. Yes, Elgin Coal & Oil.
Q. Elgin Coal & Oil Company? Is that the name of the business?
A. Yes, sir.
Q. Where is that located?
A. 24 Kimball Street in Elgin.
Q. Mr. Mitchell, did you ever hear of Barney's Snooker Hall?
923 A. I did.
Q. Where is it located?
A. On Douglas Avenue.
Q. In what city?
A. Elgin.
Q. Elgin, Illinois?
A. Correct.
Q. During the year 1946, Mr. Mitchell, did you ever have occasion to go to Barney's Snooker Hall?
A. I did.
Q. For what purpose did you go there?
A. Amusement.
Q. What kind of amusement?
A. Poker; poker game.
Q. What kind of poker did you play there?
A. I believe it was mostly 7-card stud.
Q. Who operated Barney's Snooker Hall, Mr. Mitchell, in 1946?
A. Well, I believe Mr. Achilli was the owner of it, but of course, he didn't direct the game.
Q. He what?
A. He didn't direct the game.
Q. Yes.
A. It was in the hands of somebody else.
924 Q. How many tables were operated at Barney's Snooker Hall for the purpose of playing poker?
A. Well, I think there might have been two on occasion, but for the most part it was just one.
Q. How many players would sit in at the game including yourself?
A. Well, it varied.
Q. Varied from what to what?

A. Probably five to eight.
Q. Now, was there someone in the game who was acting for the house, a houseman?
A. Yes, there was.
Q. Who?
A. Ralph Weaver.
Q. Now, in the course of the progress of the game was there a drag for the house?
A. There was.
Q. Now, how was the game played? In other words, what did you use in playing the game, coins, money, chips, or what?
A. Chips.
Q. From whom would you buy the chips?
A. From the dealer.
Q. What was the value of the chips?
925 A. I believe they were 25 and a nickel.
Q. They were colored chips, were they?
A. Yes.
Q. What colors were they?
A. Blue and white, I believe.
Q. Blue and white?
A. Yes.
Q. You recall blue and white?
A. Yes.
Q. What was the value of the blue?
A. 25 cents.
Q. What was the value of the white?
A. 5.
Q. Now, what was the average drag per game?
A. I wouldn't have any idea.
Q. Would chips be dragged, Mr. Mitchell?
A. Chips would be dragged, that's right.
Q. Would they vary in number?
A. Yes, depending upon the size of the pot.
Q. How would the number of chips that were dragged be determined?
A. I don't know how that was determined.
Q. Did you ever see anyone other than Ralph Weaver act for the house?
926 A. I believe Mr. Achilli on occasion might have.
Q. Do you recall ever seeing anyone else?
A. I don't believe so; not during those years.

Q. About when, to your best recollection, was it that the game started?

A. Eight-thirty to nine.

Q. And how long would the games last?

A. Until one.

Q. How many nights did you play, Mr. Mitchell?

A. Oh, probably three times, four times in a year, possibly.

Q. How many nights—you said three or four times a year?

A. That's right.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Mitchell, over how long a period of years did you go to Barney's Snooker Hall?

A. You mean since it was first opened?

Q. From the time you first went to the time you ceased going.

A. Well, I went there probably since in the '30's.

Q. In the '30's?

927 A. The late thirties.

Q. What?

A. In the late thirties.

Q. And you continued to go how long?

A. Well, until whenever it was that Mr. Achilli got out.

Q. I cannot hear you.

A. When Mr. Achilli got out of there, you know.

Q. Then you ceased going?

A. Well, I've been in there occasionally since then.

Q. You have been in there since?

A. Yes.

Q. When did Mr. Achilli get out of there, if you know?

A. I don't remember when he got out.

Q. I believe you testified there were times occasionally when Mr. Achilli dealt?

A. I believe he may have on rare occasions.

Q. Very rare occasions?

A. Very rare occasions, yes.

Q. Can you recall what years that might have been?

A. Well, possibly between '46 and '9.

928 Q. What?

A. Possibly between '46 and '9. I don't remember exactly.

Q. Why do you say "between '46 and '9"?

A. Well, that's the years that I assume he owned the place. I can't be positive of that, of course.

Mr. Batter: That is all.

Mr. Russo: That is all. Thank you, Mr. Mitchell.

(Witness excused.)

HOMER JAHNCKE, called as a witness on behalf of the Government having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Homer Jahncke.

Q. Will you spell your last name?

A. J-a-h-n-c-k-e.

Q. What is your address, Mr. Jahncke?

A. 359 Fulton, Elgin.

Q. I am having difficulty hearing you, Mr. Jahncke.

929 I would like for you to keep your voice up so the Court and Jury may hear you, please.

A. Yes, sir.

Q. Did you ever hear of Barney's Snooker Hall?

A. Yes, sir.

Q. Where is that located?

A. Douglas Avenue, Elgin.

Q. Elgin, Illinois?

A. Yes, sir, Illinois.

Q. Directing your attention to the year 1946, Mr. Jahncke, did you have occasion to go to Barney's Snooker Hall?

A. I did.

Q. For what purpose did you go there?

A. Played poker.

Q. What kind of poker did you play?

A. Dealer's choice.

Q. In playing dealer's choice, what kinds of poker did you play?

A. Well, 5-card stud, 7-card stud, draw.

Q. How many tables were in operation in 1946 during the time that you played there?

A. One.

Q. Generally, how many players sat at the table
930 including yourself?

A. That varied from five to eight players.

Q. What time did the game start generally?

A. Around nine o'clock.

931 Q. And how long would they last?

A. Until twelve or one.

Q. On how many nights a week were poker games played at Barney's Snooker Hall?

A. Not playing every night, I couldn't exactly say, but it varied from five nights to a full week.

Q. Have you sat in on games on Sundays too?

A. Right.

Q. In playing the games, Mr. Jahncke, what did you use, coins, chips, or what?

A. Chips.

Q. Were they colored chips?

A. Yes, sir.

Q. What colors were they?

A. White, blue and red.

Q. What was the value of those chips?

A. White were a nickel, blues a quarter, and the reds were a half a dollar.

Q. From whom did you buy the chips?

A. The dealer.

Q. Who was the dealer in 1946?

A. Ralph Weaver, to the best of my recollection.

Q. During the course of the game, Mr. Jahncke, was there a drag taken?

932 A. Yes, sir.

Q. By the person who was acting for the house?

A. Yes, sir.

Q. And you have testified, I believe, that that was Ralph Weaver.

A. Yes, sir.

Q. How much was the drag per hand?

A. That was a percentage basis, I understand. It varied according to the size of the pot.

Q. And generally what was that drag?

A. Oh, ten, fifteen, twenty-five cents.

Q. That was per hand, was it?
A. No, you couldn't say every hand.
Q. Per pot?
A. Per pot.
Q. Speaking generally, Mr. Jahncke, what was the average number of hands that was played per hour during the time that you played?
A. About fifteen.
Q. Again speaking generally, Mr. Jahncke, how did the size of the pots run? What is your best recollection as to that?
A. An average?
Q. Yes, sir.
933 A. Five dollars.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Over a period of how many years did you go to Barney's Snooker Hall?
A. About eight years.
Q. What was that range of years?
A. 1942 to 1950.
Q. 1942 to 1950?
A. Yes, sir.
Q. Was Ralph Weaver the house man during all of that time?
A. I didn't quite get the question.
Q. Was Ralph Weaver the house man during all that time?
A. No. No, he wasn't.
Q. Who else was?
A. A man by the name of Chuck Millay and, well, that is the only other one I could mention the name.
Q. Chuck Millay and Ralph Weaver?
A. And Ralph Weaver.
Q. And you were interrogated with respect to the
934 year 1946. Can you isolate that year and confine the testimony you have given to that particular year, or is that the range over the entire period?
A. That is the range over the entire period.
Q. Do you as a matter of fact know who operated Barney's Snooker Hall in 1946?
A. I couldn't definitely say.

Mr. Batter: That is all.
Mr. Russo: Just a moment, Mr. Jahncke.

Redirect Examination by Mr. Russo.

Q. Did you ever hear—What was the common knowledge as to who operated Barney's Snooker Hall in 1946?
Mr. Batter: I object to that, your Honor.
The Court: Objection sustained.
Mr. Russo: That is all, Mr. Jahncke. Thank you.
(Witness excused.)

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935-936 * * *

937 RALPH CLIFFORD WEAVER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Ralph Clifford Weaver?
A. Right.
Q. Your last name is spelled W-e-a-v-e-r?
A. Right.
Q. What is your address, Mr. Weaver?
A. 3872 Mission Boulevard, San Diego, California.
Q. What is your business or occupation?
A. Selling vacuum cleaners.
Q. By whom are you employed?
A. Airway Sanitizer.
Q. Mr. Weaver, do you know Sam Achilli?
A. I do.
Q. Do you see him in the Court Room?
A. Yes, sir.
Q. Will you point him out, please?
A. (The witness indicated.)
Q. The third man sitting—
A. The third man.
938 Q. The third man sitting at the far end of Defense Counsel table?
A. Right.
Q. When was the first occasion you had to meet Sam Achilli?
A. Well, I think it was in 1942. I wouldn't be certain. It was '42 or '43.

Q. Where did you first meet him?
A. Barney's Snooker Hall.
Q. Where was that?
A. Elgin, Illinois, 117 Douglas Avenue.
Q. In what city?
A. Elgin, Illinois.
Q. On the accasion that you first met him, what if anything did you do?
A. I beg your pardon?
Q. On the occasion that you first met him, what were the circumstances under which you first met him?
A. I was in a poker game.
Q. With Mr. Achilli?
A. And several others.
Q. Yes. Now, at the time you first met Mr. Achilli who owned Barney's Snooker Hall?
939 A. Ora Barnhart.
Q. Did there come a time when Mr. Barnhart sold Barney's Snooker Hall?
A. Yes, sir.
Q. When was that?
A. 1942 or '43; I don't know which.
Q. To whom, if you know, did Mr. Barnhart sell Barney's Snooker Hall?
A. Sam Achilli and Charley Tidey.
Q. Were you ever employed at Barney's Snooker Hall?
A. Yes, sir.
Q. When and during what period?
A. I started there in '42 or '43 and worked up until —off and on until part of '46.
Q. When you were first employed at Barney's Snooker Hall, who operated it?
A. Sam Achilli and Charley Tidey. I think his name was Charley.
Q. How did they operate, if you know?
A. Just what do you mean by that?
Q. Were they partners?
A. I think so, yes.
Q. How long did that partnership arrangement continue?
940 A. Well, I would say six or eight months. I can't be certain of that.
Q. That is your best recollection?

A. That's the best of my recollection, yes.
Q. Then what happened, if anything?
A. Charley Tidey sold out to Sam Achilli.
Q. After Charley Tidey sold out to Sam Achilli, did you continue to work—
A. I did.
Q. —for Sam?
A. I did.
Q. How long did you work for Mr. Achilli?
A. Off and on from 1942 or '43—as I said, I don't exactly remember what year I started there—up until around the middle of 1946. I don't know what month.
Q. What was the nature of your employment at Barney's Snooker Hall?
A. Operated a poker game.
Q. How many tables did you operate?
A. One.
Q. Generally how many players sat in at these games?
A. If it was a full game it was eight. There
941 wasn't always a full game. That included myself.
Q. In the course of those games did you act as the man for the house?
A. I did.
Q. Was there a drag—
A. Yes, sir.
Q. —for the house?
A. Yes, sir.
Q. What was the average drag per pot, Mr. Weaver?
A. Well, I would say that the average drag—of course, it varied. It depended upon what was in the pot. I would say that the average drag was around 40 cents a pot.
Q. What would you say the average drag per night was?
A. Well, some nights we had a game of an hour and a half and some nights we had a game of six hours or seven hours, but I would say per night it ranged from—oh, $20.00 to $45.00.
Q. Now, how many nights a week did you hold games at Barney's Snooker Parlor?
A. Seven nights a week if there was anybody there to play.
Q. Now, in playing those poker games, what
942 symbols did you use, coins, chips or what?
A. Chips.

Q. Who sold the chips?
A. I did.
Q. Were the chips of various colors?
A. Yes.
Q. What was the value of the colors of the chips?
A. The white ones were a nickel, the red ones were a quarter and the blue ones 50 cents.
Q. And was the drag in chips?
A. Yes, sir.
Q. From whom would the players buy the chips?
A. Me.
Q. Now, as you dragged for the house, what disposition would you make of the chips?
A. Dropped them down a hole in the table. They fell into a box down under the table, and there was a slot cut in the table and the chips went down this slot into this box down here (indicating).
Q. What kind of a box was it?
A. Well, it was just a box about that big square, I guess (indicating approximately twelve inches).
It was just a wooden box with a door on it and a padlock on it.
943 Q. Was the box padlocked to the table?
A. Yes, sir—was it padlocked to the table?
Q. Yes.
A. The box?
Q. Yes.
A. It was nailed.
Q. And was the box padlocked?
A. The box was padlocked, yes.
Q. Did you have a key to that box?
A. No, sir.
Q. Now, after a game was over what disposition would you make of the chips and the money, if any, that was taken in during the course of that game?
A. I made no disposition of the chips. The money I put in the file cabinet and locked it up.
Q. Where was the file cabinet, Mr. Weaver?
A. Well, it was right in back of me against the wall. It was a regular filing cabinet with four—
Q. Did you have a key—pardon me.
A. There was four drawers, I believe it was.
Q. Did you have a key to it?
A. Yes, sir.

Q. Who else had access to the file cabinet besides you?

944 A. The man from downstairs. At that time I think it was Mr. Jacobs, and whether Mr. Achilli had a key or not to it, I don't remember.

945 Q. Now how was the accounting made with respect to the chips that had been deposited in the box and the money that you took in during the course of a game?

A. Well, the next day after the game, Mr. Jacobs would come up, open the box, count the chips, and I had to have the money there to correspond with the chips.

Q. Did you derive any income from your employment?

A. Yes, sir.

Q. How was that income determined?

A. I got $40 a week. The way that was determined, I got 20 percent up to $200. If I ran over that, over $200, then I got 35 percent.

Q. Then on the basis of that arrangement, what was your weekly income from your appointment at Barney's Snooker Hall?

A. Oh, from $40 to $60.

Q. During the time that you were employed at Barney's Snooker Hall by Mr. Achilli, what if any other business did he operate, if you know?

A. Buying and selling cars.

Q. At the time that you first met him, was he also engaged in the business of buying and selling cars?

946 A. He was.

Q. Where was he located at that time?

A. On Highland Avenue, Elgin, Illinois.

Q. Now do you recall the name of the person—Strike that question.

Tell us, please, the location of the business with reference to 192 Wellington. Can you describe that?

A. Well, there was a gas station and an extra lot there.

Q. Who owned that lot?

A. Ben Gallina.

Q. What year was that, to your best recollection?

A. It was 1942 or 1943.

Q. Do you know whether or not he was in business for himself at that time or whether he was employed by someone else?

A. He was in business for himself.

Q. And at that time under what name was he operating?

A. Highland Motor Sales.

Q. How long, Mr. Weaver, did he operate as Highland Motor Sales on Mr. Gallina's lot?

A. Well, that I can't say for sure. I really don't
947 know. I think, to the best of my knowledge—

Q. What is your best recollection?

A. It would be until 1944 or '45. Now I can't be sure about that.

Q. What happened if anything, and if you know, at or about that time?

A. He moved.

Q. Where did he move to?

A. I don't know whether it is Wellington or not, Wellington and Grove Avenue. The place was formerly owned, I think, by Hoppe's.

Q. Was that known as Hoppe's Garage?

A. I think so.

Q. Now at the time that Mr. Achilli was operating on Mr. Gallina's lot, do you know whether at that time he had the Chrysler-Plymouth franchise?

A. I do not know.

Q. And the Mr. Achilli whom you have pointed out in the court room, is that the same Mr. Achilli by whom you were employed at Barney's Snooker Hall?

A He is, yes, sir.

Q. At whose direction, Mr. Weaver, did you place the money that was taken in from the poker game in the filing cabinet?

948 A. At whose direction?

Q. Yes, sir.

A. Well, the people I worked for, Sam Achilli and whoever owned it.

Q. And during the period of time, during the year 1946, during the period of time that you worked there, as I understand it, you said from the first of the year until sometime about the summer?

A. A few months after the first of the year, but I don't know exactly how long.

Q. What was your average income from your employment there in that period?

A. I got my $40.

Mr. Russo: Your witness.

Mr. Batter: What was that last question and answer, please?

(Record read.)

By Mr. Russo:

Q. That was per week?

A. Per week.

949 *Cross Examination by Mr. Batter.*

Q. Mr. Weaver, if I understood your testimony correctly, you ceased your employment at Barney's Snooker Hall in the summer of 1946, is that correct?

A. Sir?

Q. If I understood your testimony correctly, you ceased your employment at Barney's Snooker Hall in the summer of 1946, is that correct?

A. In the summer?

Q. Yes.

A. Yes. I worked for one man after that.

Q. At Barney's Snooker Hall?

A. Yes, for a couple of weeks or something like that.

Q. Who was that?

A. Chuck Millay. Chuck Millay is all I know.

Q. What do you mean when you say you worked for Chuck Millay? Was he the owner after that?

A. He bought the place, I think it was in October. I am not positive on that.

Q. October of what year?

A. 1946.

Q. 1946?

950 A. Yes.

Q. That would be after your employment, would it?

A. That would be after my employment because I was out of there, but after he bought the place, he hired me and I went back in there for a couple of weeks.

Q. After he bought the place, he hired you?

A. Yes.

Q. What in your memory definitely states this year as 1946 instead of some other year?

A. What made me think—or I mean, what made me say 1946 instead of some other year?

Q. Yes.

A. In 1945 at Christmas, Chick Jacobs, Charles I guess is his name, gave me a $50 bill for Christmas in 1945, and how I remember it was 1945 because I went downtown and bought my daughter a watch with it for a Christmas present, and that was Christmas, 1945, and I left here in 1946, in November, and went to Southern Illinois. I know it was in November because I went hunting down there and I got the rabbit fever, and the hunting season doesn't open until November 10, 1946, it was. So I wouldn't have been hunting rabbits if it hadn't been in November, and I had just gotten
951 there. That is what makes me remember it.

Q. Prior to your separation from Barney's Snooker Hall, you did have a new employer, did you not?

A. Had a what?

Q. A new employer.

A. I don't quite understand that. Prior to—?

Q. Your separation from Barney's Snooker Hall in the summer of 1946.

A. Yes.

Q. You had a new employer, did you not?

A. I didn't work.

Q. At Barney's Snooker Hall?

A. There was three or four months in there, about that, that I didn't work at all until Chuck Millay bought the place and hired me to run the poker game again. I worked there, I think, a couple of weeks. Then he fired me and I was out altogether.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. When was that now that you were fired, Mr. Weaver?

A. In November, 1946.

Q. Now at or about the time that you were dis-
952 charged by Mr. Achilli, did you have any conversation with him about taking—

Mr. Batter: The witness didn't testify he was discharged by Mr. Achilli. I object to counsel's statement.

By Mr. Russo:

Q. Were you discharged by Mr. Achilli?

A. I think I quit. I don't remember whether I was fired that time or quit.

Q. Well, at the time that you were either discharged or fired, did you have any conversation with Mr. Achilli concerning the taking over of the business by you from him?

A. Well, he wanted to sell it, and nobody seemed to have any money to buy it outright, so he made some mention of somebody taking it and giving him $75 a week until it was paid for. I told him I would take it over, but I didn't get it, so I didn't take it over.

Mr. Russo: Any further questions?

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Weaver. That will be all.

The Witness: Thank you.

(Witness excused.)

953 BEN GALLINA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Ben Gallina?

A. Yes, sir.

Q. And is that spelled G-a-l-l-i-n-a-?

A. Correct.

Q. Where do you live, Mr. Gallina?

A. I live at Riverside, California.

Q. What is the address?

A. 4045 Arline Street.

Q. What is your business at the present time?

A. At the present time I am unemployed.

Q. How long have you been unemployed?

A. Oh, about six months.

Q. What was your business prior to that time?

A. Service station business.

Q. Now prior to your residence at 4045 Arline Street, Riverside, California, where did you live?

A. 180 North McLean, Elgin, Illinois.

Q. How long did you live in Elgin?

A. About thirty-two years.

954 Q. Over what period, Mr. Gallina?

A. From 1922, I guess, or 1923 to 1953.
Q. Do you know the defendant, Sam Achilli?
A. Yes, sir.
Q. How long have you known him?
A. From about 1938.
Q. Do you see him in the court room?
A. Yes, sir.
Q. Will you point him out, please?
A. The third fellow from the desk there (indicating).
Q. The third man at the far end of defense counsel table?
A. That is right.
Q. And when did you first meet him?
A. I met him in 1938.
Q. What were the circumstances, Mr. Gallina, under which you first met Mr. Achilli?
A. Well, I was running a service station on 301 Highland Avenue, Elgin, and Mr. Achilli was talking to a gentleman running a used car lot by the name of Harold Money, and what the conversation was I really don't know, but to my opinion was that he was applying for a job to sell cars for Harold Money.
955 Q. Who owned that lot, Mr. Gallina?
A. The property?
Q. Yes.
A. I did.
Q. And to whom did you have it leased, if you had it leased?
A. I didn't have it leased, but I had it rented by the month.
Q. To whom had you rented?
A. To Mr. Harold Money, to begin with.
Q. And what business was he operating on that lot, if any?
A. A used car lot.
Q. Did Mr. Money give Mr. Achilli a job?
A. Yes, sir.
Q. How long did Mr. Achilli work for Mr. Money?
A. Oh, about a year.
Q. Then what if anything happened?
A. Then Mr. Achilli bought a half interest in the business.
Q. Then how long was it that Mr. Achilli and Mr. Money operated that business?

A. Oh, about six or eight months.

Q. Then what happened, if anything?

956 A. Then Mr. Achilli bought Mr. Money out.

Q. Do you know how much Mr. Achilli paid Mr. Money for the other half interest in the business?

A. Well, as I understand, he paid $500.

Q. Do you know, Mr. Gallina, where Sam Achilli got all or any part of the money with which he paid Harold Money?

Mr. Batter: I object to that, your Honor.

Mr. Russo: He can testify if he knows, if your Honor please.

The Court: He may answer it.

By the Witness:

A. Why, as I understand, which I could not prove, as I didn't see the transaction, nor I didn't see the check that was turned over to Mr. Harold Money—

Mr. Batter: I object to it, your Honor, as hearsay from the witness' own statement.

The Court: Objection sustained.

By Mr. Russo:

Q. Did Mr. Money leave the business after he sold it to Mr. Achilli?

A. He did.

Q. Then after Mr. Money left, what if anything

957 happened in connection with that business?

A. Well, Mr. Achilli operated the business by himself.

Q. I believe you testified that you owned that lot, is that right?

A. Yes, correct.

Q. Now during the time that Mr. Achilli was operating that business there, were you receiving any money from Mr. Achilli?

A. Yes, sir, I was, $25 a month rent.

Q. After Mr. Achilli took over that lot, who paid you the money, the $25 a month?

A. Mr. Achilli.

Q. How long did that arrangement continue?

A. Between six and eight months.

Q. Did it continue the whole time that Mr. Achilli remained there?

A. That is right.

Q. How long did Mr. Achilli operate that business on your lot?

A. Well, from the time that he bought out Mr. Money it was between six and eight months.

Q. And when did his occupancy of your lot cease, as you best remember?

958 A. Oh, I think it was in the fall of 1943—yes, about 1943, yes.

Q. About how long was Mr. Achilli there altogether?

A. By himself?

Q. Yes, sir.

A. Between six and eight months.

Q. Did there come a time, Mr. Gallina, when you asked Mr. Achilli for an increase in the rental?

A. Yes.

959 Q. Did you have a conversation with Mr. Achilli?

A. Yes.

Q. About that?

A. I did.

Q. Who was present besides yourself and Mr. Achilli if anyone?

A. No one else.

Q. Relate for the Court and Jury in substance what that conversation was.

A. I asked Mr. Achilli for rent of $35.00 a month and at that time he said that he couldn't afford to pay that much money, so I says, "From here on I'll—you got thirty days to make up your mind", and on the end of the month he pulled all his cars off the lot.

Q. After he removed his cars from your lot where if any place else did he begin doing business?

A. Well, at that time I didn't know, when he pulled the cars off the lot, that he pulled them on account of the raise in rent, but instead he was called in Service, and as I understand he came to Chicago for an examination and

960 was turned down and later on he came again, thirty days later, and he was turned down, and after that he started another used car lot on South Grove Avenue, Elgin.

Q. How long did he operate on Grove Avenue?

A. Oh, to the best of my knowledge I would say about six months.

Q. Under what name did he operate there?

A. Under Highland Motor Sales.

Q. Did there come a time when he moved from Grove Avenue?

A. Yes.

Q. About when was that?

A. Oh, in the year 1944. I believe it was around the fall of 1944.

Q. Where did he move to?

A. He moved to 192 Wellington Avenue.

Q. Is 192 Wellington Avenue the same place where Highland Motor Sales is located at the present time?

A. Yes, sir.

Q. Mr. Gallina, did you ever hear of Barney's Snooker Hall?

A. Yes, sir.

Q. Where is that located?

A. 117 Douglas Avenue.

961 Q. In what city?

A. Elgin.

Q. Directing your attention to the year 1946, did you ever have any occasion in that year to visit Barney's Snooker Hall?

A. I did.

Q. For what purpose did you go there?

A. To play poker.

Q. In the year 1946, Mr. Gallina, who operated Barney's Snooker Hall?

A. Mr. Achilli operated the Snooker there until the fall of 1946, and in the fall of 1946 he sold it to Mr. Chuck Molay.

Q. In the conduct of the games—strike that question. —I believe you testified you went there for the purpose of playing poker, is that correct?

A. Correct.

Q. What kind of poker did you play there?

A. Stud poker.

Q. Stud poker?

A. Yes, sir; seven-card stud.

Q. How many poker tables were there in operation there at that time?

962 A. Just one.

Q. What was the average number of players at these games?

A. Oh, it all depended; from four, six, to eight. The limit was eight.

Q. During the year 1946, Mr. Gallina, who was the house man? Who operated the card games for the house? Who was the dealer, the houseman?

A. Mr. Ralph Weaver.

Q. Now, in the course of playing poker was there a drag for the house?

A. Yes.

Q. Will you explain, Mr. Gallina, for the Court and Jury just what a drag is?

A. Well, a drag—I guess you would call it a profit for the home, for the house, which would amount to maybe —oh, 30 to 40 cents a pot.

Q. Was there a drag for each pot?

A. Yes, there was.

Q. Who took the drag?

A. Mr. Weaver.

Q. How would he take it? In coin or chips or how?

A. There were chips.

Q. What if anything would he do with the chips 963 that he took for a drag?

A. Well, there was a little slot in the table and he put those chips in the slot.

Q. Now, did the chips have various colors?

A. Yes.

Q. What colors did they have?

A. The nickel chips were white, the blues were a quarter and the reds were a half.

Q. Generally, so far as you know, Mr. Gallina, what was the average drag per pot?

A. Oh, per pot, I'd say it averaged about 30 to 40 cents.

Q. How many games would be played in an hour, generally?

A. Oh, I'd say between ten and twelve.

Q. What time of day or night would the game start?

A. Oh, sometimes it would start at seven o'clock, sometimes at eight, sometimes at nine. It all depends on how the boys got around.

Q. How long would the games last?

A. One o'clock.

Q. Were games played there on Sundays also?

A. Yes, sir.

964 Q. How many evenings a week were the games played at Barney's Snooker Hall?

A. Seven days a week.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Tell me, were there enough people there to have a game every night?

A. No, not quite every night.

Q. Were there enough people there so that on such nights as there was a game it would necessarily continue until one o'clock?

A. Well, it all depends on how many people were there playing. If the game was a good going game they would stay until one o'clock, but there was many and many a nights there was no game there, especially in the summertime.

Q. Very often it would break up early, too, wouldn't it?

A. That's right.

Q. Now, I believe you testified that Mr. Achilli sold the operation of Barney's Snooker Hall in 1946, did you not?

A. That's right.

Q. How do you place that year 1946?

965 A. Well, I'll tell you: I remember that very thoroughly because another Buddy of mine and I—was going to Vincennes, Indiana and this Buddy of mine wanted a ride as far as Clay City, and I drove him as far as Clay City and left him there and I went on to Vincennes, and that was in the month of November, 1946.

Q. Why was that in 1946 instead of 1945, let's say? I mean, how do you localize it as the year 1946?

A. Well, because I remember very thoroughly that was it.

Q. No other significant event other than that trip to Vincennes that would definitely associate in your mind the year 1946?

A. I beg your pardon?

Q. There is no other definite event other than your going to Vincennes that would definitely locate the year as 1946 instead of any other year, is there?

A. Oh, yes. I guess I'm old enough to know whether it was 1945 or 1946.

Q. You knew at the time undoubtedly, but do you presently have any recollection that that is definitely
966 the year?

A. Yes. Very thoroughly, yes, sir.

Q. You do?

A. I do.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Gallina. That will be all.

(Witness excused.)

SEYMOUR I. BURTON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Seymour I. Burton?

A. Yes, sir.

Q. Your first name is spelled S-e-y-m-o-u-r?

A. Yes, sir.

Q. Your last name is spelled B-u-r-t-o-n?

A. Yes, sir.

Q. Where do you live?

A. 1009 Chestnut Avenue in Wilmette.

Q. What city?

967 A. Wilmette, Illinois.

Q. What is your business or profession?

A. I am an attorney.

Q. How long have you been an attorney?

A. Since 1934.

Q. Now, in addition to your profession as an attorney, do you have any other business or occupation?

A. Yes, sir. I am with Material Service Corporation.

Q. What is your capacity at the present time?

A. Vice-President.

Q. How long have you been Vice-President of Material Service Corporation?

A. Since August of last year, 1954.

Q. Now, prior to August, 1954, did you have any other connection with Material Service Corporation?

A. Yes, sir.

Q. What was your connection prior to August, 1954, with Material Service Corporation?

A. Well, I was house attorney for the company for many years prior to that, and at one time Assistant Secretary, which office I held prior to becoming Vice-President.

968 Q. Were you the house attorney in 1946, Mr. Burton?

A. Yes, sir, I was.

Q. Now, directing your attention to March 1st, 1946, did you, as House Attorney for Material Service Corporation have any transaction with Sam Achilli or with anyone purporting to act on his behalf concerning a piece of property owned by Material Service Corporation about three miles south of Elgin on Highway 25?

A. Yes, shortly after the first of March, of 1946 our company received a letter from a lawyer by the name of Earl H. Gromer of Elgin, following which we had a transaction with Mr. Achilli through Mr. Gromer.

Q. As a result of these negotiations did you prepare an agreement?

A. Yes, sir, I did.

Mr. Russo: Will you mark this as Government's Exhibit 79 for identification, please.

(The document was thereupon marked Government's Exhibit 79, for identification.)

969 By Mr. Russo:

Q. Mr. Burton, I show you Government's Exhibit No. 79 for identification and ask you to examine it and then state whether or not that is the agreement to which you have referred.

A. Yes, sir. This is an agreement that was entered into between Material Service Corporation and Sam and Ruth Achilli.

Q. Now, after you prepared Government's Exhibit No. 79 for identification, what if anything did you do with it?

A. Well, after some correspondence with Mr. Gromer I prepared this document in duplicate, I believe, and sent it to Mr. Gromer with a request that he have it signed by his clients, Sam and Ruth Achilli.

Q. At the time that you mailed Government's Exhibit No. 79 to Mr. Gromer, did it bear any signatures?

A. No, sir. At the time I mailed it—the first time I mailed it to him, it did not.

Q. Did there come a time when you received Government's Exhibit 79 for identification back from Mr. Gromer?

970 A. Yes, sir.

Q. At that time were there any signatures on Government's Exhibit 79 for identification?

A. Yes, sir. There were signatures appearing at the very end, on the last two lines of the fifth page of that instrument.

Q. What signatures appear on there?

A. The signatures of Sam and Ruth Achilli appeared to have been on there.

Q. After you received Government's Exhibit 79 for identification with those signatures, what if anything did you cause or procure to be done?

A. Well, I took the matter—or rather, took the instrument, which was in duplicate, to Mr. Irving Crown, who is a Vice-President of our company, and initialed it and he signed it on behalf of the company, subsequent to which Mr. S. J. Marks, who was Assistant Secretary of the corporation, signed it on behalf of the company and the corporate seal was put on it and subsequently it was shortly thereafter returned to Mr. Gromer. That is, one copy—this copy (indicating)—was returned to Mr. Gromer. The original or the other executed original

971 we kept in our files.

Q. Is Government's Exhibit No. 79 for identification a duplicate original copy of that agreement?

A. It appears to be, yes, sir.

Q. Is there any doubt in your mind about that?

A. None, no, sir. There is not.

Q. Now, at or about the time that Government's Exhibit No. 79 was executed, what if any consideration moved from Mr. Achilli to Material Service Corporation?

A. It is my recollection that—may I refresh my recollection by referring to my file here?

Q. Yes, sir.

A. Prior to receiving the instrument from Mr. Gromer after he had advised me that it had been signed by the Achillis, we received $100.00 in the form of a check.

Q. What was the total consideration that was agreed upon for the sale by Material Service Corporation of that property to Sam and Ruth Achilli?

A. The total consideration was $1,000.00.

Q. Now, did there come a time when Material
972 Service Corporation executed a deed for that property?

A. Yes, sir, there did.

Mr. Russo: Will you mark this as Government's Exhibit 80 for identification, please.

(The document was thereupon marked Government's Exhibit 80 for identification.)

By Mr. Russo:

Q. Now, Mr. Burton, I show you Government's Exhibit No. 80 for identification, and ask you to examine it and state whether or not that is either the original or the duplicate original of the deed to which you have referred?

A. Well, that is the original of the deed. There was no duplicate original. We just executed one.

Q. That is the deed?

A. Yes, sir.

Q. What signatures if any does Government's Exhibit 80 bear?

A. Well, it bears the signature of Material Service Corporation by Irving Crown, Vice-President, and
973 Sidney J. Marks, Assistant Secretary, and it bears the signature of Arthur H. O'Connor, a Notary Public.

Q. On what date was Government's Exhibit 80 executed?

A. It is my recollection that it was executed on the date it bears, which was June 15th, 1946.

Q. Are you familiar with the signature of Mr. Irving Crown?

A. Yes, sir.

Q. Is that his signature?

A. It is, sir.

Q. Are you familiar with the signature of Mr. Sidney J. Marks?

A. I am, sir.

Q. Is that his signature?

A. It is.

Q. To whom was Government's Exhibit 80 for identification delivered?

A. It was mailed by me to Mr. Gromer, Earl H. Gromer in Elgin.

Q. Now what if any consideration moved from Sam

Achilli or from anyone purporting to act on his behalf, at or about the time that you delivered that deed
974 to Mr. Gromer?

A. Well, prior to the delivery of the deed we received an additional $900, that is, additional to the $100.00 which we had previously received from Mr. Gromer.

Q. Was that $1,000 the total consideration that Material Service Corporation received for the property described in Government's Exhibit 79 for identification and Government's Exhibit 80 for identification?

A. Yes, sir, with one minor exception. It is my recollection there was some obligation on their part to construct a fence around the property, and it was referred to in the deed as being part of the consideration.

Q. Does Government's Exhibit 79 for identification correctly recite the consideration that moved from Achilli to Material Service Corporation?

A. No. 179 is the agreement?

Q. Yes.

A. Yes, sir, it does.

Q. Does Government's Exhibit 80 for identification correctly recite the consideration that moved from Achilli to Material Service Corporation?

975 A. Government's Exhibit 80 which is the deed dated June 15th recites a consideration of $10.00 and other good and valuable considerations. However, we actually received $1,000 for the conveyance of this property.

976 Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 79 and 80.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 79 and 80 for identification were thereupon received in evidence as Government Exhibits 79 and 80, respectively.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

The Court: That will be all, sir.

(Witness excused.)

Mr. Russo: May it please your Honor, if there is no objection by counsel for the defense, we would like to substitute for Government Exhibit No. 80, which pur-

ports to be the deed, a certified photostatic copy prepared by the Recorder of Kane County.

Mr. Batter: May I see the photostat?

Mr. Russo: Yes.

Mr. Batter: No objection.

The Court: All right. The substitution may be made.

977 Mr. Russo: Just a moment, Mr. Burton, before you go.

May I have the photostat marked Government Exhibit 80-A, and have that substituted on the record for Government Exhibit 80.

The Court: Yes.

(The document was thereupon received in evidence as Government Exhibit 80-A.)

Mr. Russo: Thank you, Mr. Burton.

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MORTIMER HAWKINS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Mortimer Hawkins?

A. That is correct.

Q. Will you spell your first name, please?

A. M-o-r-t-i-m-e-r.

978 Q. Where do you live, Mr. Hawkins?

A. Elgin, Illinois.

Q. What address?

A. 450 North Commonwealth.

Q. What is your business or profession?

A. I am architect.

Q. How long have you been an architect?

A. Since 1934.

Q. What is your business address?

A. 17 Douglas Avenue.

Q. In what city?

A. Elgin, Illinois.

Q. Will you describe briefly, Mr. Hawkins, the nature of the work of an architect for the Court and Jury?

A. Well, as a professional man you are engaged by a client to perform an architectural service, which comprises the following things: Making preliminary sketches

and conferences, working drawings, specifications, obtaining figures, supervising the job, and upon completion releasing it and giving it to the owner.

Q. Mr. Hawkins, do you know Sam Achilli?

A. Yes, sir.

979 Q. When did you first meet him?

A. Oh, in the first part of the summer, I think, of 1946.

Q. Do you see the defendant, Sam Achilli, in the court room?

A. Yes, sir.

Q. Will you point him out, please?

A. He is seated by the column, with the glasses (indicating).

Q. The second man on the far side of defense counsel table?

A. With the glasses and gray hair.

Q. Is he the same Sam Achilli that you met in June of 1946?

A. Yes, sir.

Q. What were the circumstances under which you first met Sam Achilli?

A. I would say it was through a mutual friend.

Q. What is the name of the mutual friend?

A. Mr. Gromer.

Q. Tell the Court and Jury, please, how that came about.

A. Well, as I can recall it, at that time my office was in the Tower Building at 100 East Chicago Street,

980 and I believe I met Mr. Gromer in the lobby of the building, and he asked me if I would be interested in doing a job for Mr. Achilli.

Q. Then what if anything happened?

A. Well, prior to this there was a building or a restaurant three miles south of Elgin, and there was a fire.

Q. What was the name of that building?

A. The Red Lion.

Q. After your conversation with Mr. Gromer, did you meet Mr. Achilli?

A. Yes, I did.

Q. Had did th[illegible]nt?

A. Well, I [illegible]at the best that I can recall, I drove ou[illegible] to the site.

Q. Did you meet anyone there?

A. And I believe that I met Sam at that time.

Q. Did you have a conversation with Sam Achilli at that time?

Was there any conversation concerning the ownership of the premises?

A. Yes, there was. I believe Sam and Earl asked me if I could replace or rebuild or was interested in doing this building.

981 Now I am not sure whether it was actually asked at the site or if it, if this conversation was or took place at the Colonial Restaurant, which is on U. S. 20 in Elgin, Illinois.

Q. Was there any discussion about your services in connection with the Red Lion building? I believe you said they were contemplating rebuilding it, is that correct?

A. That is right.

Q. Was there any conversation in that connection about rebuilding?

A. At lunch there was a discussion of the building and what the architect would do and the fee that would be charged for that type of work, and I believe at that time I gave them a resume or a synopsis of what the professional services of an architect were at lunch.

Q. As a result of that conversation, did you write a letter to anyone?

A. Yes, sir.

Q. To whom did you write a letter?

A. I wrote a letter to Sam Achilli, and I confirmed my conversation which I had, explaining the services of an architect, the stages or progress of the work, and
982 the amount of the payments for each one or partial service rendered.

Q. Was that letter prepared in duplicate?

A. Yes, it was. I have a copy of that.

Mr. Russo: I will ask that this be marked Government Exhibit 81 for identification.

(The document was thereupon marked Government Exhibit 81 for identification.

By Mr. Russo:

Q. I now show you Government Exhibit 81 for identification, and ask you if that is a duplicate original copy of the letter to which you have referred.

A. I would say yes, sir.

Q. Now after you mailed the original of Government Exhibit No. 81 for identification, what if anything happened?

A. I proceeded to make sketches on receipt of a retainer.

Q. What was the amount of the retainer?

A. The amount of the retainer was $320, or for the preliminary sketches, which was two percent as outlined here.

983 Q. From whom did you receive that $320?

A. I would say that I received it from a check from Sam Achilli.

Q. I believe you testified that you began preparing sketches, elevations, things of that sort.

A. Plans and elevations.

Q. And floor plans?

A. Right.

Q. Now after you prepared those sketches, the elevations and floor plans, what did you do with them, if anything?

A. Oh, upon completion of these sketches, which are the plans and elevations, I submitted them to Sam for his approval.

Q. By Sam you mean the defendant, Sam Achilli?

A. Sam Achilli, that is correct.

Q. Did he approve them?

A. Yes, sir.

Q. After he approved those sketches, the elevations and floor plans, what if anything did you do?

A. I then prepared the working drawings and specifications to complete the building.

Q. Then after you made the working drawings and prepared the specifications, what if anything did you
984 do with them?

A. Then we proceeded to get figures, competitive figures or bidders.

Q. Were the floor plans, the working drawings and specifications approved by anyone?

A. They were approved before the drawings went out for figures.

Q. Then after they were approved, you asked for bids?

A. That is correct.

Q. Did you receive bids?

A. Partially. May I explain it this way:

Q. The drawings and specifications were broken down in that the general drawings and specifications were considered as one figure, and that the pipe trades, such as plumbing, heating, lighting, ventilation, were taken as separate figures.

Now on the general, and because of the time of year or right after the war, with critical materials and the fact that you couldn't get steady prices on materials, it was decided that, because we couldn't get competitive figures, it was decided that we would take and build this building, or replace it on a time-and-material or cost-
985 plus basis, and one contractor was selected for that.

Q. You said "we decided." Who decided?

A. Well, actually it would be Sam Achilli.

Q. Now the other work, I believe you said plumbing, heating, and so on, that we not let as a part of the general contract, but you did receive bids from various firms for that type of work, is that correct?

A. Yes, on some we did receive firm bids.

Q. Now were each of the bids that were submitted to you for the work that was contemplated to be done on the Red Lion approved by anyone?

A. Yes, they would have to be approved by Sam Achilli because I am an agent or act as a professional agent for obtaining figures for the client.

Q. Did Mr. Achilli approve those bids?

A. Yes, sir.

Q. Now Mr. Hawkins, who got the general contract work?

A. Mr. Lamp, Clifford Lamp.

Q. Did the work of reconstructing, rebuilding the Red Lion then go forward?

A. Yes, sir.

Q. In connection with the progress of the work
986 that was being done on the Red Lion, what services did you render?

A. Well, the customary architectural services, such as supervision of the job, payouts, the issuing of architect's certificates, some full-size and details that would go along with the job.

Q. Mr. Hawkins, will you explain for the Court and Jury, please, what you mean by an architectural certificate?

A. Well, the contractor performs a certain amount of work during the month and he buys certain materials which he builds and incorporates into the building. At the end of the month he has a statement which is prepared in his office and submitted to my office which the architect checks as to the amount of work done.

If he is satisfied that that has been accomplished, he will issue an architect's certificate. It is a slip of paper best described like a check stub and a check itself, in which the architect tells the client or certifies that this is a fair statement and it should be paid. It is prepared, typewritten and signed by the architect and submitted to the owner for payment. Now that is done on or about the 10th or 15th of each month.

987 Q. Let me see if I understand your testimony correctly. You would say, then, that an architectural certificate is a written direction to the owner that certain work has been done, certain material has been supplied, and that payment for that work and material may now be made by the owner?

A. That is correct.

Q. Is that substantially what you have said?

A. Yes, sir.

Q. Now, Mr. Hawkins, in connection with your professional work do you keep books and records?

A. Yes, sir.

Q. Are those books and records kept in the regular course of business?

A. Yes, sir.

Q. Is it the regular course of business for you to keep such books and records?

A. Yes, sir.

Q. Are those records made at or about the time of the transaction or the event they purport to represent?

A. Yes, sir.

Q. Now, in connection with the reconstruction of 988 the Red Lion, how many architectural certificates did you issue?

A. Fifty-seven.

Q. Did you keep a record of those fifty-seven certificates?

A. Yes, sir.

Q. How did you keep that record?

A. I kept them in—it's a black covered book with architect's certificates in it. It is all bound and has a hard back.

Mr. Russo: Will you mark this as Government's Exhibit 82 for identification, please?

(The book was thereupon marked as Government's Exhibit 82 for identification.)

By Mr. Russo:

Q. Now, Mr. Hawkins, I show you Government's Exhibit 82 for identification and ask you if that is the black book or the book in which you kept the architect's certificates that you issued in connection with your supervision of the work of reconstructing the Red Lion?

A. That is correct.

989 Q. Now, does Government's Exhibit No. 82 for identification, Mr. Hawkins, truly and correctly reflect the name of the owner for whom you were doing the work, the name of the contractor who did the work, and the amount of disbursements that you authorized the owner to make with respect to the certificates that you issued in connection with the reconstruction of the Red Lion?

A. Yes, sir.

Q. Directing your attention, Mr. Hawkins, to Certificate No. 7, was that certificate issued at your direction, or did you issue it?

A. I issued it at the direction—

Q. At whose direction did you issue that?

A. Sam Achilli's.

Q. Does the work or the materials reflected in Government's Exhibit No.—or rather, in Certificate No. 7 in Government's Exhibit No. 82, constitute a part of the work that you authorized in connection with the reconstruction of the Red Lion?

A. Well, may I say that this is for kitchen equipment and fixtures and equipment, but not a part of the building.

Q. Yes.

990 A. In other words, these are things that could be moved in and out or screwed to the walls or ceilings.

Q. Who directed you to issue that certificate?

A. Sam Achilli.

Q. To whom was it issued?

A. It was issued to the Sun Ray Fixture—or rather, Manufacturing Company in Rockford.

Q. With the exception of Government's Exhibit 7—not Government's Exhibit 7, but Certificate No. 7, in Government's Exhibit 82 with the exception of Certificate No. 7, do Certificates Nos. 1 through 57 contain a direction to Sam Achilli to pay, does it contain the date on which you authorized payment and does each of them contain the name of the person in whose name or favor they were drawn, and does each of them contain the amount of money that you authorized to be paid under that certificate?

A. Yes, sir.

Q. With the exception of Certificate No. 7 what is the total amount of disbursements that you authorized under the Certificates that you issued?

A. Well, I cannot tell you the—I cannot tell you
991 the exact amount. I cannot recall it.

Q. Is there anything from which you can refresh your recollection?

A. Yes, sir.

Mr. Russo: Will you mark this as Government's Exhibit No. 83, for identification, please.

(The document was thereupon marked Government's Exhibit 83, for identification.)

By Mr. Russo:

Q. Now, Mr. Hawkins, I show you Government's Exhibit No. 83 for identification.

A. Yes.

Q. And I ask you to examine it and then state whether or not it refreshes your recollection as to the amount that you authorized to be paid under the 56 Certificates that you issued?

A. Yes, sir.

Q. What is that amount?

A. The cost of the building?

Q. What is the total amount of disbursements that you authorized under the certificates?

A. The total amount there is $73,080.93. That is
992 the cost of the building.

Q. Does that amount include the amount that was authorized to be disbursed by Certificate No. 7?

A. No, sir.

Q. It does not?

A. Certificate No. 7 is not included.

Q. Now, in addition to the amounts that you ordered disbursed under the 56 Certificates that you issued, did you make any disbursements that are not reflected on there for or on behalf of Sam Achilli?

A. Yes, sir.

Q. In what amounts?

A. Well, it would be the last—it's around $141.

Q. Will you take a pencil and a piece of paper and tell the Court and Jury what that amount is?

A. The moneys advanced were four separate items, and the total is $141.67.

Q. Is that $141.67 included in the total of $73,080.92?

A. Yes, sir.

Q. Now, Mr. Hawkins, does that figure of $73,993 080.92 include your fee?

A. No, sir.

Q. What was your fee in connection with the work you did for Mr. Achilli in the replacing of the Red Lion?

A. $7,726 was my fee.

Q. Now, how was that payment made to you?

A. Well, they were made in a payment over a period of years, two years, or three years. I have the amounts paid in each year.

Q. What amount was paid to you in each year for your fees?

A. Well, the job ran from 1946 through 1948.

Q. What was the amount paid to you in 1946?

A. In 1946 the amount was $1,625.00.

Q. What was the amount paid to you in the year 1947?

A. $3,101.

Q. What was the amount paid to you in the year 1948?

A. $3,000.

Q. Who paid you that money?

A. To the best of my recollection it was paid by check.

994 Q. By whom?

A. (No answer.)

Q. Who paid you the money?

A. I would say that Sam Achilli would pay me.

Q. Mr. Hawkins, was Government's Exhibit No. 83 a summary of your books and records that was prepared

by you at either my request or at the request of an employee of the Bureau of Internal Revenue?

A. Yes. It was compiled in my office at the request of the Bureau of Internal Revenue.

Q. Was it prepared by you personally?

A. Yes, sir.

Q. Does Government Exhibit No. 83 for identification correctly reflect your records with respect to the name of the contractor to whom you authorized payments to be made and the amount of payment that you authorized to be made to each such contractor?

A. Yes, sir.

Q. Is it a true and correct summary of all the payments that were made in connection with the reconstruction of the Red Lion?

A. Yes, sir, to the best of my knowledge.

Q. Now, including your fee, what to your knowl-
995 edge was the total amount expended by Mr. Achilli in the reconstruction of the Red Lion?

A. It would be an amount of the cost of the building of $73,080.93 and the other fees, architectural, which total $80,806.93.

Q. $80,806.93?

A. That is correct.

Q. Now, what portion of the total amount of $80,806.93, to your knowledge was expended by Sam Achilli in the reconstruction of the Red Lion in the year 1946?

A. Well, the total amount of the draws by the contractor is $792.22 and the total fee is $1,625, making a total of 2,417.22.

Q. By what do you mean $2,417.22?

A. That is correct.

Q. What was the total amount expended in the year 1947 by Mr. Achilli in the reconstruction of the Red Lion?

A. Well, the construction, or payments to the contractors, $66,720.76 and the architectural fees are $3,101, making a total of $69,821.76.

Q. What was the amount expended in that connection in the year 1948?

996 A. Payment to contractors was $5,567.95 and the architectural fee was $3,000, making a total of $8,567.95.

Q. Now, directing your attention to the first meeting

that you had with Mr. Achilli, did he at that time make any representation to you as to the ownership of the Red Lion?

A. I would say yes, that he owned the Red Lion.

Q. He told you that he owned the Red Lion?

A. Yes, sir.

Q. Now, directing your attention to Government's Exhibit 81 for identification and to the date thereof, is that at or about the date on which you first met Mr. Achilli?

A. Yes, sir.

Q. And that date is what?

A. The 17th of June.

Q. 1946?

A. 1946.

Mr. Russo: At this time, may it please the Court, I offer in evidence Government's Exhibits 81, 82 and 83.

Mr. Batter: No objection to Government's Ex-
997 hibit 81.

The Court: It may be received.

(The document previously marked Government's Exhibit 81 for identification, was thereupon received in evidence as Government's Exhibit 81.)

Mr. Batter: We have no objection to Government's Exhibit 83 if it is definitely understood that this is simply a compilation of costs.

Mr. Russo: That is what the witness testified.

The Court: It may be received.

(The document previously marked Government's Exhibit 83 for identification, was thereupon received in evidence as Government's Exhibit 83.)

Mr. Batter: With respect to Government's Exhibit No. 82, there is no objection providing the Exhibit is confined to such part of this book as deals with and relates to the Defendant's business. I notice back here a number
998 of other stubs that apparently have no connection with this matter.

Mr. Russo: That is exactly right.

Mr. Batter: They are being excluded?

Mr. Russo: This, as I understand the witness' testimony, is a record kept by him in the usual and ordinary course of business. He has testified that the first 57 Certificates related to transactions involved in the Red Lion. Anything else that is in there, or records relating to other transactions, have no connection with this case.

The Court: It is so understood.

Mr. Batter: No objection, then.

The Court: It may be received.

(The document previously marked Government's Exhibit 82 for identification, was thereupon received in evidence as Government's Exhibit 82.)

Mr. Russo: Your witness.

Mr. Batter: Your Honor, may we take a few minutes to examine these?

The Court: Yes. We will take a short recess, ladies and gentlemen of the jury, and then return to the 999 jury box, please.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

The Court: You may proceed.

Mr. Batter: Your Honor, I am not quite clear about the Government's offer of Government's Exhibit 82, which is the record of the architect, because I notice after the things pertaining to the Red Lion there are some others, but following that there is a series of these blank receipts. It is perfectly all right with me that these blanks be included in the Exhibit. I just want to make certain whether they are or not.

Mr. Russo: The whole record is in evidence, as I understand it.

Mr. Batter: Fine; fine.

Mr. Russo: But the jury is only to consider the 1000 first 57 certificates in the book.

Mr. Batter: In other words, the jury is not to consider these blank pages at the end?

Mr. Russo: Except as Mr. Hawkins testified that that is the form of the complete certificate before he filled out and issued these to the contractor for payment from Mr. Achilli.

Mr. Batter: But these will go to the jury in the form that Mr. Hawkins filled out—

Mr. Russo: Yes.

Mr. Batter: —for that purpose?

Mr. Russo: Yes, sir.

Mr. Batter: Thank you.

1001 *Cross Examination by Mr. Batter.*

Q. Now, Mr. Hawkins, referring to Government's Exhibit No. 81, which is your letter dated June 17, 1946, in the nature of a proposal, which reads in part as follows:

"... cost of the buildings and furnishings which are estimated at $16,000 for the buildings and $4,000 for the fixtures and furnishings ...",

comparing these two figures of $16,000 for the building and $4,000 for the fixtures and furnishings with Government's Exhibit 83 which aggregates $80,860.93, will you explain the relation of these two documents to one another with those variances?

A. Yes, sir. I would explain it this way: The estimate was a replacement value of the existing building that was burned, and not what was proposed.

Q. Now, then, the proposal was entirely different from this replacement of $16,000 and $4,000, is that true?

A. Would you state that question again?

Q. The proposal which you referred to—

A. Yes.

1002 Q. (Continuing) —was entirely different, then, from the $16,000 and $4,000 mentioned in your June 17th letter which you stated is for the purpose of replacement?

A. Yes, sir. The $16,000 was approximately a replacement value, filled in to some board in Chicago, the WPA, or something, because at that time materials were critical, and the rest of that letter states as to the fee letter, as to the charges, payments to the architect and when they become due.

Q. Now, what occasioned the increase from $16,000 and $4,000 to the compilation contained in Government's Exhibit 83 of $80,806.93?

A. Well, to the best of my knowledge—I have no pictures, I have no drawings of the building that burned, but it was a building, as I can best describe it fairly, built on cedar posts off of the ground, and not to belittle the owner, but I would say they were more or less a series of sheds or additions to a building. The building that was proposed—and that, of course, was frame.

The building that was proposed was to be of a fireproof nature of block, brick, metal deck bar joist construction.

1003 Q. Let me get it clear. The figures contained in Government's Exhibit 81, your letter dated June

17th, do not pretend to be a proposal for the construction that subsequently amounted to $80,806.93, is that correct?

A. Yes, sir.

Q. Now, then, Mr. Hawkins, in testifying you said, if I recall correctly, that you first met Mr. Achilli through Mr. Gromer, is that correct?

A. That is to the best of my recollection; that did take place.

Q. Then you also testified that subsequently the structure as it was erected was approved by Mr. Achilli?

A. To the best of my knowledge, yes.

Q. And the mode of financing, that is, on a cost-plus basis, was approved by Mr. Achilli, is that correct?

A. Yes, sir.

Q. And the letting of contracts, and so forth, was approved by Mr. Achilli, is that correct?

A. To the best of my knowledge, yes.

Q. Now, tell me this: In these various meetings with Mr. Achilli whereby he approved the new structure and where he approved the method of construction and
1004 the method of determining the cost of such construction, were your meetings with Mr. Achilli alone or with others?

A. I can't accurately tell you how many were present.

Q. Did Earl Gromer participate in any of them?

A. It is possible.

Q. Can we be a little more definite? Is it probable? Do you have any distinct recollection one way or another?

A. No. Actually, it is so long ago I could not state definitely whether Earl Gromer and Sam Achilli met in my office with me and there were three or four people present.

Q. Your offices, you testified, I believe, were in the same building with Earl Gromer, is that correct?

A. That is correct. They were at 100 East Chicago Street.

Q. After you were given this job, would you have occasion to discuss the job or its progress with Earl Gromer, either with Mr. Achilli or without him?

A. No, sir. I mean, it would be—I would say that Sam would be the one I would discuss those things with.

Q. In your various contacts and meetings with Earl Gromer you would never mention this job?

A. No. I mentioned it with Earl Gromer and with Sam.

Q. You kept him currently posted as it went along, didn't you?

A. I would say so.

Q. Now, Mr. Hawkins, Certificate No. 1 in this book is dated December 20, 1946, to Sam Achilli in favor of Clifford E. Lamp. Certificate No. 2 reads to "Sam Achilli—Red Lion, Inc.", and so does No. 3. No. 4 reads, "Red Lion, Inc.—Sam Achilli."

Was there a corporation involved in this construction?

A. I couldn't say. Originally I believe it was Sam Achilli and then later on I became aware that it was a corporation. That is to the best of my knowledge. Now, I do not know.

Q. But the characterization "Sam Achilli—Red Lion Inc." or "Red Lion Inc.—Sam Achilli"—did it or did it not have any particular significance?

A. Only that that was the way that you would identify that payment with the job.

Q. So that as you made out these various certi-
1006 ficates, the certificate itself on Line 2 would read the same as the stub?

A. I could not say, because that is in freehand or pen and the other certificate was typed.

Q. The part that was deleted from the book was typed?

A. Yes, sir.

Q. Where would your secretary or whoever typed that get the instructions from?

A. Off from that certificate.

Q. From the stub?

A. Yes, sir.

Q. Well, then, each of these certificates according to this form that I see here requires your signature?

A. That is correct.

Q. And it is addressed to a certain person or persons. In signing the certificate would you compare it with the stub?

A. Would I compare the figures that were typed?

Q. Would you compare the certificate that you signed with the information contained on the stub here?

A. [illegible]
Q. [illegible] where the certificate reads "To blank" [illegible] stub reads, "To Red Lion Inc.—Sam Achilli"
1007 [illegible] Sam Achilli—Red Lion Inc.", would your certificate read the same way?
A. I do not know.
Q. That you would not check?
A. I could check, if I could have the certificate that corresponds to the number.
Q. No. I mean, that you would not check at the time you signed the certificate, would you?
A. Well, I would be certain that it was issued to that particular job or that particular party.
Q. It would be what the stub reads, or not?
A. Well, as a matter of record I suppose it would be as the stub reads so was it typed.
Q. Now, then, Certificate No. 1 is dated December 20th, 1946, and Certificate No. 57, which is the last one applicable to this job is dated the 24th of February, 1948, some fourteen months later. The dates that these certificates bear are not, or are they, the dates of payment?
A. They do not represent the date of payment. They might.
Q. They might?
A. They might.
Q. As a matter of fact, they do not represent
1008 payment at all, do they?
A. No, sir.
Q. So that the issuance of a certificate does not mean that that certificate has been paid, does it?
A. No, sir. I can issue a certificate, but I do not know that it has been paid unless the certificate and the check are brought back to my office. That is correct.
Q. Now, on Government's Exhibit 83 near the foot of page 2 you have an item here, "Legal fees, total fees, legal, $424.60."
I have looked for it in the certificate book and I did not see it there. Maybe I skipped it.
A. No.
Q. Is it in there?
A. No, sir.
Q. It is not?
A. No. The certificates represent authorization of payment to the contractors. My fees were billed on a

separate statement as professional services and they will not show up in the certificate book.

Q. That is your fee. Now, with respect to legal fees, they do not show up in that book either, do they?

1009 A. No, sir.

Q. Where is that information procured from?

A. The last statement that I sent to Sam Achilli was slow in coming, or I did not receive payment, so I asked an attorney to collect the final amount for me, and that is how that is represented.

Q. When did you collect that final amount, in what year?

A. I think you will find it on the bottom of the slip, which is in 1948, the date.

Q. Perhaps you can find it for me.

A. I only have it as a date in 1948. It would be sometime in 1948.

Q. Well, then, you did collect it in 1948?

A. Yes, sir. I had it. I received it, that is correct.

Q. And that was a fee to your attorney?

A. That is correct.

Q. What was the name of that attorney?

A. Wheeler Brittain.

Q. Wheeler Brittain?

A. Wheeler H. Brittain.

Q. Now, Mr. Hawkins, you have described to the Court and Jury the duties and obligations of an

1010 architect, and I do not recall your making any reference to financing. Is it a part of an architect's professional service to his client or for his client to work out and arrange financing at times?

A. It is not the practice in my office.

Q. It is not the practice in your office?

A. That is correct.

Mr. Batter: That is all.

Mr. Russo: Just one further question.

Redirect Examination by Mr. Russo.

Q. For whom did you do the work of supervising the reconstruction of the Red Lion? For Sam Achilli or for the corporation, Red Lion, Inc.?

A. Well, as a professional man I am responsible to the owner, which may be an individual or a corporation.

Q. With whom were you dealing? With an individual or a corporation?

A. Well, I imagine Sam Achilli.

Q. You know you were dealing with Sam Achilli, do you not?

1011 A. Yes, sir.

Mr. Russo: Thank you.

Recross Examination by Mr. Batter.

Q. If you knew you were dealing with Sam Achilli and Sam Achilli only, why did you put on there "Red Lion, Inc."?

A. Well, I am not qualified to answer these legal questions, but Sam Achilli was a part of the corporation which was, I believe, Red Lion Incorporated. That structure, I cannot—I do not know.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. Is it not true, Mr. Hawkins, that that project was commonly known as the Red Lion project?

Mr. Batter: I object your Honor. What it was commonly known as has nothing to do with the issues in this case.

Mr. Russo: He can testify to that, as to what the common thought was about the project, if he knows.

1012 Mr. Batter: Red Lion has not entered into this.

Mr. Russo: You brought it in, Mr. Batter.

Mr. Batter: The only thing that has entered into it is Sam Achilli and Red Lion, Inc.

The Court: Objection sustained.

Mr. Russo: Thank you. That is all, Mr. Hawkins.

(Witness excused.)

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1014 WILLIAM A. TURPIN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is William A. Turpin?
A. It is.
Q. Is Turpin spelled T-u-r-p-i-n?
A. That's right.
Q. Where do you live, Mr. Turpin?
A. Route 3, Woodstock, Illinois.
Q. What is your business or occupation?
A. I am a farmer.
Q. How long have you been a farmer?
A. Since 1946.

Q. Mr. Turpin, directing your attention to a
1015 piece of property on Highway 25, about three miles south of Elgin, Illinois, commonly known as the Red Lion property, will you state, please, whether or not you owned that property during the year 1945?
A. I did.
Q. Now, at the time that you owned the Red Lion property, tell us please what that property consisted of.
A. A large single story frame building approximately 30 or 35 feet wide, 80 feet long, and an office in the back, which was an addition built on, and a shed for sleeping quarters for a couple of men.
Q. Do you know the Defendant, Sam Achilli?
A. Yes, I do.
Q. How long have you known him?
A. Approximately 1941, 1940, right in there—since that time.
Q. Do you see the Defendant, Sam Achilli, in the Court Room?
A. I do.
Q. Will you point him out, please.
A. Right over there (indicating).
Q. The second man at the far end—
A. That's right.
1016 Q. —of defense counsel table?
A. That's right.
Q. Now, directing your attention, Mr. Turpin, to November 10th, 1945, did you have any business transaction with the Defendant, Sam Achilli, at or about that time?

A. Yes, we did.

Q. What was the nature of that transaction?

A. A sales contract was drawn up for the sale of the property and the real estate known as the Red Lion.

Q. Now, is that same Red Lion property that you have testified is located about two miles south of Elgin on Highway 25?

A. That's right.

Q. Was that agreement reduced to writing?

A. Yes, it was.

Mr. Russo: Will you mark this for identification, please, as Government's Exhibit No. 84.

(The document was thereupon marked Government's Exhibit 84 for identification.)

By Mr. Russo:

Q. Now, Mr. Turpin, I show you Government's
1017 Exhibit 84 for identification.

A. Yes.

Q. I ask you if that is the agreement to which you have referred?

A. It is.

1018 Q. Now showing you Government Exhibit No. 84 for identification, which purports to be an agreement by and between William A. Turpin, party of the first part, with his wife, Harriet L. Turpin, signing the agreement for the purpose of assuring the release of her right of dower, and Sam Achilli, party of the second part, I will ask you to look at the last page thereof, page 4, and directing your attention to the signatures about two-thirds of the way down the page, whose signature is the first signature that appears on there?

A. My wife, Harriet Leonard Turpin.

Q. Whose signature is the second signature that appears on there?

A. Mine, William A. Turpin.

Q. And whose signature is the third signature that appears on there?

A. Sam Achilli.

Q. Was the signature of Sam Achilli affixed on Government Exhibit No. 84 at or about the date the document bears, November 10, 1945?

A. That is right.

Q. Now, Mr. Turpin, what was the consideration for

the conveyance of the Red Lion property to Sam Achilli?

1019 A. $18,400.

Q. How was that payment made?

A. $2400 was made at the time, and I have forgotten the amounts, but $5,000 was made at another time and $1,000 another time, and $5,000 two other times, or approximately, right close to there, within ten dollars of it one way or another.

Q. Directing your attention again to Government Exhibit No. 84, I will ask you whether it correctly recites the consideration that moved to you from the defendant Sam Achilli.

A. Yes, it does.

Q. Does Government Exhibit No. 84 correctly describe the property that you conveyed to Sam Achilli?

A. Yes, it does.

Q. Now I believe you testified that you received $2400, $2,400, at the time that the agreement, Government Exhibit 84, was executed, is that correct?

A. That is right.

Q. I also believe that you testified that you received one payment of $5,000 approximately and another of $1,000.

A. That is right.

Q. Now I will ask you whether or not those two

1020 payments were received by you in the year 1946.

A. That is right.

Q. You also testified, I believe, that you received two other payments of approximately $5,000 each, a total of approximately $10,000, and I will ask you whether or not you received those payments in the year 1947.

A. I did.

Q. Did you receive the full consideration that is called for in the agreement described as Government Exhibit 84 for identification?

A. I did.

Q. After you received the full consideration called for by the agreement, Government Exhibit No. 84 for identification, what if anything did you do?

A. We executed a guarantee title in his name.

Mr. Russo: I will ask that this be marked Government Exhibit No. 85 for identification.

(The document was thereupon marked Government Exhibit 85 for identification.)

By Mr. Russo:

Q. Now, Mr. Turpin, I show you Government Ex-
1021 hibit No. 85 for identification, and ask you if that is the guarantee title or warrantee deed to which you have referred.

A. It is.

Q. I will ask you to examine it and then state whether or not Government Exhibit 85 for identification recites truly the consideration that moved to you from the defendant, Sam Achilli.

A. No, it doesn't.

Q. What consideration does that recite?

A. Ten dollars.

Q. And what was the full and true consideration that you received from Mr. Achilli?

A. $18,400.

Q. Directing your attention to the signatures about two-thirds of the way down the page, whose signature is the first that appears thereon?

A. William A. Turpin, mine.

Q. That is your signature?

A. That is right.

Q. And whose is the second signature that appears on there?

A. Harriet Leonard Turpin.

Q. And who is Harriet Leonard Turpin?

1022 A. My wife.

Q. Were those signatures placed on that document on or about the date it bears, April 16, 1947?

A. That is right.

Q. Does Government Exhibit No. 85 for identification correctly describe the property that you transferred to Mr. Achilli under that conveyance?

A. It does.

Mr. Russo: At this time, may it please the Court, the Government offers in evidence Government Exhibits 84 and 85.

Mr. Matter: No objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 84 and 85 for identification were thereupon received in evidence and marked Government Exhibits 84 and 85, respectively.)

Mr. Russo: Your witness.

1023 *Cross Examination by Mr. Batter.*

Q. Mr. Turpin, when in 1946 did you receive any payments on this contract?

A. I couldn't tell you the date.

Q. Can you approximate it?

A. I would say in the latter part of the year.

Q. The latter part of the year. In 1946 you received how much?

A. I believe $6,000, one $5,000 and a $1,000, two payments. One of $5,000 and one of $1,000.

Q. And when in 1947 did you receive some more money?

A. That would be in the early part of the year, and that was two payments, one $4,900 and some odd, and the other was $5,000.

Q. How early in the year?

A. I think it was around the third or fourth month.

Q. So that by April of 1947 you received full payment?

A. Approximately in there, that is right.

Q. Mr. Turpin, referring to Government Exhibit No. 84, I am trying to scan the document and find out whether there is any insurance provision in here, I haven't had much opportunity.

What is your recollection? Do you know where it

1024 is?

A. Yes, we did have some insurance. I wouldn't know where to find it in there.

Q. Oh, here it is now. The party of the second part, that is, Mr. Achilli, agrees he will protect the party of the first part against any loss or damage by fire or windstorm, and so on.

Mr. Russo: I hope the question is not a secret. I am sure the jury can't hear you, Mr. Batter.

Mr. Batter: Oh, excuse me. I was not really intending to read. Will you read this?

1025 Q. Did you receive, pursuant to this contract, insurance policies to cover the property?

A. That is right.

Q. And was there a fire at that property?

A. There was.

Q. When?

A. 1946. It burned to the ground.

Q. And how much insurance did you collect at that time?

A. I can't recall the exact amounts. It wasn't anywhere near enough to cover the property, though.

Q. Then were such payments as you received in 1946 the insurance proceeds, or did you receive those sums separately and independent of the insurance?

A. A goodly share of it was the insurance. I can't recall which was which, but I know we signed quite a few insurance checks which were made out, I believe, jointly.

Q. So that the $10,000 that you received in 1946 was in part, at least in part the proceeds of insurance policies?

A. That's right.

Mr. Batter: That is all.

1026 *Redirect Examination by Mr. Russo.*

Q. I will ask you whether or not it is a fact, Mr. Turpin, that you received the $10,000 concerning which Mr. Batter asked you prior to the time that you delivered the deed to Mr. Achilli, at or about that time?

A. I received all the money before I delivered the title, yes.

Q. Yes. Now, under the agreement was Mr. Achilli required to protect your interest in that property until you had received the full consideration for it?

A. I can answer you best like this: We didn't have the property fully insured for its value, but—

Q. When you say "we", Mr. Turpin, whom do you mean?

A. I mean my family.

Q. Yes, sir. Go ahead.

A. In case there was a fire which was a total loss, there wasn't enough insurance to cover the balance due me, and then the real estate, the land itself, and the other constructions were valuable as resale value.

Q. Do I understand you correctly that under the agreement you required Mr. Achilli to protect—

A. The existing insurance that I had, he took over, and that was required, yes.

1027 Q. So that the money that you received was payment from Mr. Achilli—

A. Actually—

Q. (Continuing)—regardless of the source from which he secured the money?

A. Let me have that question again.

Mr. Russo: Will you read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. That's right.

Mr. Batter: I object, your Honor. He is asking for a conclusion of the witness. The contract speaks for itself.

The Court: It may stand. Proceed.

Mr. Russo: No further questions. Thank you, Mr. Turpin.

Mr. Batter: That is all.

(Witness excused.)

1028 ROY E. FLORA, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please.

A. Roy E. Flora.

Q. How do you spell your last name?

A. F-l-o-r-a.

Q. What is your address?

A. 219 North Weston Street, Elgin.

Q. That is Elgin, Illinois?

A. Right, sir.

Q. Mr. Flora, what is your business or occupation?

A. I am a Vice-President of the Union National Bank & Trust Company of Elgin.

Q. How long have you held that position?

A. I have been a Vice-President approximately six years.

Q. Have you held any other position in connection with that bank?

A. I was Assistant Cashier.

Q. How long were you Assistant Cashier?

1029 A. About three years.

Q. Now, in the conduct of the business of the Union National Bank & Trust Company of Elgin, does the bank keep books and records?

A. Yes, they do.

Q. Did you in response to a subpoena duces tecum bring certain books and records of the bank with you?

A. Yes.

Q. Are those books and records of the Union National Bank & Trust Company of Elgin kept under your supervision and custody?

A. Yes.

Q. Are those books and records kept in the usual course of business?

A. Yes.

Q. And is it the regular and usual course of business to keep such records?

A. Yes.

Q. Are those books and records made at or about the time of the event, occurrence or transaction they purport to reflect?

A. Yes.

Q. Now, directing your attention, Mr. Flora, to August 27th, 1947, I will ask you whether or not the Union
1030 National Bank & Trust Company of Elgin, Illinois had a transaction with the Defendant, Sam Achilli?

A. Yes. I would have to—

Q. What was the nature of that transaction, do you recall?

A. I think he purchased some bonds, but I would like to see the card to make sure of the date.

Mr. Russo: Mr. Reporter, will you mark this as Government's Exhibit 86 for identification, please.

(The document was thereupon marked Government's Exhibit 86, for identification.)

Mr. Russo: Will you mark this as Government's Exhibit 87 for identification, please.

(The document was thereupon marked Government's Exhibit 87, for identification.)

By Mr. Russo:

Q. I show you Government's Exhibit 86 for identification, and ask you if that is a record of the Union National Bank & Trust Company of Elgin?

A. Yes, it is.

1031 Q. I ask you to refer to it and state what the nature of that transaction—

A. That is the—

Q. Just a minute.

A. Pardon me.

Q. I ask you to examine it and state whether or not the bank had a transaction with Sam Achilli on or about August 27th, 1947?

A. Yes.

Q. What was the nature of that transaction?

A. Mr. Achilli borrowed some money from the bank in the sum of $8,000, and he put up as collateral eight U. S. Treasury Notes, 2-½ per cent. That (indicating) is known as a collateral card.

Q. Government's Exhibit 86 for identification is known as a collateral card, is that correct?

A. That's right, sir.

Q. What, if you know, did Mr. Achilli do with the $8,000 he borrowed on August 27th, 1947?

A. (No answer.)

Q. What was that money used for?

A. Well, there are two possibilities. He could have either borrowed it to buy bonds, or secondly, he could have used that money for something else. He 1032 could have had his own money to buy bonds, I don't know.

However, I would assume he probably purchased bonds with the money he borrowed.

Q. Did he use $8,000 to purchase United States Treasury bonds?

A. Yes, sir.

Q. What treasury bonds did he buy? Do you have a description of them?

A. Yes. They are on the white card there.

Q. Will you describe them? I show you Government's Exhibit 87 for identification and ask you to refer to it and describe the eight United States Treasury Bonds he bought.

A. He bought $8,000 worth of United States Treasury Bonds, 2-½ per cent bonds of twelve-fifteen-sixty-seven-seventy-two, Serial Nos. 582466-F to 582473, inclusive.

Q. Did Mr. Achilli give the bank any security for the $8,000?

A. He did, yes. He deposited these bonds as his security.

Mr. Russo: Will you mark this as Government's Exhibit 88 for identification, please.

1033 (The document was thereupon marked Government's Exhibit 88, for identification.)

By Mr. Russo:

Q. I show you Government's Exhibit 88 for identification, and I will ask you if that is one of the records of the Union National Bank & Trust Company?

A. Yes.

Q. Now, did Mr. Achilli repay the $8,000 that he borrowed from the bank?

A. Yes.

Q. Directing your attention to Government's Exhibit 88 for identification, will you state whether or not on September 30th, 1947 he repaid any of the loan, of that $8,000 loan?

A. Yes. He made a payment of $500.00.

Q. Directing your attention to November 1st, 1947, did he make a payment on that date?

A. Yes. He made a payment of $500.00.

Q. Directing your attention to November 28th, 1947, did he make a payment on that date?

A. Another payment of $500.00.

Q. Directing your attention to December 24th, 1947, did he make a payment on that date?

1034 A. Another payment of $500.00.

Q. Directing your attention to January 27th, 1948—

A. Another payment of $500.00.

Q. Another payment of $500.00?

A. That is right.

Q. Directing your attention to February 17th, 1948, did he make a payment on that date?

A. He made a payment of $1,000.

Q. Directing your attention to March 3rd, 1948, did he make a payment on or about that date?

A. Yes. He made a payment of $4,500.

Q. Directing your attention to March 3rd, 1948, was there any other transaction with the bank?

A. He made another payment of $500.00.

Q. Directing your attention to March 11th, 1948, did he make a payment on that date?

A. Another payment of $500.00.

Q. Directing your attent n to March 31st, 1948, did he make a payment on that date?

A. A payment of $500.00.

1035 Q. Directing your attention to April 30, 1948.

A. A payment of $500.

Q. Directing your attention to May 26, 1948, did he make a payment on that date?

A. A payment of $500.

Q. Directing your attention to June 16, 1948, did he make a payment on that date?

A. A payment of $500.

Q. Directing your attention to July 10, 1948, did he make a payment on that date?

A. A payment of $500.

Q. Did he make a payment on July 15?

A. $1,000.

Q. $1,000?

A. Right.

Q. Did he make more than one payment on that date?

A. Yes, he made another payment on that date of $5,000.

Mr. Batter: Of how much?

Mr. Russo: $5,000.

The Witness: $5,000.

By Mr. Russo:

Q. Directing your attention to July 30, 1948, did he make a payment on that date?

1036 A. Payment of $500.

Q. Keep your voice up, Mr. Flora, so the Court and Jury may hear you too.

A. $500.

Q. Directing your attention to August 24, 1948, did he make a payment on that date?

A. A payment of $500.

Q. Directing your attention to September 21, 1948, did he make a payment on that date?

A. $500.

Q. Directing your attention to October 11, 1948, did he make a payment on that date?

A. A payment of $500.

Q. Did he make a payment on November 10, 1948?

A. A payment of $500.

Q. Did he make a payment on November 17, 1948?

A. Payment of $2500.

Q. Did he make a payment on November 30, 1948?
A. A payment of $500.
Q. Did he make a payment on December 20, 1948—is November 30 the last date on which he made a payment?
A. Well, no, there are other payments, but they go into 1949.
1037 Q. What is the last payment that was made in the year 1948?
A. Payment of $500.
Q. On what date was that made?
A. That was made on November 30, 1948.
Q. Was the loan, the original loan of $8,000, finally repaid by Sam Achilli?
A. Yes.
Q. And after the loan was repaid, was the collateral, the eight $1,000 Treasury notes that you held as collateral, returned to him?
A. Well, yes, but I woud like to look at the ledger sheet once.
Yes, that was paid.
Q. At the time that the eight $1,000 Treasury notes were returned to him, did the bank secure a receipt from from Mr. Achilli?
A. Yes.
Q. I show you Government Exhibit No. 87 and ask you if that is the receipt that you received from him?
A. No. The receipt we received from Mr. Achilli is on the collateral card.
Q. On the collateral card, Government Exhibit No. 86?
A. Yes. This receipt is the receipt that at the
1038 time Mr. Achilli purchased the bonds, that was the receipt that we received from him turning the bonds over to us.
Q. And at the time the final payment was made, he signed Government Exhibit No. 86?
A. That is right.
Q. Directing your attention to the signature on the far right-hand side of Government Exhibit No. 86, whose signature is that?
A. Sam Achilli.
Q. Directing your attention to the signature on the lower right-hand corner of Government Exhibit No. 87, whose signature is that?

A. Sam Achilli.

Q. Directing your attention again to Government Exhibit No. 88, I want you to examine it, please, and state whether or not the bank made other loans to Sam Achilli.

A. Yes.

Q. When was the next loan made to Sam Achilli?

A. On January 16, 1948.

Q. In what amount?

A. $5,000, an unsecured note.

Q. Was there another loan after that?

1039 A. There was another one made on March 3, 1948, for $4500.

Q. Were there any other loans made to him in the year 1948?

A. Yes, there was one made on July 15, 1948, for the sum of $5,000.

Q. And were all those loans repaid to the bank?

A. Yes.

Q. What was Mr. Achilli's liability to the bank as of December 3, 1948?

A. December 31, 1948, $2,000.

Mr. Russo: I will ask that this be marked Government Exhibit 89 for identification.

(The document was thereupon marked Government Exhibit 89 for identification.)

By Mr. Russo:

Q. Mr. Flora, I show you Government Exhibit 89 for identification, purporting to be an agreement dated December 30, 1944, and ask you if the bank had a transaction at or about that time either with Sam Achilli or with someone purporting to act on his behalf.

A. Yes.

Q. Directing your attention to the signature about

1040 two-thirds of the way down the page on the right-hand side, will you examine it, please, and state whose signature that is.

A. That is Walter H. Bosworth, vice president in charge of the trust department of the bank.

Q. Of the Union National Bank and Trust Company.

A. Of the Union National Bank and Trust Company of Elgin.

Q. Directing your attention to the signature below and to the left of that of Mr. Bosworth's, examine it, please, and state whose signature that is.

A. Carl Oberortmann.
Q. And who is Mr. Oberortmann?
A. Cashier of the bank at that time.
Q. Directing your attention to the two signatures at the bottom of the page on the right-hand side, examine that exhibit, please, and state whose signatures they are.
A. Sam Achilli and Earl H. Gromer.
Q. Were all the signatures affixed to Government Exhibit 89 affixed thereon on or about the date the document bears, December 30, 1944?
A. Yes, I would say so.
Q. Mr. Flora, what does Government Exhibit No.
1041 89 purport to be?
A. That is an agreement between the Union National Bank and Trust Company of Elgin as Trustee and acting in behalf of Sam Achilli and Earl H. Gromer. It is commonly known as a land trust.
Q. And who were the beneficiaries under that trust?
A. Sam Achilli one-half interest and Earl H. Gromer one-half interest.
Q. Now what were the circumstances under which Government Exhibit No. 89 for identification was executed?
A. Well, it was the purchase of a piece of property in Elgin on Wellington Avenue. It is now known as the Highland Avenue Motor Sales.
Q. Is that at 192 Wellington in Elgin, Illinois?
A. I believe that is correct.
Q. What was the consideration for the execution of that agreement?
A. You mean the sale price or the—
Q. What were the circumstances that brought about the execution of that agreement?
A. Gee, I can't tell you that because I wasn't there at the time.
Q. Did Mr. Gromer and Mr. Achilli apply to the bank for a loan?
1042 A. Yes, they did.
Q. In what amount?
A. A loan of $18,000.
Q. Was the loan granted?
A. Yes.
Q. And after the loan was granted, what did the bank do?

A. Well, we made the loan.

Q. Did you create a trust account?

A. Well, the trust account was created before the loan was granted?

Q. And after the loan was made, was the money credited to the loan account?

A. Correct.

Q. What was the number of that account?

A. I believe it is 129—I would have to see the sheet to make sure. Trust Agreement 129—No. 127 is the number.

Mr. Russo: I will ask that this be marked Government Exhibit No. 90 for identification.

(The document was thereupon marked Government Exhibit 90 for identification.)

1043 By Mr. Russo:

Q. Mr. Flora, I show you Government Exhibit No. 90 for identification, and ask you if that is the trust loan agreement to which you have referred?

A. Yes, it is.

Q. And that bears what number?

A. Trust No. 127.

Q. Directing your attention to the third sheet of Government Exhibit No. 90, which comprises altogether six sheets, directing your attention to the third sheet and to the column headed, "Principal Increase," will you tell the Court and Jury, please, what that column represents?

A. That represents the monthly payments that were made by the Highland Motor Sales or Sam Achilli and Gromer on this trust agreement. This sheet is a liability sheet as far as the bank is concerned. It shows the bank's liability on that mortgage.

Q. To the trust account?

A. That is right.

Q. What is the bank's liability on that?

A. Well, it started out at $18,000.

Q. Directing your attention to the column headed, "Decrease," what do the figures in that column

1044 represent?

A. There is only the one figure, and that represents the total amount of the mortgage, $18,000.

Q. Directing your attention to the fourth page of Government Exhibit No. 90 for identification, and directing

your attention to the column headed, "Decrease," what does that column represent?

A. That column represents the monthly payments made on the mortgage.

Q. By whom?

A. By Achilli and Gromer.

Q. Will you examine it, please, and state whether the monthly payments were made regularly?

A. Yes.

Q. Now will you refer to Government Exhibit No. 90 for identifification and state, beginning with the first date, the date and the amount of payment, and continue through December 31, 1948?

A. Do you want me to read each date?

Q. Refer to it and state the date and amount of payment beginning with the first date.

A. 1/30/45, $300.

Q. Pardon me. State the month and the date so there won't be any confusion as to figures.

1045 A. All right.

February, 1945, that would be the February payment—

Q. The first payment was made in February?

A. That is right, $300.

March, $300.

April, $300.

May, $300.

June, $300.

Q. Is that all in the year 1945?

A. That is right.

Q. All right, sir. Continue.

A. July, 1945, $300.

August, 1945, $300.

September, 1945, $300.

October, '45, $300.

November, '45, $300.

December, '45, $300.

January—Wait a minute here. Will you go back here to, when I said November, there were a couple of payments made the same month.

Mr. Batter: I can hardly hear you, Mr. Witness.

The Witness: I asked her to go back—

1046 By Mr. Russo:

Q. Do you wish to correct your testimony?

A. Yes, I wish to make a correction here.
Q. Where do you wish to start?
A. At November.
Q. Now what is the date on which the payment was made and the amount?
A. 11/17/45, $300. Then 12/4/45, $300. Then 12/22/45, $300.
Then February, 1946, $300.
February 28, 1946, $300.
April 1st, '46, $300.
May 1st, 1946, $300.
May 31, '46, $300.
June 30, '46, $300.
July 31, 1946, $300.
August 30, '46, $300.
September 30, '46, $300.
October 31, $300. That is in 1946.
November 2, 1946—now there is a crossout here on this, and I don't know whether that is December or whether it is November, but it is the November payment. It was $300.
Then December 30, 1946, $300.
1047 January 30, 1947, $300.
February 27, 1947, $300.
March 28, 1947, $300.
April 29, 1947, $300.
May 29, 1947, $300.
June 27, $300. That is in 1947.
July 31, 1947, $300.
August 30, 1947, $300.
September 30, 1947, $300.
October 31, 1947, $300.
November 28, 1947, $300.
December 31, 1947, $300.
February 2, 1948, $300.
February 28, 1948, $300.
March 30, 1948, $300.
April 30, 1948, $300.
May 28, 1948, $300.
June 29, 1948, $300.
July 31, 1948, $300.
August 30, 1948, $300.
And October—

Q. How about September?

A. Oh, September 29, $300. October 29, 1948, $300.

1048 1/30/48, $500.

December 29, 1948, $300.

Q. The next date is in 1949?

A. Yes.

Q. All right.

Now, Mr. Flora, in the conduct of the business of the Union National Bank and Trust Company, does that bank make microfilm reproductions of the monthly bank statements of its depositors that it issues to its depositors?

A. Yes, we do.

Q. What is the method of microfilm reproduction employed by the bank?

A. We use a Recordak.

Q. Is the Recordak method microfilm reproduction of bank records done in the regular course of business?

A. Yes, it is.

Q. Is it the regular course of business to make and keep such Recordak microfilm reproductions?

A. Yes.

Q. Under whose custody and supervision are such Recordak microfilm reproductions kept?

A. Well, under my supervision, or I help on it.

1049 Q. Did you in response to a subpoena duces tecum bring with you such Recordaks of the monthly bank statements of Sam Achilli for the period December 31, 1945, to December 31, 1948, inclusive?

A. Yes.

Q. Do you have them with you?

A. They are right over there.

Mr. Russo: I will ask that this carton be marked Government Exhibit No. 91 for identification.

(The carton was thereupon marked Government Exhibit 91 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit No. 91 for identification, purporting to be a cardboard carton, about 9 by 11 by 11, on which there appears the words, "Roy Flora, Recordak Film, Union National Bank and Trust Company of Elgin," and on the left, the name, "S. Achilli," and ask you if that contains the microfilm that

you were asked to produce under subpoena duces tecum.

A. Yes, I believe so.

1050 Q. Now, Mr. Flora, did you at my request make or cause to be made an enlargement of the Recordaks of the monthly statements of Sam Achilli's account with the Union National Bank & Trust Company for the period December 31st, 1945, to December 31st, 1948, inclusive?

A. Yes, sir.

Mr. Russo: Mr. Reporter, will you mark this as Government's Exhibit 92 for identification, please.

(The document was thereupon marked Government's Exhibit 92 for identification.)

Mr. Russo: This will be 93.

(The document was thereupon marked Government's Exhibit 93 for identification.)

Mr. Russo: And 94.

(The document was thereupon marked Government's Exhibit 94 for identification.)

By Mr. Russo:

Q. Now, Mr. Flora, I hand you Government's Exhibit 92 for identification consisting of 13 pages stapled

1051 together, Government's Exhibit 93 for identification, consisting of 13 pages stapled together, and Government's Exhibit 94 for identification, consisting of 11 pages stapled together, and ask you if they are the enlargements of the microfilm Recordaks of Sam Achilli's monthly statements during the period I have mentioned?

A. Yes.

Q. Now, are Government's Exhibits 92, 93 and 94 true and correct enlargements of that microfilm?

A. Yes. I would say so.

Q. Directing your attention now to Government's Exhibit No. 92, will you refer to that, please, and refer to the entry for December 31st, 1945, and state what Mr. Achilli's balance with the bank was on that date?

A. $16.31.

Q. Now, referring to the same Exhibit, will you state what his bank balance was as of January 1st, 1946?

A. (No answer.)

Q. What was the date I asked before?

A. 1945.

Q. 1945. What is the balance for January 1st, 1946?

A. $16.51. That is evidently a bad print. That 1052 is "51" cents on that first figure. $16.51.

Q. $16.51?

A. That is right.

Q. Is that the same balance on January 1st?

A. That is right.

Q. What was his balance on December 31st, 1946?

A. $293.

Q. Now, referring to Government's Exhibit 93, will you state, please, what Mr. Achilli's balance was as of January 1st, 1947?

A. $3,579.54.

Q. What was that figure again?

A. $3,579.54.

Q. And what was his balance as of December 31st, 1947?

A. $3,579.54.

Q. Perhaps I did not make myself clear.

A. Well, on December 31st, 1947—oh. 1947. I am sorry.

Q. Let's go back for a minute to January 1st, 1947. December 31st, 1946, let's go back to.

A. That is the same as this (indicating).

Q. What was his balance on December 31st, 1946?

A. $3,579.54.

Q. Now, what was his balance on January 1st, 1947?

1053 A. $3,579.54.

Q. The same balance?

A. Right.

Q. January 31st, 1947?

A. January 31st, 1947?

Mr. Russo: Wait a minute, now. Maybe I am saying the dates wrong. December 31st, 1947.

By Mr. Russo:

Q. I believe you have testified as to what it was on January 1st, 1947, is that right?

A. Right.

Q. Now, I want the balance on December 31st, 1947.

A. $2,148.03.

Q. Now, what was his balance on January 1st, 1948?

A. $2,148.03.

Q. And what was his balance on December 31st, 1948?

A. $7,148.03. That is the end of the month, $7,148.03.

Mr. Russo: Let's start over.

By Mr. Russo:

Q. Directing your attention to Government's Exhibit No. 82 for identification, state, please, what Mr. Achilli's balance was as of December—

Mr. Batter: Do you want to correct that Exhibit 1054 Number to 92?

Mr. Russo: Pardon?

Mr. Batter: Do you want to correct that Exhibit Number to 92?

Mr. Russo: 92. That is right.

Mr. Batter: You said "82."

Mr. Russo: All right. 92 is the correct number.

By Mr. Russo:

Q. I want his balance as of December 31st, 1945.

A. $1,651.

Q. Now, what was his balance as of January 1st, 1946?

A. $1,651.

Q. What was his balance as of December 31st, 1946?

A. $3,579.54.

Q. Now, directing your attention to Government's Exhibit No. 93, what was his balance on January 1st, 1947?

A. $3,579.54.

Q. Directing your attention to December 31st, 1947, what was his balance on that date?

A. $2,148.03.

Q. Was his balance on January 1st, 1948, the same as his balance for January 31st, 1947?

1055 A. Come again?

Mr. Russo: All right. Strike the question.

By Mr. Russo:

Q. What was his balance on January 1st, 1948?

A. $2,148.03.

Q. Read that again.

A. $2,148.03.

Q. That was his balance, was it not, on December 31st, 1947?

A. That is right.

Q. Now, what was his balance on January 1st, 1948?

A. I am sorry, but this is the balance right here (indicating), $2,148.03. See here (indicating)?

Q. What is that date there?

A. That's January 15th, 1948.

Q. And that is his balance on that date?

A. That is right.

Q. What was his balance on December 31st, 1948?
A. December?
Q. Yes.
A. $6,934.55.
The Court: We will take a short recess ladies and gentlemen of the jury. The witness will remain
1056 on the witness stand, please.
(Whereupon a short recess was taken, after which the following further proceedings were had in open Court in the presence and hearing of the jury:)
1057 By Mr. Russo:
Q. Directing your attention, Mr. Flora, to Government Exhibit No. 88 for identification, to the reverse side thereof, and directing your attention now to November 17, 1948, I would like for you to state the balance of Mr. Achilli's liability to the bank on that date.
A. Zero.
Q. He owed the bank nothing on that date?
A. That is right.
Q. Now directing your attention to November 17, 1948, was there a transaction between Mr. Achilli and the bank on that date?
A. Yes.
Q. What was that transaction?
A. He borrowed $2,500.
Q. All right. Now directing your attention to December 20, 1948, was there a transaction with Mr. Achilli and the bank on that date?
A. Yes.
Q. What was that transaction?
A. He borrowed $23,000.
Q. And what was—
Mr. Batter: How much was that?
1058 The Witness: $23,000.
By Mr. Russo:
Q. What was Mr. Achilli's liability to the bank on December 20, 1948?
A. $25,000.
Mr. Russo: I will ask that this be marked Government Exhibit No. 95 for identification.
(The document was thereupon marked Government Exhibit 95 for identification.)
By Mr. Russo:
Q. Now I show you Government's Exhibit 95 for identification, purporting to be a cashier's check dated De-

cember 20, 1948, Check No. 28824, payable to the order of Sam Achilli and Ruth Achilli, and Theodore Gordon, in the amount of $35,000, issued by the Union National Bank and Trust Company, and directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. Fletcher C. Lamphere.

Q. Who is Mr. Lamphere?

A. A vice president of the bank.

Q. Was this cashier's check issued by the Union
1059 National Bank and Trust Company?

A. Yes.

Q. Directing your attention to the reverse side of Government Exhibit 95, I will ask you to examine it and state whether or not it bears any endorsements.

A. Yes, it does.

Q. What endorsements does it bear?

A. Ruth Achilli, Sam Achilli, and Theodore Gordon.

Q. Now examine Government's Exhibit No. 95, Mr. Flora, please, and state when it was paid.

Do you know whether or not it has any connection with this $23,000 loan made by Mr. Achilli?

A. Yes, I believe it does.

Q. What relation does it have?

A. I know that the $23,000 is part of this money.

Q. You know it is a part of that money?

A. Yes.

Q. And when was that cashier's check paid or cashed?

A. 1/25/49.

Q. And when was the $23,000 loan repaid by Sam Achilli?

A. 1/26/49.

Q. Do you know for what purpose this draft was issued, Mr. Flora, Government Exhibit No. 95 for
1060 identification?

A. Well, indirectly I know what it was but not directly. I wasn't involved in the transaction.

Q. Did your information come to you in the course of your duties with the bank?

A. Well, one of the officers involved told me, so it wouldn't come—

Q. It didn't come to you directly?

A. No.

Mr. Russo: I will ask that these documents be marked Government Exhibits 96, and so on, for identification.

(The documents were thereupon marked Government Exhibits 96 through 101, inclusive, for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit 96 for identification, purporting to be a draft on the American National Bank and Trust Company of Chicago. The remitter, Sam Achilli. Date, December 30, 1944. Draft No. 28090, payable to the order of Henry Hopp in the amount of $4,000.

I will ask you if that is a draft on the Union National Bank and Trust Company.

1061 A. Yes.

Q. Was the draft purchased by Mr. Achilli on or about the date the draft bears, December 30, 1944?

A. Yes.

Q. Now I show you Government Exhibit No. 97 for identification, purporting to be a cashier's check on the Union National Bank and Trust Company, No. 15462, dated December 30, 1944, payable to the order of Henry Hopp in the amount of $13,000.

I ask you to examine that cashier's check, please, and state whether or not it is a cashier's check issued by that bank.

A. It is.

Q. Do you know who purchased that cashier's check?

A. No.

Q. You don't know?

A. No.

Q. Now I show you Government Exhibit No. 98 for identification, purporting to be a cashier's check of the Union National Bank and Trust Company of Elgin, dated March 12, 1947, No. 20231, payable to the order of Sam Achilli, in the amount of $9,941.76; and purporting to bear the signature of Roy E. Flora.

Is that a cashier's check of the Union National

1062 Bank and Trust Company?

A. Yes.

Q. Do you know at this time who purchased that check?

A. I can't say for sure on that check.

Q. Directing your attention to the reverse side of

Government Exhibit No. 98 for identification, whose endorsement appears on there, if anyone's?

A. Sam Achilli.

Q. Now I show you Government Exhibit No. 99 for identification, purporting to be a cashier's check of the Union National Bank and Trust Company, dated April 17 1948, No. 26444, payable to the order of Highland Motor Sales in the amount of $680, and ask you if that is a cashier's check issued by the Union National Bank and Trust Company.

A. Yes, it is.

Q. Directing your attention to the reverse side thereof, I will ask you to state whether or not it bears an endorsement.

A. Yes, it does.

Q. What endorsement does it bear?

A. Highland Motor Sales.

Q. Now I show you Government Exhibit No. 100 for identification, purporting to be a cashier's check of
1063 the Union National Bank and Trust Company, No. 15477, bearing no date, payable to the order of Earl Gromer, in the amount of $3,500.

I will ask you if Government Exhibit No. 100 is a cashier's check issued by the Union National Bank and Trust Company.

A. Yes, sir.

Q. Directing your attention to the reverse side thereof, I will ask you to examine it and state whether or not it bears an endorsement.

A. Yes, it does.

Q. What endorsement does it bear?

A. Earl Gromer.

Q. Now I show you Government No. 101 for identification, purporting to be a cashier's check of the Union National Bank and Trust Company, dated June 14, 1948, No. 27040, payable to the order of Highland Motor Sales, in the sum of $930, and ask you if that is a cashier's check issued by the Union National Bank and Trust Company.

A. Yes, sir.

Q. Directing your attention to the reverse side of Government Exhibit 101 for identification, I will ask you to state whether it bears any data and any endorse-
1064 ments.

A. Yes, it does.

Q. What data and endorsement does it bear?

A. "Payment in full to the Highland Motors on the Howard decott, 1948 Plymouth four-door, Motor No. PL5738291, Serial No. 11937026, for deposit to account of Highland Motor Sales."

Q. Now with the exception of that portion of the data on the back of the check that purports to be an endorsement of the Highland Motor Sales—By the way, is that a stamped or handwritten endorsement?

A. A stamped endorsement.

Q. Now the other data, when was that placed on Government Exhibit 101 for identification?

A. That was probably placed, well, it was placed on there at the time that the check was written. Our loan department has a habit on car sales, they usually type on the back that data.

1065 Q. Now, Mr. Flora, I hand you Government's Exhibits 86 and 87, and ask you to examine them and state whether or not you can state whether those Treasury Notes were cashed.

A. No. I can't state whether they have been cashed or not.

Q. I hand you again Government's Exhibit 88, Mr. Flora, and ask you to examine it and state what Mr. Achilli's indebtedness to the bank was as of December 31st, 1948.

A. $25,000.

Q. Now, what was Mr. Achilli's indebtedness to the bank on December 31st, 1947?

A. $6,000.

Q. What was Mr. Achilli's indebtedness to the bank on December 31st, 1946?

A. None.

Q. What was Mr. Achilli's indebtedness to the bank on December 31st, 1945?

A. I can't state. I do not have any records here. I do not know.

Q. Did Mr. Achilli have any transactions with the bank prior to 1946?

A. Yes. He had the trust agreement.

1066 Q. Other than the trust agreement, do you know whether or not he had an indebtedness to the bank?

A. He had the mortgage on that property.

Q. The mortgage on the property.

A. Yes.

Q. I now hand you Government's Exhibit 90 for identification, and ask you to refer to it and state what the balance which represented the equity of Mr. Achilli and Mr. Gromer on that trust account was as of December 31st, 1945.

A. $14,400.

Q. Now, what was the balance that represented Mr. Achilli's and Mr. Gromer's equity on December 31st, 1946?

A. $10,800.

Q. And on December 31st, 1947?

A. $7,200.

Q. That is $7,200?

A. Right.

Q. And on December 31st, 1948?

A. $3,500.

Q. Now, I believe the figures that you gave me, Mr. Flora, in connection with Government's Exhibit No. 90 were the decrease and balances of their liability to
1067 the bank, is that correct?

A. That is right.

Q. What is the difference between those balances and $18,000, each time, the equity that Mr. Gromer and Mr. Achilli had?

A. Well, it would increase each month as they made their payment. As they made their payment their equity would increase.

Q. Their equity would increase to the extent of the difference between the liability on the date concerning which you have testified and the $18,000?

A. That is right.

Q. I show you again, Government's Exhibit 100 for identification and ask you to state, if you know, who purchased it.

A. Well, I would presume that Earl Gromer purchased it.

Q. On what date?

A. That I cannot say. Unfortunately, the teller that made out the check did not—

Q. Does it bear any stamp on there that gives you an approximate date on which it was purchased?

A. I would say around 1-5-45. It was probably purchased around the first of the year 1945.

1068 Mr. Batter: What Exhibit Number for identification is that?

Mr. Russo: 100.

By Mr. Russo:

Q. Now, have you testified, Mr. Flora, to Mr. Achilli's complete or entire indebtedness to the bank for the period December 31st, 1945, to December 31st, 1948?

A. Yes. I believe so.

1069 Mr. Batter: Your Honor, I anticipate Mr. Russo is going to offer these Exhibits in evidence.

Mr. Russo: As soon as I can locate them all.

Mr. Batter: It is going to take some time for me to look them over too. I wonder if it wouldn't be better now if we adjourned for the lunch hour, and let Mr. Russo arrange the Exhibits and then submit them to me, for my examination, and perhaps we can save the time of your Honor and the Jury in that manner.

Mr. Russo: That is all right, but at this time, if your Honor please, I want to make this offer pending the time that I can find the ones that I can't find right now. I offer in evidence Government's Exhibits 95, 96, 99, 98, 101, 86, 87, 88, 89, 90, 92, 93 and 94.

Mr. Batter: Your Honor, I am still going to have to have time to look them over.

1070 The Court: Yes. You might do that during the lunch hour.

We will recess now, ladies and gentlemen, and return back here at two o'clock, please.

The witness is instructed not to discuss the case in the meantime with anyone, please.

(Whereupon the further hearing of the trial of the above-entitled cause, was recessed until two o'clock p.m. of the same day, Wednesday, April 20th, 1955.)

1071

(Caption—No. 53-CR-154)

Before Hon. Win G. Knoch,
and a Jury.

Wednesday, April 20, 1955,
2:00 o'clock p.m.

Court met pursuant to recess.

Present:
Mr. Russo,
appeared for the Government;
Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States of America, *v.* Achilli, the case on trial.

(Whereupon the following further proceedings were had in open court in the presence and hearing of the jury:)

Mr. Russo: Will you mark this as Government's
1072 Exhibit 102 for identification, please.

(The document was thereupon marked Government's Exhibit 102, for identification.)

Mr. Russo: And mark this, please, Government's Exhibit 103.

(The document was thereupon marked Government's Exhibit 103 for identification.)

ROY E. FLORA, called as a witness on behalf of the Government, having been previously duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Cont'd) by Mr. Russo.

Q. Mr. Flora, I show you Government's Exhibit No. 102 for identification and 103 for identification, both purporting to be photostatic copies of financial statements.

A. Yes.

Q. I will ask you if you know where the originals
1073 are?

A. I do not know where they are.

Q. Were they received by the bank in connection with any transaction had between the bank and Sam Achilli?

A. Yes, they were.

Q. Do Government's Exhibits 102 and 103 for identification—first, is Government's Exhibit 103 for identification a true and correct photostatic copy of the original?

A. Yes.

Q. Is Government's Exhibit 103 for identification a true and correct photostatic copy of the original?

A. Yes.

Q. Directing your attention to the signatures on the reverse side of Government's Exhibit 102 for identification, the signatures in the lower right-hand corner, whose signatures are those?

A. Ruth Achilli and Sam Achilli.

Q. Were those signatures placed on Government's Exhibit No. 102 on or about the date the document bears, January 12th, 1948?

A. Yes.

1074 Q. Directing your attention to Government's Exhibit No. 103 for identification, and to the reverse side thereof, I will ask you whose signature it is at the lower right-hand corner of the reverse side of Government's Exhibit No. 103?

A. Sam Achilli's.

Q. Was that signature placed on Government's Exhibit 103 on or about the date the document bears, September 26th, 1949?

A. Yes.

Q. Was the data contained on Government's Exhibit 102 for identification on there at the time that it was submitted to the bank in connection with any business between the bank and Mr. Achilli?

A. Yes.

Q. Is your answer the same with respect to Government's Exhibit No. 103 for identification?

A. Yes.

Q. Was that data on there with respect to the information with respect to assets?

A. Yes. That was on there.

Q. Was the same information on there at the time they were submitted with respect to liabilities?

A. Yes, sir.

Q. Was the information on there at the time it
1075 was submitted with respect to obligations to the Union National Bank & Trust Company?

A. Yes.

Q. And with respect to real estate owned by the applicant?

A. Yes, sir.

Q. Mr. Achilli?

A. Yes.

Q. With respect to life insurance that he had, was that information on there?

A. Right.

Q. Now, directing your attention to Government's Exhibit 103 for identification, was the information on there at the time it was submitted to the bank with respect to assets held by the Defendant, Sam Achilli?

A. Yes.

Q. And is that true with respect to the other information with respect to liabilities?

A. Yes.

Q. Is it also true with respect to the information with respect to liabilities to the Union National Bank & Trust Company?

A. Yes.

Q. And with respect to real estate owned by the
1076 Defendant, Sam Achilli?

A. Yes.

Q. And with respect to the information concerning insurance?

A. Yes.

Mr. Russo: In addition to the other Exhibits we also offer in evidence Government's Exhibits 102 and 103.

Mr. Batter: Your Honor, may I ask the witness a few questions respecting these Exhibits before I make my motion?

The Court: All right.

By Mr. Batter:

Q. Mr. Witness, do you have a copy of the subpoena duces tecum that was served upon you?

A. A copy of the subpoena?

Q. Yes.

A. No, I do not.

Q. I recall you testified this morning that that sub-

poena required you to produce all the records of the bank pertaining to Sam Achilli; is that correct?

A. That is correct, sir.

Q. Now, I direct your attention to Government's' Exhibits 92, 93 and 94 for identification, and ask you

1077 how that account is entitled.

A. "Sam Achilli, Special Account."

Q. Was there a Sam Achilli Regular Account?

A. No.

Q. What is the signification of the "Special Account" designation?

A. I do not know what he used it for, but he called it a special account.

Q. But there was no regular account?

A. No. There was no regular account there at that time.

Q. I direct your attention to Government's Exhibit 88 for identification entitled, "Liability Ledger" and direct your attention to the fact that this begins on August 26th, 1947. Is there a prior sheet respecting any transactions of Sam Achilli in the bank?

A. I do not believe so.

1078 Q. Do you know so?

A. I am positive because we checked back and I couldn't find one at all.

Q. In other words, there were no loan transactions with Mr. Achilli prior to August 26, 1947, is that correct?

A. Not to my knowledge, that is right.

Q. Well, as to the bank's knowledge.

A. There might be a small loan. Of that, I can't say. I mean, he might have come in and borrowed two or three hundred dollars before this date, but this is the first time that he has made any loan in this department of the bank.

Q. Which department of the bank is this?

A. This is the Collateral Loan Department.

Q. Is he likely to have substantial loans in the unsecured loan department?

A. Well, the collateral and the unsecured—now in the bank you have consumer loans, then you have this department which takes care of unsecured and secured loans, and then you have the real estate loans, et cetera.

But you make your substantial loans in the department of the bank. In the consumer loans, it is automobile, and so on.

1079 Q. So it would be your testimony that prior to January 26, 1947, Sam Achilli had no substantial loans with the bank?

A. I could find no record of that, sir.

Q. And if you could find no record of it, he had none, did he?

A. I would assume that.

Q. Directing your attention to Government Exhibits Nos. 86 and 87, counsel inquired of you whether this record would show you whether or not these bonds were sold through the bank.

Is there any other record of the bank that would show that?

A. No, there is no record at the bank that would show that the bonds were sold that I could find. There wouldn't be anything on the books.

Q. If the bonds were sold through the bank, would there be a record?

A. There might be a credit to his account of $8,000 and some cents, but that would be the only record. I presume, or we presumed, we searched the records and could find nothing in the bank that would indicate it.

Q. Directing your attention to Government Exhibits for identification 102 and 103, which are financial

1080 statements, where are the originals of those statements?

A. That I don't know, sir.

Q. Where did these photostats come from?

A. The photostats, when the Government originally started their investigation, there were photostats made of the two financial statements at that time.

A. No, sir.

Q. Did you ever make a comparison of these photostats with the originals?

A. Yes.

Q. When?

A. At the time that they were printed up. That is a matter of about, oh, a year and a half to two years ago.

Q. But these two particular documents have not been in your possession during that time, have they?

A. That is right, sir.

Q. Do you know that these are the very same documents that you made the comparison of?

A. Yes, I believe they are.

Q. Never mind what you believe. Do you know?

1081 A. Yes, I know.

Q. How do you know?

A. I can tell by the statements. I recognize them.

Q. Is there any identification on there that permits you to identify this photostat as the one that you checked against the original?

A. Take a look at that up in the corner.

Q. What is the significance of what you directed my attention to in the corner?

A. Well, I knew that that was on there.

Q. But do you know anything else about the rest of the statement, the two sheets of it?

A. What would you like to know, sir?

Q. I would like to know whether you are in a position to positively testify that these are the documents that you compared with the originals before the originals disappeared?

Mr. Russo: The witness has answered the question, if your Honor please.

The Court: The objection is sustained.

Mr. Batter: Your Honor, at this time we have no objection to Government Exhibits numbered 87, 86, 89, 90, 88, 94, 92, 93, 101, 99, 95, 96, and 98.

1082 I think that covers the entire list that counsel offered excepting Exhibits 102 and 103, and I object to both of them.

I object to Government Exhibit 103 because it has no bearing upon this case at all. It is a financial statement dated September 26, 1949, some months after the conclusion of this period before the Court.

With respect to Government Exhibit 102, the absence of the original has not been satisfactorily explained nor has it been satisfactorily testified to that this is in fact a copy of the original.

Mr. Russo: We withdraw at this time, if your Honor please, Government Exhibit No. 103.

The Court: Let me see the other one.

(Government Exhibit 102 for identification was handed to the Court by Mr. Batter.)

The Court: It may be received subject to the objection, and the others may be received without objection.

(The documents previously marked, respectively,
1083 Government Exhibits 86 to 90, inclusive, 92 to 96, inclusive, 98, 99, 101 and 102, for identification, were thereupon received in evidence as Government Exhibits 86 to 90, inclusive, 92 to 96, inclusive, 98, 99, 101 and 102.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: May it please the Court, unless counsel for the defense has any objection, I would like at this time to substitute photostatic copies for Government Exhibits 87, 86, 88, 90, and 89. I would like to have the photostatic copies marked with the same identification mark that are on the originals.

Mr. Batter: May I inspect them, your Honor?

The Court: Yes.

(The above exhibits were handed to Mr. Batter.)

1084 Mr. Batter: There is no objection at all, your Honor, to Government's Exhibits 86, 87, 88 and 89 if the photostats are marked similar to the originals.

With respect to Government's Exhibit No. 90 there will be no objection if counsel will rearrange his photostat a little bit. I have this in mind: The witness was asked to testify from certain pages of the original and some of these originals have backs to them so that a comparison of his testimony will not match up with the photostat as it is presently constituted.

Mr. Russo: All right. Let's match them up.

Mr. Batter: With that rearrangement, there is no objection.

The Court: All right. They may be received, that transportation having been made.

(The documents previously marked Government's Exhibits 86 to 90, both inclusive, for identification were thereupon received in evidence as Government's Exhibits 86 to 90, inclusive.)

1085 Mr. Russo: Mr. Reporter, will you mark these substituted photostatic copies with the same numbers that are borne by the originals.

(The photostatic copies were thereupon marked Government's Exhibits 86, 87, 88, 89 and 90, respectively.)

Mr. Russo: At this time, Mr. Flora, I will return to you the carton of Recordaks and the original Exhibits concerning which you have testified for re-inclusion in your bank records.

Thank you. That will be all.

(Witness excused.)

JAMES W. McCUMMINGS, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name, sir, and spell your last name?

A. James W. McCummings, M-c-C-u-m-m-i-n-g-s.

1086 Q. What is your address, Mr. McCummings? Your residence address.

A. 526 South Boeke Road, Evansville, Indiana.

Q. What is your business or occupation?

A. Petroleum Engineer.

Q. Mr. McCummings, will you keep your voice up so that the Court as well as the jury may hear you.

A. Yes.

Q. You are a petroleum engineer?

A. Yes, sir.

Q. Do you maintain an office?

A. Yes, sir.

Q. Where?

A. 702 Old National Bank Building, Evansville, Indiana.

Q. Mr. McCummings, do you know the Defendant, Sam Achilli?

A. I do.

Q. Do you see him in the Court Room?

A. Yes, sir.

Q. Will you point him out, please?

A. Sitting right over at the table (indicating).

Q. The second man at the far end of the table, defense counsel table?

A. Yes, sir.

1087 Q. Directing your attention to November 26th, 1946, did you at or about that time have any transaction with the Defendant, Sam Achilli?

A. The company I was with at that time did have.
Q. What was that transaction?
A. Mr. Achilli purchased an interest in the lease and in the drilling of a well on a lease in Lawrence County, Illinois.
Q. At that time what was your capacity in the McCummings Oil Company?
A. President.
Q. Is the McCummings Oil Company in existence today?
A. No, sir.
Q. Now, during the time that the company was in existence, in the conduct of its business did the McCummings Oil Company keep books and records?
A. Yes, sir.
Q. And was it the usual course of business for you to maintain such books and records?
A. Yes, sir.
Q. Were you served with a subpoena duces
1088 tecum to bring with you the books and records of the McCummings Oil Company relating to the transaction had by that company with Sam Achilli?
A. I was.
Q. Did you bring those books and records with you?
A. Some of them.
Q. Why didn't you bring all of them?
A. They were apparently destroyed.
Q. Did you search for them?
A. Yes, sir; thoroughly.
Q. Were you able to locate them?
A. No, sir.
Mr. Russo: Will you mark this as Government's Exhibit 104 for identification, please?
(The document was thereupon marked Government's Exhibit 104 for identification.)
By Mr. Russo:
Q. I show you Government's Exhibit No. 104 for identification, Mr. McCummings, purporting to be an assignment of oil and gas lease, and ask you if you have ever seen the original?
A. Yes, sir.
1089 Q. Is Government's Exhibit 104 a true and correct photostatic copy of the original?
A. Yes, sir.

Q. Directing your attention to the signature about four-fifths of the way down the right-hand side, whose signature is that, if you know?

A. That's my signature.

Q. And was your signaturue placed on there on or about the date the document bears?

A. Yes, sir.

Q. November 26th, 1946?

A. Yes, sir, it was.

Q. What, if you know, was done with the original of Government's Exhibit No. 104 for identification?

A. It was forwarded to Mr. Achilli.

Q. For what purpose?

A. For his records.

Q. Had that been recorded prior to the time that you mailed it to him?

A. Yes, sir.

Q. Does it correctly reflect the consideration that moved between McCummings Oil Company and Sam Achilli?

A. No, sir.

Q. What consideration is reflected on Govern-
1090 ment's Exhibit No. 104?

A. $1.00.

Q. What was the true and correct consideration?

A. I am guessing, because it has to be by memory, but I think it was—

Mr, Batter: Just a minute.

Mr. Russo: I do not want you to guess, Mr. McCummings.

By Mr. Russo:

Q. I want your best recollection.

Mr. Batter: I object to the witness guessing.

By Mr. Russo:

Q. What is your best recollection?

A. It would be in the neighborhood of $2,500.

Q. Did you receive that amount from Sam Achilli?

A. Some place in the neighborhood of that amount.

Q. How was that consideration paid?

A. As far as I can remember, it was by car and by money.

Q. How much was by money?

A. I don't remember.

Q. What kind of a car did you receive?

A. A Chrysler.

1091 Q. What year model?

A. 1946.

Q. Was it new or used?

A. New.

Q. Now, did the oil well which is related to this assignment of oil and gas lease, Government's Exhibit 104 for identification, produce any oil?

A. Yes, sir.

Q. Were there any payments, to your knowledge, made to Sam Achilli under this assignment during the year 1946?

A. None, to my knowledge.

Q. When, if you recall, was the car delivered to you? Approximately when.

A. I assume it would have been prior to the assignment.

Q. And when was it that you received cash? Approximately when.

A. If that was when the transaction was, it would have been prior to the assignment because we would not have made the assignment until we had the money.

Q. And the assignment is dated November 26th, 1946?

A. Correct.

Mr. Russo: At this time, may it please the Court,

1092 we offer in evidence Government's Exhibit No. 104.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 104, for identification was thereupon received in evidence as Government's Exhibit 104.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. McCummings. That will be all.

(Witness excused.)

EDWARD E. GLASHAGEL, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Doctor, will you state your full name, please, and spell your last name.

A. Edward W. Glashagel, G-l-a-s-h-a-g-e-l.

1093 Q. Where do you live, Doctor?

A. Elgin, Illinois.

Q. What is you street address?

A. 480 Oakhill Road.

Q. Doctor, I am afraid that the Court and Jury will not be able to hear you unless you keep your voice up.

A. 480 Oakhill Road.

Q. How long have you been a physician?

A. Twenty-two years.

Q. Doctor, do you know the Defendant, Sam Achilli?

A. I do.

Q. Do you see him in the Court Room?

A. I do.

Q. Will you point him out, please?

A. Sitting over there at the last table on the right (indicating).

Q. The second man at the far end of defense counsel table?

A. Yes, sir.

1094 Q. Now directing your attention to January 31, 1947, did you have any business transaction not involving your professional services with the defendant Sam Achilli?

A. Yes, sir. I sold him a vacant lot.

Q. Where was that lot located?

A. It was Lot No. 7 of Oak Hill Subdivision in Elgin, Illinois.

Q. What was the consideration for that lot?

A. In reviewing the tax stamps, $2,000.

Q. And how was payment made to you by Mr. Achilli?

A. He paid me in cash.

Q. Now after you received payment, did you convey that property to him?

A. Yes, sir.

Mr. Russo: I will ask that this be marked Government Exhibit No. 105 for identification.

(The document was thereupon marked Government Exhibit 105 for identification.)

By Mr. Russo:

Q. Did you give him a warranty deed?

A. Yes, sir.

1095 Q. I show you Government Exhibit 105 for identification, purporting to be a certified photostatic copy in the office of the Recorder of Deeds in Kane County, Illinois, and ask you to examine it and state whether or not that is a true and correct photostatic copy of the deed you delivered to Mr. Achilli.

A. Yes, sir, it is.

Q. Directing your attention to the signature about three-fourths of the way down the page, whose signature is that?

A. My signature.

Q. And after you signed the deed, what did you do with it? Did you deliver it to anyone?

A. My attorney represented me, and I believe he took care of it. Where he delivered it, I do not know.

Q. Directing your attention to the fact that the deed recites a consideration of $10 and other good and valuable consideration, I will ask you if the recital of that consideration is the true consideration that you received from Mr. Achilli?

A. Yes, sir.

Q. Ten dollars? Is that the true consideration?

A. No, sir.

Q. What was the true consideration?

1096 A. $2,000.

Mr. Russo: At this time, may it please the Court, we offer in evidence the certified photostatic copy of a warranty deed on file with the Recorder of Deeds, Kane County, as Government Exhibit No. 105.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Governmen. Exhibit 105 for identification was thereupon received in evidence as Government Exhibit 105.)

Mr. Russo: Your witness.

Mr. Batter: No questions.

Mr. Russo: Thank you, Doctor. That will be all.

(Witness excused.)

1097 WYNYARD SWAINSON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Doctor, will you state your full name and then spell it, please?
A. Wynyard, W-y-n-y-a-r-d, Swainson, S-w-a-i-n-s-o-n.
Q. Where do you live, Doctor?
A. 454 Douglas.
Q. In what city?
A. Elgin.
Q. Illinois?
A. Yes, sir.
Q. What is your profession?
A. A dentist.
Q. How long have you been engaged in that profession?
A. Oh, about eighteen years.
Q. Where is you office located?
A. 55 North Grove.
Q. In what city?
A. Elgin.
Q. Elgin, Illinois?
A. Yes, sir.

1098 Q. Directing your attention, Doctor, to December 6, 1945, will you state whether or not you had a transaction with Sam Achilli at or about that time?
A. I did, sir.
Q. What was the nature of that transaction?
A. I bought a piece of property on Dundee and Chester from Mr. Achilli and, I believe, his uncle.
Q. Doctor, I can't hear you. I wish you would keep your voice up.
A. I say, I bought a piece of property on Chester and Dundee Avenue from Mr. Achilli and Mr. Santurro.
Q. From Mr. Achilli and Mr. Santurro?
A. Yes, sir.
Q. What was the address of that property?
A. I believe it was listed as 816 or 817 or 819. It is 825 now.
Q. Dundee Avenue?

A. Dundee Avenue.
Q. Elgin, Illinois?
A. That is right.
Q. What was the price that you agreed to pay for that property?
A. $15,000.
Q. Did you pay that consideration to Mr. Achilli
1099 and Mr. Santurro?
A. I did, sir.
Q. Did you make a down payment at the time that you entered into the agreement?
A. I paid $1500 down, I believe, in December, 1945, and I paid that to my attorney, Mr. Paulson.
Mr. Russo: I will ask that this document be marked Government Exhibit No. 106 for identification.
(The document was thereupon marked Government Exhibit 106 for identification.)
By Mr. Russo:
Q. I show you Government Exhibit 106 for identification, and ask you to examine it and then state whether or not that is the agreement to which you have referred.
A. Yes, sir, it is.
Q. It is?
A. Yes, sir.
Q. Keep your voice up, Doctor, so the Jury and Court may hear you.
A. Yes, sir.
Q. Now directing your attention to the signatures in the second one-quarter of the rear of the document,
1100 whose signature is the first signature that appears thereon?
A. Sam Achilli.
Q. Whose is the second?
A. Ruth Achilli.
Q. Whose is the third?
A. Henry Santurro.
Q. And the fourth?
A. Alice Santurro.
Q. And the fifth?
A. My own, Wynyard Swainson.
Q. Do you recall at the present time when it was that you paid the balance of the $15,000?
A. April the 1st of 1946.

Q. How much did you pay at that time?
A. I paid the balance.
Q. The balance between—
A. I think the balance was a little over—
Q. (Continuing)—between $15,000 and the $1500 that you paid down?
A. That is right, sir
Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibit No. 106.
1101 Mr. Batter: No objection.
The Court: It may be received.
(The document previously marked Government Exhibit 106 for identification was thereupon received in evidence as Government Exhibit 106.)
Mr. Russo: Your witness.
Mr. Batter: No questions.
Mr. Russo: Thank you, Doctor. That will be all.
The Witness: Thank you.
(Witness excused.)

ARTHUR H. MIDDLETON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Arthur K. Middleton?
A. Arthur H.
Q. Arthur H.?
A. Yes, sir.
Q. Where do you live, Mr. Middleton?
1102 A. I live in Golden, Colorado.
Q. Mr. Middleton, you will have to keep your voice up so that the Court and Jury can hear you. I can't hear you myself.
A. I live in Golden, Colorado, Route 4, Box 13.
Q. Prior to the time that you lived at Golden, Colorado, where did you live?
A. I lived at 310 Ann Street.
Q. In what city?
A. Elgin, Illinois.
Q. What is your business in Colorado, Mr. Middleton?
A. I have a motel.

Q. Do you know the defendant, Sam Achilli?
A. Yes, I know him.
Q. Do you see him in the court room?
A. I believe he is right over there (indicating).
Q. Are you indicating the third man at the far end of defense counsel table?
A. The third man, yes, sir.
Q. How long have you known him?
A. Oh, I couldn't tell you how long. About seven years, I guess.
Q. When did you first meet him?
A. When he came to the house.
1103 Q. When was that? Tell us about that, Mr. Middleton.
A. That was about 1948, I think.
Q. What happened?
A. He came to the house and offered me a price for a piece of ground up on Dundee Avenue.
Q. How much did he offer you?
A. $10,000.
Q. Was there any further conversation about that?
A. Well, he was coming back that night but he didn't come back. I didn't see him that night.
Q. Did anyone thereafter approach you with respect to purchasing that property from you?
A. Yes, sir.
Q. Who did?
A. Well, Abelmann, the real estate man.
Q. Do you know Mr. Abelmann's first name?
A. No, I don't.
Q. You say he is a real estate man?
A. Yes, sir.
Q. In Elgin?
A. In Elgin.
Q. Did you discuss the sale of that property with Mr. Abelmann?
A. Yes, sir.
1104 Q. Did you state a price for which you agreed to sell the property?
A. $12,000.
Q. Was there a deal involved? Did you sell the property?
A. Yes, sir, I did.

Q. To whom did you find you sold the property?
A. Well, I think it was sold to the bank.
Q. Did you enter into an agreement to sell the property with anyone?
A. Yes, sir.
Mr. Russo: I will ask that this be marked Government Exhibit 107 for identification.
(The document was thereupon marked Government Exhibit 107 for identification.)
By Mr. Russo:
Q. I show you Government Exhibit No. 107 for identification, Mr. Middleton, and direct your attention to page 3 and to the signature in the lower right-hand corner of page 3. Whose signature is the first that appears thereon?
A. That is my signature.
Q. And whose is the second?
1105 A. Well, that is Sam's wife.
Q. What is her name?
A. Ruth Achilli.
Q. And whose is the third signature?
A. Sam.
Q. Were those signatures placed on there on or about the time that this agreement was entered into?
A. Yes, sir, as far as I know. I think these were on first and I signed afterwards.
Q. Ruth Achilli's and Sam Achilli's signatures were on there first and you signed afterwards?
A. Yes, sir, as near as I can remember it was that way.
Q. Now at the time that this agreement was signed by you, what if any consideration did you receive?
A. You mean the price?
Q. Yes, sir.
A. $6,000.
Q. And how was that paid to you?
A. Well, the $6,000 was a down payment.
Q. $6,000 was a down payment, and was that down payment made to you on or about the date this document bears, November 4, 1948?
A. Yes, sir.
1106 Q. Did you during the year 1948 receive any other payment from Sam Achilli?
A. $200.

Q. $200?
A. Yes, sir.
Q. Did you receive the rest of the consideration from Sam Achilli thereafter?
A. Thereafter, yes, sir.
Q. After you had received the full consideration from Mr. Achilli, did you deliver to them a warranty deed?
A. Well, I didn't deliver it to them.
Q. Did you sign one?
A. I signed one, yes, sir.

1107 Mr. Russo: We had better have this marked as an Exhibit. Will you mark this as Government's Exhibit 108 for identification, please, Mr. Reporter.

(The document was thereupon marked Government's Exhibit 108, for identification.)

By Mr. Russo:
Q. I show you Government's Exhibit 108 purporting to be a photostatic copy of a warranty deed, and direct your attention to the signature thereon.
A. Yes.
Q. I will ask you whether or not that is your signature?
A. That is my signature.
Q. Directing your attention to the fact that that deed recited a consideration of $10.00 for that property, I will ask you if that is the true consideration?
A. What is it? $10.00?
Q. Yes.
A. (No answer.)
Q. Is $10.00 the considertion that you received?
A. No, sir.
Q. What was the true consideration?

1108 A. $10,000.
Q. Wasn't that $6,000, or was it $10,000?
A. (No answer.)
Q. $12,000.
A. $12,000 is right.
Q. $12,000?
A. $12,000 is right. $10,000 was wrong.

Mr. Russo: At this time, may it please the Court, I offer in evidence Government's Exhibit 107 and Government's Exhibit 108 which purport to be a certified and photostatic copy kept in the records of the Office of the Recorder of Deeds for Kane County, Illinois.

Mr. Batter: Your Honor, there is no objection to Government's Exhibit 108, which is dated June 21st, 1950.

The Court: It may be received.

(The document marked Government's Exhibit 108 for identification was thereupon received in evidence as Government's Exhibit 108.)

Mr. Batter: There is, however, a very definite objection to Government's Exhibit 107 for identification, which is undated. I do not know whether it
1109 has any bearing on the issues before the Court at all.

Mr. Russo: The witness by his testimony fixed the date, if your Honor please.

The Court: It may be received subject to the objection.

(The document previously marked Government's Exhibit 107 for identification was thereupon received in evidence as Government's Exhibit 107.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Middleton, I believe you testified you executed this agreement in 1948, did you not?

A. I didn't understand what you said.

Q. I believe you testified you executed this agreement, Government's Exhibit No. 107, in 1948, did you not?

A. Yes, sir.

Q. How do you set the date of 1948 as the year in which you executed that agreement?

A. How do I set that date?

1110 Q. Yes.

A. Well, it was just that date. I didn't set it. I don't know what you mean.

Q. How do you know you executed that document in 1948?

A. Well, here it says about the taxes for 1948. Wasn't there another paper here?

Q. I don't know. Don't ask me.

A. I had a little slip here that—that must be it (indicating), isn't it?

Mr. Russo: Will you mark this as Government's Exhibit 109 for identification, please, Mr. Reporter?

(The document was thereupon marked Government's Exhibiit 109 for identification.)

(Mr. Russo handed Government's Exhibit 109 for identification to Mr. Batter.)

By Mr. Batter:

Q. Is that the slip to which you have referred?

A. Yes, sir.

Q. I ask you again: How do you know you executed that document in 1948?

A. Well, here it says "1948" on it.

1111 Q. That is not the date, or that does not purport to be the date you executed the document, does it?

A. Well, that was supposed to be the date right there, November 1st, 1948.

Mr. Batter: Supposed to be the date is the best you can say. That is all.

Mr. Russo: Just a minute, please, Mr. Middleton.

Redirect Examination by Mr. Russo.

Q. Mr. Middleton, I will ask you whether Government's Exhibit 107 was executed by you and by Sam Achilli and Ruth Achilli before you executed the deed?

Mr. Batter: He has already testified to that, your Honor.

Mr. Russo: Well, you are bringing it up and trying to confuse the witness, Mr. Batter.

The Court: Objection sustained.

Mr. Russo: I want to get him—

The Court: Objection sustained. He has already testified to that.

1112 By Mr. Russo:

Q. Does Government's Exhibit 109 for identification refresh your recollection about the time that you executed Government's Exhibit 107?

A. Well, just about the time, yes. On there it is November 1st, 1948.

Q. And that refreshes your recollection?

A. Yes, sir.

Mr. Russo: Thank you, sir.

Recross Examination by Mr. Batter.

Q. Now, Mr. Witness, when you speak of "about the time", what do you mean? Could two or three months make a difference in "about the time"?

A. I couldn't just tell right down to the—November 1st, 1948 means November 1st, 1948, I suppose.

Q. But that has nothing to do with Government's Exhibit 107.

Mr. Russo: I object to the argument, if your Honor please, with the witness.

Mr. Batter: Q. That does not appear in Government's Exhibit No. 107, does it?

A. It appears in that other piece of paper.

Mr. Batter: That is all.

1113 Mr. Russo: Thank you, Mr. Middleton. That will be all.

(Witness excused.)

The Court: We will take a short recess, ladies and gentlemen, please.

(Whereupon a short recess was taken after which the proceedings were resumed, in open court, in the hearing and presence of the jury:)

1114 ARTHUR L. PAULSON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name?

A. Arthur L. Paulson.

Q. Where do you live, Mr. Paulson?

A. Elgin, Illinois.

Q. What address, please?

A. R. D. 4, Elgin, Illinois. It is about six miles south of the city limits.

Q. What is your profession?

A. A lawyer.

Q. How long have you been a lawyer?

A. Since 1907.

Q. Directing your attention, Mr. Paulson, to on or about December 6, 1945, did you represent Wynyard S. Swainson in the sale of a piece of property by him to anyone?

A. I represented Dr. Swainson, but he bought a piece of property.

Q. He bought a piece of property?

A. Yes.

1115 Q. What was the property he bought?

A. It was on the corner of Chester and Dundee Avenue in the City of Elgin, Illinois.

Do you want a legal description?

Q. No, sir. Just relate the transaction.

A. Dr. Swainson, who was my client, called on me and asked me to represent him in the purchase of a piece of property at numbers 819 and 823 Dundee Avenue in the City of Elgin, which property he said was owned by Sam Achilli and Henry Santurro. He said that Mr. William Abelmann, a real estate man in Elgin, represented the owners in making the sale, and that Mr. Abelmann would see me.

Mr. Abelmann called to see me and told me what the deal was about, that is, the purchase price and all the conditions, and asked me to draw a contract between the owners and Dr. Swainson, which I prepared in triplicate and gave him two copies of the contract, which he said he would take to Mr. and Mrs. Achilli and Mr. and Mrs. Santurro for their signatures and then to Dr. Swainson for his signature.

He brought one copy back, signed by all the parties, some days later. I retained the office copy of the contract, which is unsigned and which I have in my

1116 possession.

Then Mr. Abelmann also brought the abstract of title to the real estate, which he asked me to send down to the abstract company at Geneva, Illinois, and have supplemented to date, and then for me to examine for Dr. Swainson, and if the title was all right, why then the deal might be closed.

So the abstract was sent to the abstract company, was supplemented and came back to me. I examined it. There was good title in Mr. Achilli and Mr. Santurro.

Then Mr. Abelmann brought me a deed signed by the owners and their wives, and we discussed the items of the deal, and I prepared a closing statement showing the purchase price, also the credits and off-sets, which indicated there was a balance due to Messrs. Santurro and Achilli of $14,777.48.

So Mr. Abelmann gave me the deed of the property to Dr. Swainson, also an assignment of the insurance

policies, and I gave Mr. Abelmann my check to him as agent for the owners of $14,777.48.

Q. Mr. Paulson, I show you Government Exhibit 106 in evidence, and ask you if that is the agreement to which you have referred.

1117 A. Yes, sir. This is the original, one of the originals.

Q. That is right, yes, sir. And it bears the signatures of all the parties?

A. It does.

Q. And those signatures were placed on there on or about the date the document bears, the 6th day of December, 1945?

A. Or shortly thereafter, yes, sir.

Q. Now do you have with you the canceled check that you delivered to Mr. Abelmann?

A. I have.

Q. May I see it, please?

Mr. Russo: I will ask that these documents be marked Government's Exhibits 110 and 111, respectively, for identification.

(The documents were thereupon respectively marked Government Exhibits 110 and 111 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 111 for identification, purporting to be a check of Paulson & Morgan, Attorneys, No. 1392, dated April 2, 1946, payable to

1118 the order of William H. Abelmann, in the amount of $14,777.48.

Directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. It is mine.

Q. And was that signature placed on there on or about the date the document bears?

A. It was on that date.

Q. And this is the check that you delivered to Mr. Abelmann on behalf of Mr. Achilli?

A. That is right.

Q. Now I show you Government Exhibit 110 for identification, and ask you to examine it and state whether or not it is a true and correct photostatic copy of the deed that was delivered by Mr. Achilli and Mr. Santurro to Dr. Swainson?

A. It is.

Q. Directing your attention to the fact that Government Exhibit No. 110 states that the consideration is $10 and other valuable consideration, I will ask you whether the deed cites the true consideration?

A. It does not.

Q. What was the true consideration?

1119 A. $15,000. There are revenue stamps on the deed which indicate that consideration.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibit Nos. 111 and No. 110, which purports to be a certified photostatic copy of a deed in the custody of the Recorder of Deeds for Kane County, Illinois.

Mr. Batter: No objection.

The Court: It may be received.

(The documents previously marked Government Exhibits 110 and 111 for identification were thereupon received in evidence as Goxernment Exhibits 110 and 111.)

Mr. Russo: Your witness.

Mr. Batter: No questions.

Mr. Russo: Thank you, Mr. Paulson.

(Witness excused.)

1120 RANSTEAD S. LEHMANN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mr. Lehmann, will you state your full name and spell it, please, for the record?

A. Ranstead, R-a-n-s-t-e-a-d, S. Lehmann, L-e-h-m-a-n-n.

Q. Where do you live, sir?

A. 416 East Chicago Street, Elgin, Illinois.

Q. What is your profession?

A. Lawyer.

Q. How long have you been a lawyer, Mr. Lehmann?

A. Since 1929.

Q. Directing your attention, Mr. Lehmann, to the estate of Minna S. Lay, were you one of the executors and rustees under the last will and testament of Minna S. Lay?

A. I was.

Q. Under that last will and testament of Minna S. Lay, did she leave any property at 18 and 20 Douglas Avenue to be disposed of under her will?

A. She did.

1121 Q. In your capacity as executor and trustee of Minna S. Lay's estate, did there come a time when you agreed to sell the property at 18 and 20 Douglas Avenue, Elgin, Illinois?

A. There did.

1122 Q. Will you relate for the Court and Jury how that transaction came about?

A. Mr. William H. Abelmann, a real estate man in Elgin, told me that he had a purchaser for the property at the price we were asking, namely, $55,000, and the co-executor and I discussed the matter and decided to sell it in accordance with the offer brought to us by Mr. Abelmann.

Q. Was there an agreement drawn up then pursuant to that discussion?

A. That was.

Mr. Russo: Will you mark this as Government's Exhibit 112 for identification, please.

(The document was thereupon marked Government's Exhibit 112, for identification.)

By Mr. Russo:

Q. I show you Government's Exhibit 112 for identification and ask you if that is the agreement to which you have referred?

A. It is.

Q. With whom was the agreement made?

A. Sam Achilli and Ruth Achilli as purchasers, and August Wilkening and myself as executors under

1123 the Will of Mina S. Lay, deceased.

Q. Directing your attention to the signatures on the lower right-hand portion of page 3 of Government's Exhibit 112 for identification, I will ask you whose signatures appear thereon?

A. August Wilkening's, mine, Sam Achilli's and Ruth Achilli's.

Q. When was the agreement entered into?

A. On or about the date it bears, which I believe is the 14th day of September, 1948.

Q. What was the consideration moving from Sam and Ruth Achilli to you and to Mr. Wilkening as executors and trustees?

A. $55,000.

Q. How was that consideration paid?

A. A down payment of $5,500 was put in escrow at the time of the signing of the instrument.

Q. That was on or about—

A. The date it bears, namely, the 14th day of September, 1948.

Q. Did you receive the rest of the consideration?

A. We did.

Q. When?

A. In September of 1949.

1124 Q. And in what amount?

A. Fifty-three thousand and some hundred dollars.

Q. Now, at the time you received the full consideration for that property, did you execute a deed?

A. We did.

Q. What did you do with the deed after you executed it?

A. Delivered it to Mr. Wiedemann who was representing Mr. Achilli at the time.

Q. Do you know whether or not, Mr. Lehman, there was any escrow arrangement with respect to the $5,500 that was part of the consideration of this agreement?

A. There was an escrow, yes.

Q. Who was the escroee?

A. J. J. Wiedemann.

Q. Do you have any recollection or knowledge as to when the $5,500 was delievered to you by Mr. Wiedemann?

A. At the time of the final closing of the transaction, which I believe was in September, 1949.

Q. Would that be September, 1948?

A. No. 1949—

Q. Oh.

A. (Continuing) —was when the deal was finally closed.

1125 Mr. Russo: At this time, may it please the Court, we offer in evidence Government's Exhibit 112.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 112 for identification was thereupon received in evidence as Government's Exhibit 112.)

Mr. Russo: Your witness.

Mr. Batter: No questions.

Mr. Russo: Thank you, Mr. Paulson—I mean, Mr. Lehman.

The Witness: Yes, sir.

Mr. Russo: I have so many names in my head I can't remember them all.

(Witness excused.)

1126 JOSEPH J. WIEDEMANN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

* * *

1127-1132 * * *

1133 * * * Q. Did you represent the defendant, Sam Achilli, in the acquisition of a piece of property from the Minna S. Lay estate?

A. Yes, sir.

Q. Relate the circumstances of that transaction, Mr. Wiedemann.

A. Well, as I recall, the broker came to the office and advised me that Mr. Achilli was purchasing this property from the Minna Lay Estate, and that Ranstead Lehmann was the attorney for the sellers.

So I got in touch with him and he prepared a con-
1134 tract and presented it to me, and I looked it over and—

Q. Did you receive any money?

Mr. Batter: Your Honor, may I have a running objection to this entire testimony?

The Court: Yes.

By Mr. Russo:

Q. Did you receive any money as escrowee for the estate? Were you holding any money in connection with this transaction?

A. Yes, sir.

Q. What amount?
A. $5500.
Q. Where did you get the money?
A. I got the money from the broker, as I recall it.
Q. What is his name?
A. Abelmann.
Q. Who did he represent?
A. Well, he was representing both the seller and buyer, I believe.
Q. What was the amount of money you received?
A. $5500.
Q. And what date did you receive it?
A. Well, I have no independent recollection of that.
1135 Q. Did you receive it at or about the time the agreeemnt between the estate and Mr. Achilli was signed?
A. Yes, I did.
Q. Directing your attention to Government Exhibit No. 112, purporting to be an agreement between "Sam Achilli and Ruth Achilli, his wife, as joint tenants and not as tenants in common, hereinafter called purchasers, and August W. Wilkening and Ranstead S. Lehmann, as executors and trustees under the last will and testament of Minna S. Lay, deceased, hereinafter called sellers," did you receive that $5500 on or about the date this document bears?
A. Yes—yes, sir.
Q. That is September 14, 1948?
A. Yes, sir.
Mr. Russo: Your witness.
Mr. Batter: No cross.
Mr. Russo: Thank you, Mr. Wiedemann.
(Witness excused.)

1136 ROBERT E. WALES, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Robert E. Wales?
A. Yes, sir.

Q. And that is spelled W-a-l-e-s?
A. Yes, sir.
Q. Mr. Wales, will you keep your voice up so the Court and Jury can hear you too.
A. Yes, sir.
Q. Where do you live, please?
A. Rockford, Illinois.
Q. What address?
A. 822 Winthrop Lane.
Q. What is your business or occupation?
A. Operating and managing a store fixture factory.
Q. What is the name of it?
A. Sun-Ray Manufacturing Company.
Q. Where is that located?
A. In Rockford.
Q. What is your capacity with the Sun-Ray Fix-
1137 ture Company?
A. Vice president.
Q. How long have you held that position?
A. About nine years.
Q. What is the nature of the business of Sun-Ray Fixture Company?
A. Manufacturing and installing restaurant and tavern fixtures.
Q. In the conduct of its business, does Sun-Ray Fixtures Company maintain books and records?
A. They do.
Q. Are those books and records kept in the regular course of business?
A. They are.
Q. Is it the regular course of business to keep such books and records?
A. It is.
Q. Are those books and records kept under your supervision and custody?
A. They are.
Q. Do you know the defendant, Sam Achilli?
A. I do.
Q. Do you see him in the court room?
A. I do.
1138 Q. Will you point him out, please?
A. The gentleman in the corner with the orange tie (indicating).

Q. The gentleman with the orange tie sitting at the far end of defense counsel table?

A. Yes.

Q. When did you first meet the defendant Sam Achilli?

A. It was, I believe, in 1946, when Sam came into our store in Rockford.

Q. Had you had any conversation with him prior to the time that he came into your store?

A. No. No, I hadn't.

Q. What happened when he came to your store?

A. Mr. Achilli explained he was building a new place and needed equipment to equip it, and naturally, we being in the business, we were interested in supplying his needs.

Q. Did he tell you what kind of a building he was building and what kind of equipment he was needing?

A. He did.

Q. What did he say in that connection?

A. That he would need kitchen equipment and dining room equipment and bar equipment.

Q. Did he tell you where the location of the place 1139 was where that equipment would be needed?

A. He did.

Q. What did he tell you about that?

A. It would be the Red Lion on Highway 25 out of Elgin.

Q. In connection with the equipment that he wanted you to furnish, were you required to have access to specifications or plans?

A. I was.

Q. Were you referred to anyone for those specifications and plans?

A. I was.

Q. To whom?

A. The architect, Mr. Mortimer Hawkins.

Q. Did you get the plans?

A. I did.

Q. Did you talk to Mr. Hawkins?

A. I did.

Q. After you secured the plans and specifications from Mr. Hawkins, what if anything did you do?

A. We prepared an estimate for approval of the equipment that was to be used.

Q. And what if anything did you do with the estimate?

A. It was submitted to Mr. Achilli.

1140 Q. For what purpose?

A. For approval and to place contracts.

Q. Did he approve them?

A. He did.

Q. Was there a contract drawn up?

A. There was.

Q. Was there more than one contract drawn up in connection with that operation, that building?

A. There was.

Mr. Russo: I will ask that these documents be marked Government Exhibits 113, 114 and 115, respectively, for identification.

(The documents were thereupon respectively marked Government Exhibits 113, 114 and 115 for identification.)

By Mr. Russo:

Q. I now show you, Mr. Wales, Government Exhibit 113 for identification, purporting to be a contract No. 1598, dated March 19, 1947, and directing your attention to the signature in the lower right-hand corner thereof, I will ask you whose signature that is, if you know.

A. That is Mr. Sam Achilli's signature.

1141 Q. Was that signature affixed thereon in your presence?

A. It was.

Q. Directing your attention to the signature on the lower left-hand side, whose signature is that?

A. That is my own.

Q. What did that contract call for?

A. Complete equipment for the Red Lion tavern and night club.

Q. What is the amount of the contract?

A. $13,900.37.

Q. Did you supply the equipment called for by that contract?

A. I did.

Q. Did you receive payment therefor?

A. I did.

Q. What amount of payment did you receive?

A. We received the full amount, $13,900.37.

Q. How and when was that payment made?

A. That payment was made in check. There was $4500 paid on down payment and $9400 paid on delivery of the equipment.

Q. Was the down payment made at or about the time the contract or agreement was signed?

1142 A. It was.

Q. When was the $9,400.37 paid?

A. That was paid in June of 1947.

1143 Q. Directing your attention to Government's Exhibit 114 for identification, purporting to be a contract of Sun Ray Fixture Company, dated October 14, 1947, and directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. Mr. Sam Achilli.

Q. Was Mr. Achilli's signature affixed thereto in your presence?

A. It was.

Q. Directing your attention to the signature in the lower left-hand corner, whose signature is that?

A. My own.

Q. Were both those signatures affixed to Government Exhibit No. 114 on or about the date the docu[redacted] bears, October 14, 1947?

A. It was.

Q. What does that contract call for?

A. Special refrigerator piece of equipment.

Q. What was the amount of the contract?

A. $700.00.

Q. Was that amount paid?

A. It was.

Q. When was it paid?

A. In November of 1947.

1144 Q. Now, I show you Government's Exhibit No. 115 for identification, purporting to be a contract of Sun Ray Fixture Company, dated January 12, 1948. Directing your attention to the signature in the lower left-hand corner, whose is that?

A. My own.

Q. Directing your attention to the writing in the lower right-hand corner, what does that state?

A. Contract O.K.'d by Mr. Achilli by conversation on the phone dated January 12, 1947.

Q. What does that contract call for?

A. Tables and chairs.

Q. What is the amount of the contract?
A. $314.47.
Q. Did you supply that equipment?
A. I did.
Q. Did you receive payment therefor?
A. I did.
Q. When did you receive payment?
A. The following month.
Q. What date?
A. That would be February of 1948.

Mr. Russo: I will ask that this be marked Govern-
1145 ment's Exhibit 116 for identification.

(The document was thereupon marked Government's Exhibit No. 116 for identification.)

By Mr. Russo:

Q. Now, Mr. Wales, I show you Government Exhibit No. 116, purporting to be a contract of Sun Ray Fixture Company, contract No. 1636, dated July 14, 1947, and directing your attention to the signature in the lower right-hand corner, I will ask you whose signature that is.
A. Mr. Sam Achilli.
Q. Directing your attention to the signature in the lower left-hand corner, whose signature is that?
A. My own.
Q. Was Mr. Achilli's signature affixed to Government Exhibit 116 on or about the date it bears, July 14, 1947?
A. It was.
Q. What equipment does that call for?
A. One 4-foot beverage cooler and one 7-foot by 7-foot walk-in cooler.
Q. What is the amount of the contract?
A. $1963.50.
1146 Q. Was that equipment furnished?
A. It was.
Q. Did you receive payment therefor?
A. I did.
Q. When did you receive payment?
A. In September of 1947.

Mr. Russo: I will ask that this be marked Government's Exhibit 117 for identification.

(The document was thereupon marked Government's Exhibit 117 for identification.)

By Mr. Russo:

Q. Now, Mr. Wales, I show you Government's Exhibit No. 117 for identification. I will ask you if that is a record of the Sun Ray Fixture Company?

A. It is.

Q. Does this purport to be a contract in addition to those contracts concerning which you have testified?

A. It is.

Q. Will you state, please, for the Court and Jury, what transactions it purports to represent and when those transactions took place?

1147 A. Well, this is an itemized statement and account of all the small purchases that were made. It would cover all the supplies for the dining room and kitchen, plastic bowls and knives, forks, dishes, kettles, refrigeration installation including tubing, refrigerant, labor, mileage, glassware dispensers. Actually it amounts to the open account, which is the full record of other than the contracts that have already been discussed.

Q. What was the total amount paid by Mr. Achilli on that open account?

A. $720.14. This amount right here, $720.14.

Q. When was that payment made?

A. That was paid in September of 1947.

Mr. Russo: Now, may it please the Court, we offer in evidence Government Exhibits 113, 114, 115, 116 and 117.

Mr. Batter: Your Honor, I object to the introduction of each of these documents as not being the documents that one would glean from the interrogation. Each of these documents is signed Red Lion, Inc. by Sam Achilli as an officer or some such thing. It is the account of

1148 Red Lion, Incorporated, not of the Defendant.

The Court: I am going to withhold the ruling on these for the time being.

Mr. Russo: May I ask the witness just two more questions, your Honor?

The Court: Yes.

By Mr. Russo:

Q. Mr. Wales, directing your attention to Government Exhibit 113 and to the words "Red Lion, Inc.," in whose handwriting is that?

Mr. Batter: I object to that, your Honor. The docu-

ment speaks for itself. It happens to be printed instead of written.

The Court: He may answer.

The Witness: It is written in my hand, in green ink, Red Lion, underneath which is the signature.

By Mr. Russo:

Q. Why did you write Red Lion, Inc. on that, Mr. Wales?

Mr. Batter: I object to that, your Honor. The reason he did so is of no purpose.

The Court: He may answer.

Mr. Russo: If he put it on there merely to identi-
1149 fy the job, it certainly is pertinent, if your Honor please.

The Court: He may answer.

The Witness: All our contracts have to have a title, not the individual's name, but the place of business, because the place changes hands, one owner to another, several times in our type of business, and once it gets on our ledgers we have that only way of following up the records.

By Mr. Russo:

Q. Then were the words Red Lion, Inc. put on them merely for the purpose of identifying the job and not for the purpose of fixing responsibility?

A. That is correct.

1150 Q. Is that true with reference to Government's Exhibits 116, 115, 114 and 117?

A. It is, sir.

Mr. Russo: Now, your Honor, I will reoffer them.

Mr. Batter: May I ask the witness a question?

The Court: Yes.

By Mr. Batter:

Q. You say that the words "Red Lion, Inc." were placed upon these documents by you for the purpose of identification. Now, what did you mean by the "Inc."?

A. That's part of the title.

Q. It is a corporation, isn't it?

A. Apparently so.

Q. Did you know it was a corporation when you wrote the "Inc." there?

A. I asked the individual under what name will this be classified, and I was given to understand it was "Red Lion."

Q. Then where did you get the "Inc." from? Did you just pull it out of the air?

A. No, sir.

1151 Q. Where did you get it?

A. Well, that was part of the title given me.

Q. It was part of the title given you?

A. Yes.

Q. Then the contract is with Red Lion, Incorporated?

A. Well, the contract is with Mr. Sam Achilli.

Mr. Batter: I object to it, if your Honor please.

The Court: I am going to withhold my ruling on it, gentlemen.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Wales. That will be all.

(Witness excused.)

* * *

1152-1153 * * *

1154 ROBERT HECKMAN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your full name, please.

A. Robert Heckman.

Q. Where do you live, Mr. Heckman?

A. 920 Augusta, Elgin.

The Reporter: How do you spell your last name?

The Witness: H-e-c-k-m-a-n.

By Mr. Russo:

Q. What is your business?

A. Right today?

1155 Q. Yes, sir.

A. I'm in the trucking business.

Q. Sir?

A. Truck driver.

Q. What is the name of that business?

A. Steffan Brothers.

Q. How long have you been employed by or operating with Steffan Brothers?

A. Two years.

Q. Mr Heckman, do you know of an automobile sales company called Highland Motors?
A. I do.
Q. Directing your attention to August, 1948, did you have any transaction with that company?
A. I did.
Q. What was the nature of that transaction?
A. I bought a new car.
Q. What kind of a car did you buy?
A. '48 Chrysler.
Q. Was that new or used?
A. New.
Q. What was the purchase price?
A. A little over $2,400.
Q. Did you make payment for the car?
1156 A. Sir?
Q. Did you make payment for the car?
A. I did.
Q. How did you make payment?
A. I made a down payment and monthly payments.
Q. How much was the down payment?
A. $800.00.
Q. Was the balance financed?
A. It was.
Q. By whom?
A. Elgin Acceptance Finance.
Q. To whom did you deliver the cash?
A. I delivered it to Highland Motor Sales.
Q. And what was at or about the time that you purchased the car?
A. That's right.
Q. Do you know Sam Achilli?
A. I do.
Q. Do you see him in the Court Room?
A. I do.
Q. Will you point him out, please?
A. The gentleman sitting right over there (indicating).
Q. The third man sitting at the far end of the defense counsel table?
1157 A. That is right.
Q. Now, did you ever have any personal transaction with Mr. Achilli?

A. I have.
Q. What was the nature of that transaction?
A. Well, I approached him to borrow some money.
Q. Did you get a loan from him?
A. Not from him alone, no.
Q. Did he arrange it?
A. He helped.
Q. Was any security given for the loan?
A. Yes.
Q. Do you have that security with you?
A. I do; just part of it.
Q. May I have all the documents that you have relating to that transaction?
A. Yes, sir.
(The witness handed documents to Mr. Russo.)
Mr. Russo: Will you mark this as Government's Exhibit 118 for identification, please.
(The document was thereupon marked Government's Exhibit 118, for identification.)
1158 Mr. Russo: Government's Exhibit 119 for identification.
(The document was thereupon marked Government's Exhibit 119, for identification.)
Mr. Russo: And Government's Exhibit 120 for identification.
(The document was thereupon marked Government's Exhibit 120 for identification.)
1159 Q. Tell us, please, Mr. Heckman, how that loan came about—who you talked to and what resulted.
A. Well, I talked to Mr. Achilli and I talked to Mr. Gromer.
Q. Who did you talk to first?
A. Mr. Achilli.
Q. What did you tell him?
A. I told him I would like to borrow some money.
Q. What did he say?
A. He said, "I will have to see my partner."
Q. Did he mention his partner's name?
A. He did.
Q. Did you tell him how much money you wanted?
A. I did.
Q. How much money did you want?

A. $4,000.
Q. Did you get a loan?
A. I did.
Q. Did you give a note to secure that loan?
A. I gave—Yes, I did.
Q. I show you now, Mr. Heckman, Government Exhibit No. 118, purporting to be a chattel mortgage note dated May 1, 1947, "For value received we promise to pay to the order of Earl H. Gromer and Sam Achilli
1160 the sum of $4,600 at Suite D, Tower Building, Elgin, Illinois, at the rate of 7 percent per annum after date. This note is secured by chattel mortgage of even date herewith to Earl H. Gromer and Sam Achilli on chattel in Pingree Grove, Illinois."
Directing your attention to the signature in the lower right-hand corner, whose signature is that first one?
A. It is my own.
Q. Whose is the second signature?
A. My former wife's.
Q. After you signed that note, what did you do with it?
A. What do you mean, what did I do with it?
Q. Did you deliver the note to anyone?
A. Well, it was kept right in Mr. Gromer's office.
Q. After you signed it, you left it with Mr. Gromer?
A. That is right. He was the attorney.
Q. I show you Government Exhibit 120, and ask you if that is the deed that you delivered to Sam Achilli and Earl Gromer at the time that you signed this note.
A. I did.
Q. Directing your attention to the signature about two-thirds of the way down the page, whose signature is
1161 that, the first one?
A. Mine.
Q. Directing your attention to the second signature, whose signature is that?
A. My former wife's.
Q. Directing your attention to the date, the 28th day of April, 1947, were those signatures placed on there on or about the date the document bears?
A. Yes.
Q. Did you receive $4,600 from Mr. Gromer and Mr. Achilli?

A. No.
Q. What was the amount that you received?
A. $4,000.
Q. Did you pay that $4,000?
A. I paid $4,600.
Q. You paid $4,600?
A. Yes.
Q. When did you make payment of the $4,600?
A. I made it in monthly payments.
Q. In monthly payments? Where did you make those payments?
A. The Tower Building, Mr. Gromer's office.
Q. After the payments had been completed on
1162 that note, did you get a release?
A. I did.
Q. And you received the note back?
A. I did.
Q. And the deed back?
A. That is right.
Q. I show you now Government Exhibit No. 119, purporting to be a release of chattel mortgage, dated May 3, 1947, and ask you if that is a release that you secured at the time that you paid off that note?
A. I did.
Q. Directing your attention to the signature in the lower right-hand corner, whose signature is that, the first one?
A. I couldn't say.
Q. Can you read?
A. Yes, sir.
Q. Will you read it?
A. Sam Achilli.
Q. Directing your attention to the next one, whose signature is that?
A. Just a moment, sir. Mr. Achilli wasn't in the office at the time. I can't say whether that is his signature or not.
1163 Q. I only asked you whose signature it purports to bear.
A. All right.
Q. Whose signature does it purport to bear?
A. Sam Achilli.

Q. Whose is the second signature on there?
A. Earl Gromer.
Q. Did you receive this release on or about the data it bears, the 3d day of May, 1947?
A. I did.
Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 118, 119 and 120.
Mr. Batter: No objection.
The Court: They may be received.
(The documents previously marked, respectively, Government Exhibits 118, 119 and 120 for identification were thereupon received in evidence as Government Exhibits 118, 119 and 120.)
Mr. Russo: Your witness.

1164 *Cross Examination by Mr. Batter.*

Q. Mr. Heckman, directing your attention to Government Exhibit 119, if I understood you correctly, I believe you testified that you received this release about May 3, 1947.
A. It should be 1948.
Q. 1948?
A. Yes, sir.
Mr. Russo: Thank you, Mr. Heckman. That will be all.
Mr. Batter: That is all.
(Witness excused.)

1165 MARTIN SEYBOLD, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Martin Seybold?
A. That is correct.
Q. Is that spelled S-e-y-b-o-l-d?
A. Right.
Q. Mr. Seybold, will you keep your voice up, please, so the Court and Jury may hear you, too.
A. Yes.
Q. Where do you live, please, sir?

A. In Elgin, Illinois.
Q. What street address?
A. 315 Oak.
1166 Q. What is your business?
A. Banking.
Q. With what bank are you associated?
A. The First National Bank of Elgin, Illinois.
Q. I want to ask you again, please, to keep your voice up so the Court and Jury can hear you. We all must hear you.
A. All right.
Q. How long have you been associated with the First National Bank?
A. Forty-three years.
Q. What is your present capacity?
A. Cashier.
Q. How long have you been cashier?
A. Eight years.
Q. In the conduct of its business does the First National Bank of Elgin keep books and records?
A. They do.
Q. Are those books and records kept in the regular course of business?
A. That is right.
Q. And is it the regular course of business to keep such records?
A. That is right.
1167 Q. The records that are kept—are they made at or about the time of the transaction, event or occurrence they purport to reflect?
A. They are.
Q. Under whose custody and supervision are those books kept, Mr. Seybold?
A. The First National Bank of Elgin.
Q. What individual?
A. Various.
Q. Are they kept under your supervision?
A. Yes, they are.
Q. Were you served with a subpoena duces tecum to bring with you the books and records of the First National Bank of Elgin relating to loans made by that bank to Sam Achilli and to disbursements made by the bank on behalf of Sam Achilli?

A. I was.

Q. Did you bring those records with you?

A. I did.

Q. Now, directing your attention to about May 28th, 1947, did the First National Bank of Elgin make a loan to Sam Achilli?

A. They did.

Q. At or about the time the First National Bank of
1168 Elgin made the loan to Sam Achilli did the bank make a record, a real estate loan register of that transaction?

A. They did.

Mr. Russo: Will you mark this as Government's Exhibit 121 for identification, please.

(The document was thereupon marked Government's Exhibit 121, for identification.)

1169 Q. Now, Mr. Seybold, I show you Government Exhibit No. 121, purporting to be a real estate loan register, and ask you if that is the document to which you refer

A. That is right, it is.

Q. Does Government Exhibit 121 bear a bank or loan number?

A. It does.

Q. What is that number?

A. 1591.

Q. Now does Government Exhibit 121 purport to reflect the liability of Sam Achilli to the bank from the time that loan was made to him and thereafter the decreasing liability of Sam Achilli to the bank as payments were made from time to time by him to the bank?

A. It does.

Q. What was the amount of the loan that was made by the bank to Mr. Achilli?

A. $25,000.

Q. What is the date on which the loan was made?

A. May 28, 1947.

Q. Would you refer to Government Exhibit 121 and state what Sam Achilli's liability to the First National Bank was on December 31, 1947?

A. At the close of business on December 31, 1947,
1170 $21,977.98.

Q. Now would you refer again to Government Ex-

hibit 121 and state what Mr. Achilli's liability to the bank was on December 31, 1948?

A. $15,681.30.

Q. Did Sam Achilli deposit any collateral with the bank as security for the $25,000 loan?

A. Mortgage loan secured by trust deed.

Q. On what property, Mr. Seybold?

A. On property "Northeast quarter section 1 township 40 N, range 8 east, Third Principal Meridian."

Q. Is that the property that is commonly known as the Red Lion?

A. That is right.

Q. Directing your attention to Government Exhibit 121 and to the name "Red Lion" in parentheses, following the word "Address," what is the significance of the name Red Lion in parentheses at that point?

A. Well, that was particularly to designate which piece of property this loan was on.

Q. Now will you state, Mr. Seybold, whether the loan that was extended by the bank to Sam Achilli was extended to him in his individual capacity or in some corporate capacity?

1171 A. Well, it was in his wife's name, Sam and Ruth.

Q. By that do I understand you to mean that it was extended to him in his individual capacity?

A. That is right.

Q. After the $25,000 loan was made by the bank to Sam Achilli, was that $25,000 deposited with the bank?

A. No—Well, it was deposited in this way: Payments were made on this to the contractors as the work progressed in the form of cashier's checks.

Q. Will you tell me this: Was the $25,000 delivered to Sam Achilli or was it retained by the bank for a special purpose?

A. It was retained by the bank and payments made out of it as work on the building progressed.

Q. Was that $25,000 disbursed by the bank?

A. It was.

Q. At whose order were those disbursements made?

A. Well, the architect issued the order for payment, and we issued a cashier's check payable to the individual who had done the work.

Mr. Russo: I will ask that this be marked Government Exhibit 122 for identification.

(The document was thereupon marked Government
1172 Exhibit 122 for identification.)

By Mr. Russo:

Q. Mr. Seybold, I hand you Government Exhibit 122 for identification, and ask you whether or not that is a summary made by you or caused to be made under your supervision of the disbursements made by the bank at Sam Achilli's orders or at the orders of his architect.

A. That is right.

Mr. Russo: I will ask that these documents be marked Government Exhibits 123, 123-A, 123-B and 123-C for identification.

(The documents were thereupon marked Government Exhibits 123, 123-A, 123-B and 123-C, respectively, for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit No. 123, purporting to be a cashier's check of th eFirst National Bank of Elgin, dated June 7, 1947, No. 125517, payable to the order of Mr. M. C. Lohbauer, in the sum of $1,128.10.

I will ask you whether that check represents a disbursement made by the bank as escrowee for the account
1173 of Sam Achilli.

A. That is right.

1174 Q. Speak up, please, so the jury can hear you.

A. That is correct.

Q. Now, directing your attention to Government's Exhibit 123-A, I will ask you whether that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $1,128.10 could be made?

A. That is correct.

Q. Directing your attention to the signature in the lower right-hand corner there purporting to be the signature of M. C. Lohbauer, what if anything does Mr. Lohbauer's signature at that point indicate?

A. He received payment of that amount.

Q. Directing your attention to Government's Exhibit 123-B, I will ask you what that document purports to be.

A. It is a waiver of lien.

Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

A. M. C. Lohbauer.

Q. Directing your attention to the date, what date is affixed on Government's Exhibit 123-B?

A. June 10th, 1947.

1175 Q. Now, will you state, please, whether or not Government's Exhibit 123-B for identification accompanied Exhibit No. 123-A at the time that the disbursement was made by the bank?

A. Yes; I believe it did.

Q. Now, directing your attention to Government's Exhibit 123-C purporting to be a statement or an invoice of M. C. Lohbauer, No. 2210, what, if anything does that purport to state?

A. Well, it shows the work and the material used to make up the $1,128.10.

Q. The work, labor and material?

A. That is right.

Mr. Russo: Will you mark this as Government's Exhibit 124 for identification, please?

(The document was thereupon marked Government's Exhibit 124, for identification.)

Mr. Russo: 124-A.

(The document was thereupon marked Government's Exhibit 124-A, for identification.)

Mr. Russo: 124-B.

1176 (The document was thereupon marked Government's Exhibit 124-B, for identification.)

Mr. Russo: 124-C.

(The document was thereupon marked Government's Exhibit 124-C, for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 124 for identification which purports to be a cashier's check of the First National Bank of Elgin dated June 7th, 1947, No. 125518, payable to the order of the Elgin Wiring & Fixture Manufacturing Company in the amount of $800.00.

A. Yes.

Q. I will ask you if that Cashier's Check represents a

disbursement made by the bank as escrowee for the account of Sam Achilli?

A. It does.

Q. Now, directing your attention to Government's Exhibit 124-A for identification, I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $800.00 could be made?

1177 A. It is.

Q. Now, directing your attention to Government's Exhibit 124-B for identification, I ask you whether or not that is a waiver of lien—

A. It is.

Q. —on the work done by Elgin Wiring & Fixture Manufacturing Company?

A. It is.

Q. Directing your attention to Government's Exhibit No. 124-B for identification, what is the date on which the waiver was signed?

A. June 9th, 1947.

Q. And by whom does it purport to be signed?

A. Elgin Wiring & Fixture Company by Charles Marker.

Q. Directing your attention to Government's Exhibit 124-C, purporting to be a statement of the Elgin Wiring & Fixture Company dated June 6th, 1947, for work and labor, did Government's Exhibit 124-C and 124-B accompany Government's Exhibit 124-A at the time that the disbursement was made by the bank?

A. Yes, sir.

Mr. Russo: Will you mark this as Government's Exhibit 125 for identification, please.

1178 (The document was thereupon marked Government's Exhibit 125, for identification.)

Mr. Russo: This will be 125-A.

(The document was thereupon marked Government's Exhibit 125-A, for identification.)

Mr. Russo: And 125-B.

(The document was thereupon marked Government's Exhibit 125-B, for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 125 for identification purporting to be a cashier's check

of the First National Bank of Elgin, dated June 7th, 1947, No. 125519, payable to the order of Clifford Lamp in the sum of $3,886.51.

A. Yes.

Q. I will ask you whether or not Government's Exhibit No. 125 for identification represents a disbursement made by the First National Bank as escrowee for the account of Sam Achilli?

A. It does.

Q. I show you Government's Exhibit No. 125-A for
1179 identification, and I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $3,886.51 could be made?

A. It is.

Q. Directing your attention to the signature in the lower right-hand corner thereof, what does the signature at that point indicate?

A. That he received payment on the order.

Q. Now, directing your attention to Government's Exhibit 125-B for identification, I will ask you what that purports to be?

A. A waiver of lien.

Q. And by whom does it purport to be signed?

A. Lamp Construction Company by Clifford E. Lamp.

Q. What is the amount of the waiver?

A. $3,886.51.

Mr. Russo: Will you mark this as Government's Exhibit 126 for identification, please.

(The document was thereupon marked Government's Exhibit 126 for identification.)

Mr. Russo: 126-A.

1180 (The document was thereupon marked Government's Exhibit 126-A for identification.)

Mr. Russo: 126-B.

(The document was thereupon marked Government's Exhibit 126-B for identification.)

Mr. Russo: 126-C.

(The document was thereupon marked Government's Exhibit 126-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 126 for identification purporting to be a cashier's check of

the First National Bank of Elgin dated June 7th, 1947, No. 125520, payable to the order of Clifford Lamp in the amount of $1,297.93.

A. Yes.

Q. I will ask you if that check represents a disbursement made by the bank as escrowee for the account of Sam Achilli?

A. It does.

Q. Now, I show you Government's Exhibit 126-A for identification.

1181 A. Yes.

Q. I ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that the payment in the amount of $1,297.93 could be made?

A. It is.

1182 Q. Directing your attention to the signature in the lower right-hand corner thereof, what is the significance of the signature at that point?

A. Received payment on the work done.

Q. Directing now your attention to Government Exhibit No. 126-B, what does that purport to be?

A. Waiver of lien.

Q. Directing your attention to the signature in the lower left-hand portion thereof, by whom does that purport to be signed?

A. Lamp Construction Company, by Clifford E. Lamp.

Q. What is the date of that waiver?

A. 9th day of June, 1947.

Q. And what is the amount of the waiver?

A. $1,297.93.

Q. Directing your attention to Government Exhibit 126-C, consisting of three pages stapled together, tell the Court and Jury, please, what that purports to be.

A. Labor and material furnished in the construction.

Q. By whom?

A. By Clifford E. Lamp.

Mr. Russo: Mark these Government Exhibits 127, 127-A, 127-B and 127-C for identification.

1183 (The documents were thereupon marked Government Exhibits 127, 127-A, 127-B and 127-C for identification, respectively.)

By Mr. Russo:

Q. Now I hand you Government Exhibit 127, purport

ing to be a check of the First National Bank of Elgin, dated June 12, 1947, No. 156338, payable to the order of H. L. Becker, in the amount of $85, and purporting to be signed by Martin Seybold.

Is that you, Mr. Seybold?

A. That is right.

Q. I will ask you if that check represents a disbursement made by the First National Bank as escrowee for the account of Sam Achilli?

A. It does.

Q. Directing your attention to Government Exhibit 127-A, I will ask you if that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $85 can be made?

A. It does.

Q. And does it certify that payment could be made to H. L. Becker?

1184 A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, what is the significance of Mr. Becker's signature at that point?

A. That he received payment on the order.

Q. In what amount?

A. $85.

Q. Directing your attention to Government Exhibit No. 127-B, purporting to be a waiver of lien, what is the date of that waiver?

A. June 12, 1947.

Q. By whom does the waiver purport to be signed?

A. H. L. Becker.

Q. And what is the amount of the waiver?

A. $85.

Q. Directing your attention to Government Exhibit 127-C, purporting to be an invoice of H. L. Becker, what work does that purport to represent?

A. Material furnished in the Red Lion.

Q. In what amount?

A. $85.

Q. Is there any writing on Government Exhibit No. 127-C, any handwriting?

A. "Paid in full," signed "H. L. Becker."

1185 Mr. Russo: Mark these Government Exhibits 128, 128-A, 128-B and 128-C for identification.

In the

United States Court of Appeals

For the Seventh Circuit

No. 11575

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

SAM ACHILLI,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION.

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(The documents were thereupon marked, respectively, Government Exhibits 128, 128-A, 128-B and 128-C for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit No. 128, Mr. Seybold, purporting to be a cashier's check of the First National Bank, dated June 12, 1947, No. 125575, payable to the order of Mortimer Hawkins, in the amount of $612.00, and ask you if that cashier's check represents a disbursement made by the bank as escrowee for the account of Sam Achilli.

A. It does.

Q. To whom was that disbursement made?

A. Mortimer H. Hawkins.

Q. Now I show you Government Exhibit 128-A, purporting to be a waiver of lien, dated July 17, 1947, and ask you by whom it purports to be signed.

A. Mortimer Hill Hawkins.

Q. What is the amount of the waiver?

A. The waiver is $3,000—let's see—$3,780.

1186 Mr. Russo: Mark this Government Exhibit 129, 129-A, 129-B, 129-C and 129-D for identification.

(The documents were thereupon marked, respectively, Government Exhibits 129, 129-A, 129-B, 129-C and 129-D for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit No. 129, purporting to be a check of the First National Bank, dated June 13, 1947, No. 156350, payable to the order of the Insulation Engineering Service, in the amount of $1,439.

I will ask you if that check represents a disbursement made by the bank as escrowee for the account of Sam Achilli.

A. It does.

Q. Now I show you Government Exhibit No. 129-A, and ask you if that purports to represent a certificate by the architect, Mortimer Hawkins, that disbursement in the amount of $1,439 can be made to the Insulation Engineering Company.

A. It does.

Q. Directing your attention to the signature in
1187 the lower right-hand corner, Insulation Engineering Service by E. J. Fisher, what does Mr. Fisher's signature at that point signify?

A. That work has been done and payment received.

Q. Please speak so the jury can hear you, too, Mr. Seybold.

Will you repeat that answer?

A. That work has been done, completed, and money has been paid.

Q. Now I show you Government Exhibit 129-B, and ask you what that purports to be.

A. Waiver of lien.

Q. By whom does it purport to be signed?

A. Insulation Engineering Service Company by E. J. Fisher, owner.

Q. On what date does it purport to have been signed?

A. July 8, 1947.

Q. What is the amount of the waiver?

A. Let's see—$1,439.

Q. Now I show you Government Exhibit No. 129-C and ask you what that purports to be.

A. Contractor's affidavit.

Q. Is it an affidavit certifying that the work has been completed and that payment is requested?

1188 A. That is right.

Q. I show you now Government Exhibit 129-D, and ask you what that purports to represent?

A. Application for payment.

Q. By whom?

A. From the Insulation Engineering Service Company.

Q. And to whom does it purport to request payment of?

A. M. H. Hawkins, Architect.

Q. And Mr. Hawkins was not the man for whom you disbursed that money, was he?

A. No, he was not.

The Court: Ladies and gentlemen of the jury, we will now take a short recess so the Court may hear the morning motions. The witness may leave the witness stand, but he is instructed not to discuss the case with anyone until he returns to testify.

The Witness: Yes.

The Court: All right.

1189 (Whereupon the Court gave attention to other matters on the call, after which the following fur-

ther proceedings were had in open court in the hearing and presence of the jury:)

The Court: You may proceed.

Mr. Russo: Will you mark this as Government's Exhibit 130 for identification, please.

(The document was thereupon marked Government's Exhibit 130 for identification.)

Mr. Russo: 130-A.

(The document was thereupon marked Government's Exhibit 130-A, for identification.)

Mr. Russo: 130-B.

(The document was thereupon marked Government's Exhibit 130-B, for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 130 for identification purporting to be a cashier's check of the First National Bank of Elgin dated
1190 June 25th, 1947, No. 125714, payable to the order of Decorators Supply Corporation in the amount of $101.88.

A. Yes.

Q. I will ask you if that represents a disbursement made by the First National Bank of Elgin to the account of Sam Achilli?

A. It does.

Q. Directing your attention to Government's Exhibit 130-A for identification, I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $101.88 could be made to the contractor?

A. That is correct.

Q. Directing your attention to the signature written in the lower right-hand corner thereof, what does that purport to signify?

A. Received payment.

Q. By whom?

A. By Decorators Supply, William Grage.

Q. Now, directing your attention to Government's Exhibit 130-B for identification, will you state, please, what that purports to represent?

A. Waiver of lien,

Q. What date does it bear?

1191 A. The first day of July, 1947.

Q. By whom does that purport to be signed?

A. Decorators Supply Corporation, Elmer C. Grage, Secretary.

Q. What is the amount of the waiver?

A. $101.88.

Mr. Russo: Will you mark this as Government's Exhibit 131 for identification, please.

(The document was thereupon marked Government's Exhibit 131 for identification.)

Mr. Russo: 131-A.

(The document was thereupon marked Government's Exhibit 131-A for identification.)

Mr. Russo: 131-B.

(The document was thereupon marked Government's Exhibit 131-B for identification.)

Mr. Russo: 131-C.

(The document was thereupon marked Government's Exhibit 131-C for identification.)

1192 By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 131 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 8th, 1947, No. 125934, payable to the order of Edward Schneider, and ask you if that represents a disbursement made by the First National Bank of Elgin as escrowee for the account of Sam Achilli.

A. It does.

Q. In the amount of $1,048.38?

A. That is correct.

Q. Now, directing your attention to Government's Exhibit 131-A, I will ask you if that purports to be the certificate of Mortimer Hawkins directing payment to Edward Schneider in the amount of $1,048.38?

A. It does.

Q. Directing your attention to the signature "Edward Schneider" in the lower right-hand corner, what is the significance of that signature?

A. That he received the money in payment.

Q. Directing your attention to Government's Exhibit 131-B, I will ask you to state what that purports to be?

A. A waiver of lien.

Q. What date does it bear?

1193 A. The 14th of July, 1947.

Q. What signature does it purport to bear?

A. Edward Schneider's.
Q. What is the amount of the waiver?
A. $1,048.38.
Q. That is the same amount as reflected on Government's Exhibit 131, the check?
A. That is correct.
Q. Now, I show you Government's Exhibit 131-C purporting to be statements and bills totaling $1,048.38 and ask you what they purport to represent.
A. Material and labor in the construction of the Red Lion.
Q. Supplied by whom?
A. By Edward Schneider.
Q. Does Government's Exhibit 131-C reflect that payment was received by the contractor?
A. It does; paid in full, July 14th, 1947, Edward Schneider.
Mr. Russo: Will you mark this as Government's Exhibit No. 132 for identification, please.
(The document was thereupon marked Government's Exhibit 132, for identification.)
1194 Mr. Russo: 132-A.
(The document was thereupon marked Government's Exhibit 132-A, for identification.)
Mr. Russo: 132-B.
(The document was thereupon marked Government's Exhibit 132-B for identification.)
Mr. Russo: 132-C.
(The document was thereupon marked Government's Exhibit 132-C for identification.)
1195 Q. Now I show you Government Exhibit 132 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 8, 1947, No. 125925, payable to the order of M. C. Lohbauer, in the sum of $1,804.88.
I ask you if that cashier's check represents a disbursement made by the First National Bank as escrowee for the account of Sam Achilli.
A. It does.
Q. Now I show you Government Exhibit No. 32-A for identification, and ask you if that purports to be the certificate of Mortimer Hawkins, the architect, cer-

tifying that payment in the amount of $1,804.88 may be made to M. C. Lohbauer.

A. That is right.

Q. Directing your attention to what purports to be the signature of M. C. Lohbauer in the lower right-hand corner thereof, what does Mr. Lohbauer's signature at that place indicate?

A. Received the amount of the payment.

Q. And what was that amount?

A. $1,804.88.

Q. Directing your attention to Government Exhibit 132-B, state, please, what that purports to represent.

1196 A. Waiver of lien.

Q. What date does it bear?

A. 10th day of July, 1947.

Q. By whom does it purport to be signed?

A. M. C. Lohbauer.

Q. What is the amount of the waiver?

A. $1,804.88.

Q. Now I show you Government Exhibit No. 132-C for identification, and ask you to state what that purports to be.

A. Material and labor.

Q. Supplied by whom?

A. M. C. Lohbauer.

Q. In what amount?

A. $1,804.88.

Q. Will you state, please, whether or not it indicates that payment was received?

A. It is marked "Paid 7/11/47, M. C. Lohbauer."

Mr. Russo: I will ask that these be marked Government Exhibits 133, 133-A, 133-B and 133-C for identification, respectively.

(The documents were thereupon respectively marked Government Exhibits 133, 133-A, 133-B and 1197 133-C for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit 133 for identification, purporting to be the cashier's check of the First National Bank of Elgin, dated July 8, 1947, No. 125927, payable to the order of Kienzle Brothers Company in the amount of $44.78.

I will ask you if that cashier's check represents a

disbursement made by the First National Bank of Elgin as escrowee for account of the defendant, Sam Achilli.

A. It does.

Q. Now I show you Government Exhibit 133-A for identification, and ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $44.78 may be made to Kienzle Brothers Company.

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, what does the signature at that place purport to indicate?

A. Indicates he got the money.

Q. Keep your voice up, please.

A. He received payment.

1198 Q. In what amount?

A. $44.78.

Q. Directing your attention now to Government Exhibit 133-B for identification, will you state, please, what that purports to be?

A. Waiver of lien.

Q. What date does it bear?

A. 10th day of July, 1947.

Q. By whom does it purport to be signed?

A. Kienzle Brothers Company by Carl Kienzle, President.

Q. What is the amount of the waiver?

A. $44.78.

Q. Directing your attention now to Government Exhibit No. 133-C for identification, state, please, what that purports to be.

A. It is an invoice.

Q. From whom?

A. Kienzle Brothers Company for $44.78.

Q. Does it purport to show that it was paid?

A. It is marked "Paid 7/11/47, Kienzle Brothers Company."

Mr. Russo: I will ask that these be marked Government Exhibits 134, 134-A and 134-B for identifica-

1199 tion, respectively.

(The documents were thereupon respectively marked Government Exhibits 134, 134-A and 134-B for identification.)

By Mr. Russo:

Q. I show you now Government Exhibit 134 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 8, 1947, No. 125928, payable to the order of Western United Gas & Electric Company, in the amount of $10.56.

I will ask you if Government Exhibit No. 134 represents a disbursement made by the bank as escrowee for the account of the defendant, Sam Achilli?

A. It does.

Q. I show you now Government Exhibit 134-A for identification, and ask you if that puruports to be a certificate of Mortimer Hawkins, the architect, directing payment to Western United Gas & Electric Company, in the amount of $10.56.

A. It does.

Q. By whom does it purport to be signed?

A. Western Gas & Electric Company, F. S. Gillis.

1200 Q. And what does that signature in the lower right-hand corner thereof purport to reflect?

A. They received payment.

Q. Directing your attention now to Government Exhibit 134-B, state, please, what that purports to be.

A. Waiver of lien.

Q. What date does it bear?

A. The 18th day of July, 1947.

Q. What is the amount of the waiver?

A. $10.56.

Q. By whom does it purport to be signed?

A. Western United Gas & Electric Company, J. T. Parsons, Secretary-Treasurer.

Mr. Russo: I will ask that these be marked Government Exhibits 135, 135-A, 135-B, 135-C and 135-D for identification, respectively.

(The documents were thereupon marked, respectively, Government Exhibits 135, 135-A, 135-B, 135-C and 135-D for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit No. 135 for identification, purporting to be a cashier's check

1201 of the First National Bank of Elgin, dated July 8, 1947, No. 125929, payable to the order of M. A. VanEsso, Incorporated, in the amount of $1,145.85.

Now I will ask you if Government Exhibit No. 135 for identification represents a disbursement made by the First National Bank as escrowee for the account of the defendant Sam Achilli.

A. It does.

Q. Now directing your attention to Government Exhibit No. 135-A for identification, I will ask you if that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $1,145.85 may be made to M. A. VanEsso Company.

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, what does the signature at that place purport to reflect?

A. Received payment of $1145.85.

Q. By whom does it purport to be signed?

A. M. A. VanEsso, Incorporated, by John E. VanEsso.

Q. Directing your attention to Government Exhibit No. 135-B for identification, will you state, please, what that purports to be?

A. Waiver of lien.

1202 Q. What date does it bear?

A. July 11, 1947.

Q. By whom does it purport to be signed?

A. M. A. VanEsso, Incorporated, John E. VanEsso.

Q. What is the amount of the waiver?

A. $1145.85.

Q. Directing your attention to Government Exhibits 135-C and 135-D, will you state, please, what they purport to represent?

A. Material and labor in the amount of $1145.85.

Q. Where is that work purported to have been done?

A. At the Red Lion Inn, Elgin, Illinois.

Q. Does Government Exhibit 135-C reflect whether or not payment was received by M. A. VanEsso, Inc.?

A. It is marked "Paid, 7/11/47, M. A. VanEsso, Incorporated."

1203 Mr. Russo: Will you mark this for identification as Government's Exhibit 136.

(The document was thereupon marked Government's Exhibit 136 for identification.)

Mr. Russo: 136-A.

(The document was thereupon marked Government's Exhibit 136-A for identification.)

Mr. Russo: 136-B.

(The document was thereupon marked Government's Exhibit 136-B for identification.)

Mr. Russo: 136-C.

(The document was thereupon marked Government's Exhibit 136-C for identification.)

By Mr. Russo:

Q. Now, I show you Government's Exhibit No. 136 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 8th, 1947, No. 125930, payable to the order of Albert E. Hummel in the amount of $49.40.

1204 A. Yes.

Q. I will ask you whether Government's Exhibit No. 136 for identification represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?

A. It does.

Q. I show you now Government's Exhibit 136-A for identification and ask you if that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $49.40 could be made to Albert E. Hummel?

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

A. A. E. Hummel's.

Q. What does A. E. Hummel's signature at that point purport to reflect?

A. That he received payment in the amount of $49.40.

Q. Directing your attention to Government's Exhibit 136-B for identification, will you state, please, what that purports to be?

A. A waiver of lien.

Q. What date does it bear?

1205 A. The 5th day of August, 1947.

Q. By whom does that purport to be signed?

A. A. E. Hummel.

Q. What is the amount of the waiver?

A. $49.40.

Q. Directing your attention now to Government's Exhibit 136-C for identification, state please what that purports to be.

A. It is a statement covering the labor and materials.

Q. Done by whom?

A. By A. E. Hummel, in the amount of $49.40.

Q. State whether or not it reflects payment.

A. "Paid in full, A. E. Hummel."

Q. On what date?

A. (No answer.)

Q. It does not show, does it?

A. It does not show.

Q. What is the date of Government's Exhibit 136-C for identification?

A. July 1st, 1947.

Mr. Russo: Will you mark this as Government's Exhibit 137 for identification, please.

1206 (The document was thereupon marked Government's Exhibit 137 for identification.)

Mr. Russo: 137-A.

(The document was thereupon marked Government's Exhibit 137-A for identification.)

Mr. Russo: 137-B.

(The document was thereupon marked Government's Exhibit 137-B for identification.)

Mr. Russo: 137-C.

(The document was thereupon marked Government's Exhibit 137-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit No. 137 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 8, 1947, No. 125931, payable to the order of Arthur H. Carlson in the amount of $3,697.50.

A. Yes.

Q. I will ask you if Government's Exhibit 137 for identification represents a disbursement made by the First

1207 National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?

A. It does.

Q. Now, I show you Government's Exhibit 137-A for identification, which purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in

the amount of $3,697.50 could be made to Arthur Carlson.

A. It does.

Q. Directing your attention to the signature "Arthur H. Carlson" in the lower right-hand corner thereof, what does Mr. Carlson's signature at that place signify?

A. It indicates he received payment.

Q. Directing your attention to Government's Exhibit 137-B for identification, will you please tell us what that is?

A. A waiver of lien.

Q. What is the date of the waiver?

A. July 10th, 1947.

Q. By whom does it purport to be signed?

A. Arthur H. Carlson.

Q. What is the amount of the waiver?

A. $3,697.50.

Q. Now, directing your attention to Government's
1208 Exhibit 137-C for identification, will you state, please, what that purports to be?

A. An invoice.

Q. Whose invoice?

A. Of Arthur H. Carlson.

Q. What date does it bear?

A. July 2nd, 1947.

Q. What does it purport to reflect?

A. That he received payment on the invoice.

Q. Does it reflect the date on which payment was received?

A. Payment was received. "Paid in full, July 10, 1947, Arthur H. Carlson."

Mr. Russo: Will you mark this as Government's Exhibit 138 for identification, please.

(The document was thereupon marked Government's Exhibit 138 for identification.)

Mr. Russo: 138-A.

(The document was thereupon marked Government's Exhibit 138-A for identification.)

Mr. Russo: 138-B.

1209 (The document was thereupon marked Government's Exhibit 138-B for identification.)

Mr. Russo: 138-C.

(The document was thereupon marked Government's Exhibit 138-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 138-A for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 8th, 1947, No. 125932, payable to the order of Avenue Venetian Blind Company in the amount of $137.70.

A. Yes.

Q. I will ask you if Government's Exhibit 138 for identification represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?

A. It does.

Q. I show you now Government's Exhibit 138-A for identification and ask you if that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $137.70 may be made to Avenue Venetian Blind Company?

1210 A. It does.

Q. Directing your attention now to the signature in the lower right-hand corner, whose signature does that purport to be?

A. Avenue Venetian Blind Company by D. W. Renwick, Secretary-Treasurer.

Q. What does that signature at that point on Government's Exhibit 138-A signify?

A. It indicates that he got payment of $137.70.

Q. Directing your attention now to Government's Exhibit 138-B for identification, state, please, what it purports to be.

A. A waiver of lien.

Q. What date does it bear?

A. The 11th day of July, 1947.

Q. By whom does it purport to be signed?

A. Avenue Venetian Blind Company by D. W. Renwick —It's L. W. Renwick, Secretary-Treasurer.

Q. What is the amount of the waiver?

A. $137.70.

Q. Directing your attention now to Government's Exhibit 138-C for identification, state, please, what that purports to be.

A. An invoice.

1211 Q. Whose invoice?

A. Of the Avenue Venetian Blind Company.

Q. What date does it bear?
A. The invoice is dated June 20th, 1947.
Q. What does it purport to reflect with respect to payment?
A. Paid on July 11th, 1947.
Mr. Russo: Will you mark these as Government's Exhibits 139 and 139-A, for identification, please.
(The documents were thereupon marked Government's Exhibits Nos. 139 and 139-A for identification.)
By Mr. Russo:
Q. I show you now, Mr. Seybold, Government's Exhibit No. 139 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 10th, 1947, No. 125957, payable to the order of Mortimer Hawkins in the amount of $841.03.
A. Yes.
Q. I will ask you if Government's Exhibit No. 139 represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?
1212 A. It does.
Q. Directing your attention now to Government's Exhibit No. 139-A, will you state, please, what that purports to be?
A. An invoice.
Q. Whose invoice?
A. Mortimer Hill Hawkins, architect.
Q. What date does it bear?
A. July 8th, 1947.
Q. Does Government's Exhibit 139-A purport to have been paid?
A. Paid in full, the 17th day of July, 1947, M. H. Hawkins.
Mr. Russo: Will you mark this Government's Exhibit 140 for identification, please.
(The document was thereupon marked Government's Exhibit 140 for identification.)
Mr. Russo: 140-A.
(The document was thereupon marked Government's Exhibit 140-A for identification.)
Mr. Russo: 140-B.
1213 (The document was thereupon marked Government's Exhibit 140-B for identification.)

Mr. Russo: 140-C.

(The document was thereupon marked Government's Exhibit 140-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 140 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 10th, 1947, No. 125958, payable to the order of Valley Landscape Company in the amount of $384.00.

A. Yes.

Q. Now, I will ask you if that represents a disbursement made by the First National Bank as escrowee for the account of the Defendant, Sam Achilli?

A. It does.

Q. Directing your attention now to Government's Exhibit 140-A for identification, I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $384.00 could be paid to the Valley Landscape Company?

A. It does.

1214 Q. Directing your attention to the signature in the lower right-hand corner thereof, what signature does that purport to be?

A. Valley Landscape Company by A. H. Berger, President.

Q. What does the written signature at that point signify?

A. That he received payment.

Q. Directing your attention to Government's Exhibit 140-B for identification, please state what that purports to be.

A. A waiver of lien.

Q. What date does it bear?

A. July 14th, 1947.

Q. By whom does it purport to be signed?

A. Valley Landscape Company, by A. H. Berger, President.

1215 Q. What is the amount of the waiver?

A. $384.

Q. Directing your attention now to Government Exhibit No. 140-C, what does that purport to be?

A. Invoice of the Valley Landscape Company.

Q. For what work?

A. For evergreens.
Q. And does it indicate where the job was done?
A. For Mr. Sam Achilli at Red Lion.
Q. What is the amount of the invoice?
A. $384.00.
Q. Is that the amount that was disbursed under Government Exhibit 140 for identification, the cashier's check?
A. It is.
Mr. Russo: Mark Government Exhibits 141, 141-A, -B and -C for identification, please.
(The documents were thereupon respectively marked Government Exhibits 141, 141-A, 141-B and 141-C for identification.)
By Mr. Russo:
Q. Now, sir, I show you Government Exhibit No. 141 for identification, purporting to be the cashier's check
1216 of the First National Bank of Elgin, dated July 11, 1947, No. 125959, payable to the order of Carswell Floors in the amount of $957.90.
I will ask you if Government Exhibit No. 141 represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the defendant Sam Achilli.
A. It does.
Q. I show you now Government Exhibit No. 141-A for identification, and ask you whether or not that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $957.90 could be made to Carswell Floors?
A. It does.
Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?
A. Dorothy C. Gerber, per R. W. Carswell.
Q. What does the signature at that place on Government Exhibit 141-A signify?
A. That they received payment.
Q. Directing your attention now to Government Exhibit 141-B, state, please, what that purports to be.
A. Waiver of lien.
1217 Q. What date does it bear?
A. July 17, 1947.
Q. By whom does it purport to be signed?

A. R. W. Carswell, owner, Carswell Floors.
Q. What is the amount of the lien?
A. $957.90.
Q. Directing your attention to Government Exhibit 141-C, what does that purport to be?
A. It is an invoice in the amount of $957.90 covering material and labor.
Q. Furnished by whom?
A. Carswell Floors.
Q. Are the same amounts reflected in Government Exhibits 141-A, -B and -C the same amounts that are reflected on the cashier's check Government Exhibit 141?
A. The same amount.

Mr. Russo: I will ask that these documents be marked Government Exhibits 142, 142-A, 142-B and 142-C for identification, respectively.

(The documents were thereupon respectively marked Government Exhibits 142, 142-A, 142-B and 142-C for identification.)

1218 By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit 142 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 12, 1947, No. 125995, payable to the order of Elgin Window Cleaning Company, in the amount of $75.00.

I will ask you if that check represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the defendant, Sam Achilli.

A. It does.

Q. I direct your attention now to Government Exhibit 142-A, and ask you if that purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment could be made to Elgin Window Cleaning Company in the amount of $75.00.

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

A. Angelo T. Testor.

Q. And what is the significance of Mr. Testor's signature at that place?

1219 A. He received payment.

Q. Directing your attention now to Government

Exhibit No. 142-B, I will ask you to state what that purports to be.

A. Waiver of lien.

Q. What date does it bear?

A. 10th day of July, 1947.

Q. By whom does it purport to be signed?

A. Elgin Window Cleaning Company, Angelo T. Testor.

Q. What is the amount of the waiver?

A. $75.00.

Q. Directing your attention now to Government Exhibit No. 142-C, what does that purport to be?

A. Invoice covering work done at the Red Lion by the Elgin Window Cleaning Company.

Q. What date does the invoice bear?

A. July 7, 1947.

Q. What is the amount of the invoice?

A. $75.00.

Q. Does it reflect, or purport to reflect, whether or not payment was received?

A. It is marked "Paid, Angelo T. Testor."

Mr. Russo: I will ask that these documents be marked Government Exhibits 143, 143-A, 143-B and 143-C for 1220 identification, respectively.

(The documents were thereupon respectively marked Government Exhibits 143, 143-A, 143-B and 143-C for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit No. 143 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 12, 1947, No. 125996, payable to the order of Broecker Janitor Supply in the amount of $36.35, and I will ask you if Government Exhibit No. 143 represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the defendant, Sam Achilli.

A. It does.

Q. I show you now Government Exhibit 143-A for identification, and ask you if it purports to be a certificate of Mortimer Hawkins, certifying that payment in the amount of $36.35 could be made to the Broecker Janitor Supply Company.

A. It does.

Q. Directing your attention to the lower right-hand

corner thereof, whose signature does that purport to
1221 be?

A. Broecker Janitor Supply, W. A. Broecker.

Q. What does the signature of Broecker Janitor Supply at that point on Government Exhibit No. 143-A for identification reflect?

A. They received payment.

Q. Directing your attention now to Government Exhibit No. 43-B, state, please, what that purports to be.

A. Waiver of lien.

Q. What date does it bear?

A. 17th day of July, 1947.

Q. By whom does it purport to be signed?

A. Broecker Janitor Supply, W. A. Broecker, Owner.

Q. What is the amount of the waiver?

A. $36.35.

Q. Does the amount of the payment received as indicated by Government Exhibits 143-A, -B and -C represent the same amount, $36.35, as shown on Government Exhibit 143?

A. It does.

Mr. Russo: I will ask that these be marked Government Exhibits 144, 144-A, 144-B and 144-C for identification, respectively.

(The documents were thereupon respectively
1222 marked Government Exhibits 144, 144-A, 144-B and 144-C for identification.)

By Mr. Russo:

Q. Now, sir, I show you Government Exhibit No. 144, purporting to be cashier's check of the First National Bank of Elgin, dated July 12, 1947, No. 125997, payable to the order of Hawes & Dodd, in the amount of $125.00.

I ask you if that cashier's check represents a disbursement made by the First National Bank as escrowee for the account of the defendant, Sam Achilli.

A. It does.

Q. I show you now Government Exhibit No. 144-A, and ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $125.00 could be made to Hawes & Dodd.

A. It does.

Q. Directing your attention to the signature in the lower

right-hand corner, whose signature does that purport to be?

A. Hawes & Dodd, by Victor E. Cole.

Q. What does the signature at that place on Government Exhibit 144-A signify?

1223 A. Received payment.

Q. Directing your attention now to Government Exhibit 144-B for identification, state, please, what that purports to be.

A. Waiver of lien.

Q. What date does it bear?

A. July 19, 1947.

Q. By whom does it purport to be signed?

A. Hawes & Dodd by Victor E. Cole.

Q. What is the amount of the waiver?

A. $125.00.

Q. Directing your attention now to Government Exhibit No. 144-C for identification, state, please, what that purports to be.

A. Invoice covering work and material.

Q. Supplied by whom?

A. Hawes & Dodd.

Q. In what amount?

A. Amount of $125.00.

Q. What is the date of the invoice?

A. It looks like June 27, 1947.

Q. Does Government Exhibit No. 144-C reflect whether or not payment was made?

A. Received payment July 19, 1947, Hawes &
1224 Dodd, Victor E. Cole.

Mr. Russo: I will ask that these be marked Government Exhibits 145, 145-A and 145-B, respectively, for identification.

(The documents were respectively marked Government Exhibits 145, 145-A and 145-B for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit No. 145 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 12, 1947, No. 125998, payable to the order of Clifford E. Lamp in the amount of $431.84.

I will ask you whether that represents a disbursement made by the First National Bank as escrowee for the account of the defendant, Sam Achilli.

A. It does.

Q. Directing your attention now to Government Exhibit No. 145-A for identification, I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $431.84 could be made to Clifford E. Lamp.

A. It does.

Q. Directing your attention to the signature in
1225 the lower right-hand corner thereof, whose signature does that purport to be?

A. Clifford E. Lamp.

Q. What does Mr. Lamp's signature at that place on Government Exhibit No. 145-A signify?

A. They received payment.

Q. Directing your attention now to Government Exhibit 145-B, will you state, please, what that is?

A. Waiver of lien.

Q. What date does it bear?

A. The 14th day of July, 1947.

Q. By whom does it purport to be signed?

A. Lamp Construction Company by Clifford E. Lamp.

Q. What is the amount of the waiver?

A. $431.84.

Mr. Russo: I will ask that these be marked Government Exhibits 146, 146-A, 146-B and 146-C for identification, respectively.

(The documents were thereupon respectively marked Government Exhibits 146, 146-A, 146-B and 146-C for identification.)

By Mr. Russo:

1226 Q. Now, sir, I show you Government Exhibit No. 146 for identification, purporting to be the cashier's check of the First National Bank of Elgin, dated July 12, 1947, bearing number 125999, payable to the order of Clifford E. Lamp, in the amount of $3,475.28.

I will ask you if Government Exhibit 146 for identification represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the defendant, Sam Achilli.

A. It does.

Q. Now I show you Government Exhibit No. 146-A for identification, and ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that $3,475.28 could be paid to Clifford E. Lamp.

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner of Government Exhibit No. 146-A for identification, whose signature does that purport to be?

A. Clifford E. Lamp.

Q. What is the significance of Mr. Lamp's signature at that place?

A. He received payment.

1227 Q. Directing your attention now to Government Exhibit No. 146-B for identification, state, please, what that purports to be.

A. Waiver of lien.

Q. What date does it bear?

A. July 14, 1947.

Q. By whom does it purport to be signed?

A. Lamp Construction Company by Clifford E. Lamp.

Q. What is the amount of the waiver?

A. $3,475.28.

Q. Directing your attention to Government Exhibit No. 146-C, will you state, please, what that purports to be?

A. It is an invoice covering material and labor furnished by Clifford E. Lamp.

Q. What is the amount of the invoice?

A. The amount of the invoice is $3861.42. We paid on July 14th, 1947, $475.28. The balance due is $386.14. Marked "Paid 7/14/47 $475.28. Clifford E. Lamp."

Mr. Russo: I will ask that these be marked Government Exhibits 147, 147-A, 147-B and 147-C for identification, respectively.)

(The documents were thereupon respectively
1228 marked Government Exhibits 147, 147-A, 147-B and 147-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit No. 147 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 25, 1947, bearing number 126,134, payable to the order of Kienzle Brothers Company, in the amount of $60.98.

I will ask you if Government Exhibit No. 147 represents a disbursement made by the First National Bank of Elgin as escrowee for the account of Sam Achilli.

A. It does.

Q. What is the amount of that check?
A. $60.98.
Q. Directing your attention now to Government Exhibit No. 147-A, I will ask you if that purports to be the certificate of Mortimer Hawkins, certifying that payment in the amount of $60.98 could be made to Kienzle Brothers Company.
A. It does.
Q. Directing your attention now to the signature in the lower right-hand corner of Government Exhibit
1229 No. 147-A, I will ask you what signature that purports to be?
A. Kienzle Brothers Company by George Beckwith.
Q. I will ask you to state now what the significance of that signature at that place on Government Exhibit No. 147-A signifies.
A. Received payment.
Q. Directing your attention now to Government Exhibit No. 147-B, will you state, please, what that purports to be?
A. Waiver of lien.
Q. What is the date of the waiver?
A. The 1st day of August, 1947.
Q. By whom does it purport to be signed?
A. Kienzle Brothers Company per Carl Kienzle.
Q. What is the amount of the waiver?
A. $60.98.
Q. Directing your attention now to Government Exhibit 147-C, will you state, please, what that purports to be?
A. Invoice covering material in the amount of $60.98.
Q. Whose invoice is it?
A. Kienzle Brothers.
Q. What date does it bear?
1230 A. July 11, 1947.
Q. What does it purport to show with respect to payment?
A. It was marked "Paid 8/1/1947, Kienzle Brothers Company, G.E.B."
Mr. Russo: I will ask that these documents be marked Government Exhibits 148, 148-A, 148-B and 148-C for identification, respectively.)

(The documents were thereupon respectively marked Government Exhibits 148, 148-A, 148-B and 148-C for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government Exhibit 148 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated July 25, 1947, bearing number 126,135, payable to the order of Valley Landscape Company, in the amount of $24.75.

I will ask you if Government Exhibit No. 148 for identification represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the defendant, Sam Achilli.

1231 A. It does.

Q. Now directing your attention to Government Exhibit No. 148-A for identification, I will ask you if that purports to be the certificate of Mortimer Hawkins, certifying that payment in the amount of $24.75 could be made to Valley Landscaping Company?

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner thereof, will you state what signature that purports to be?

A. Valley Landscape Company by A. H. Burger, President.

Q. What does that signature on that point on Government Exhibit 148-A signify?

A. Received payment.

Q. Directing your attention to Government Exhibit 148-B, will you state, please, what that purports to be?

A. Waiver of lien.

Q. What is the date of the waiver?

A. 30th day of July, 1947.

Q. By whom does it purport to be signed?

A. Valley Landscape Company, by A. H. Burger, President?

1232 Q. What is the amount of the waiver?

A. $24.75.

Q. Directing your attention to Government Exhibit 148-C, will you state, please, what that purports to be?

A. Invoice covering material of the Valley Landscape Company.

Q. What is the date of the invoice?

A. July 14, 1947.
Q. What is the amount of the invoice?
A. $24.75.
The Court: I think we had better take a short recess, folks, please.
1233 (Whereupon a short recess was taken after which the following further proceedings were had in open court, in the hearing and presence of the jury, to-wit:)
Mr. Russo: May I proceed, your Honor?
The Court: Yes.
Mr. Russo: Will you mark this as Government's Exhibit 149 for identification, please.
(Government's Exhibit 149 was thereupon marked for identification.)
Mr. Russo: 149-A.
(The document was thereupon marked Government's Exhibit 149-A for identification.)
Mr. Russo: 149-B.
(The document was thereupon marked Government's Exhibit 149-B for identification.)
Mr. Russo: 149-C.
(The document was thereupon marked Government's Exhibit 149-C for identification.)
1234 By Mr. Russo:
Q. Now, sir, I show you Government's Exhibit No. 149 for identification; purporting to be a cashier's check of the First National Bank of Elgin dated July 25th, 1947, bearing No. 126136 payable to the order of A. P. Pearlman in the amount of $205.00.
A. Yes.
Q. I will ask you if that check represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?
A. It does.
Q. Now, I show you Government's Exhibit 149-A for identification, and ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $205.00 could be made to A. P. Pearlman, the weather stripping contractor?
A. It is.
Q. Directing your attention to Government's Exhibit 149-A for identification and the signature in the right-

hand corner thereof, whose signature does that purport to be?

A. A. P. Pearlman's.

Q. What is the significance of Mr. Pearlman's 1235 signature at that place?

A. He received payment.

Q. Directing your attention, now, to Government's Exhibit No. 149-B for identification, I will ask you what that purports to be?

A. A waiver of lien.

Q. What is the date of that waiver?

A. July 29th, 1947.

Q. By whom does Government's Exhibits 149-B purport to be signed?

A. A. P. Perlman.

Q. What is the amount of the waiver?

A. $205.00.

Q. Now, showing you Government's Exhibit 149-C for identification, will you state, please, what that purports to be?

A. A statement covering material and labor.

Q. Furnished by whom?

A. A. P. Pearlman.

Q. In what amount?

A. $205.00.

Q. Will you state, please, whether or not it reflects payment?

A. It is marked, "Received payment, July 29, 1236 1947, A. P. Pearlman."

Mr. Russo: Will you mark this as Government's Exhibit 150 for identification, please?

(The document was thereupon marked Government's Exhibit 150, for identification.)

Mr. Russo: 150-A.

(The document was thereupon marked Government's Exhibit 150-A for identification.)

Mr. Russo: 150-B.

(The document was thereupon marked Government's Exhibit 150-B for identification.)

Mr. Russo: I just want to remind you, Mr. Seybold, to please keep your voice up so the Court and Jury can hear you.

The Witness: Yes.

By Mr. Russo:

Q. I now show you Government's Exhibit 150 for identification purporting to be a cashier's check of the First National Bank of Elgin dated July 25th, 1947, bearing No. 126137, payable to the order of Carswell
1237 Floors in the amount of $9.30.

A. Yes.

Q. I will ask you if Government's Exhibit 150 for identification represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli?

A. It does.

Q. Directing your attention, now, to Government's Exhibit 150-A, I will ask you if that purports to be the certificate of Mortimer Hawkins, the architect, certifying that payment in the amount of $9.30 could be made to Carswell Floors?

A. It does.

Q. Directing your attention to the signature in the lower right-hand corner of Government's Exhibit 150-A, whose signature does that purport to be?

A. R. W. Carswell's.

Q. And what is the significance of Mr. Carswell's signature at that place on Government's Exhibit 150-A?

A. It indicates he received payment.

Q. Directing your attention to Government's Exhibit 150-B, will you state, please, what that purports to reflect?

A. It is a statement of Carswell Floors covering
1238 material and labor at the Red Lion in the amount of $9.30.

Q. What is the date of the invoice?

A. July 14th, 1947.

Q. Does it reflect whether or not payment was made?

A. "Paid in full, R. W. C."

Mr. Russo: Will you mark this as Government's Exhibit 151 for identification, please.

(The document was thereupon marked Government's Exhibit 151 for identification.)

Mr. Russo: 151-A.

(The document was thereupon marked Government's Exhibit 151-A for identification.)

Mr. Russo: 151-B.

(The document was thereupon marked Government's Exhibit 151-B for identification.)

Mr. Russo: 151-C.

(The document was thereupon marked Government's Exhibit 151-C for identification.)

1239 By Mr. Russo:

Q. Now, I show you Government's Exhibit 151 for identification, purporting to be a cashier's check of the First National Bank of Elgin dated July 29th, 1947, bearing No. 126193 payable to the order of Anton Kochis in the amount of $800.00.

A. Yes.

Q. I will ask you whether Government's Exhibit 151 represents a disbursement made by the First National Bank of Elgin as escrowee for the account of the Defendant, Sam Achilli.

A. It does.

Q. Now, I show you Government's Exhibit 151-A for identification, and ask you if that purports to be a certificate of Mortimer Hawkins, architect, certifying that payment in the amount of $800.00 could be made to Anton Kochis?

A. It is.

Q. Directing your attention to the signature in the lower right-hand corner of Government's Exhibit 151-A for identification, will you state, please, whose signature that purports to be?

A. Anton Kochis'.

Q. Will you state, please, what the signature of

1240 Mr. Kochis signifies at that place on Government's Exhibits 151-A for identification.

A. That he received payment.

Q. Directing your attention now to Government's Exhibit 151-B for identification, will you state, please, what that purports to be?

A. A waiver of lien.

Q. Will you state, please, what date it bears?

A. July 31st, 1947.

Q. By whom does Government's Exhibit 151-B purport to be signed?

A. Anton Kochis.

Q. What is the amount of that waiver?

A. $800.00.

Q. Directing your attention, now, to Government's Exhibit 151-C for identification, will you state, please, what that purports to be?

A. That is a statement covering labor and material.

Q. Done by whom?

A. By Anton Kochis.

Q. What is the date of the invoice?

A. July 21st, 1947.

Mr. Russo: Will you mark this as Government's
1241 Exhibit 152 for identification, please.

(The document was thereupon marked Government's Exhibit 152, for identification.)

By Mr. Russo:

Q. I now show you Government's Exhibit 152 for identification, purporting to be a cashier's check of the First National Bank of Elgin dated July 29th, 1947, bearing No. 126194 payable to the order of the First National Bank of Elgin, escrowee, in the sum of $284.10.

A. Yes.

Q. I will ask you if that was a disbursement made by the bank as escrowee for the account of Sam Achilli?

A. That was the balance of the $25,000 that was applied on the loan.

Q. In other words, if I understand your testimony correctly, all the checks beginning with Government's Exhibit 123 for identification and ending with Government's Exhibit 151 for identification, represent $25,000 less $284.10, is that correct?

A. That is correct.

Q. And what was done with the $284.10?

A. It was applied on the mortgage loan.

Q. Now, I will ask you at this time, Mr. Seybold,
1242 whether all the disbursements represented by Government's Exhibit 123 for identification, through 152 for identification, were made on behalf of Sam Achilli and to his account as an individual?

A. That is right.

Q. And were those disbursements made in connection with the reconstruction of the Red Lion building which is located about three miles south of Elgin?

A. That is correct.

Q. Now, in connection with the reconstruction of that

building, were there other architect's certificates and waivers received by the bank?

A. There were.

Mr. Russo: Will you mark this as Government's Exhibit 153 for identification, please.

(The document was thereupon marked Government's Exhibit 153 for identification.)

Mr. Russo: 153-A.

(The document was thereupon marked Government's Exhibit 153-A for identification.)

Mr. Russo: 153-B.

1243 (The document was thereupon marked Government's Exhibit 153-B for identification.)

Mr. Russo: This will be Government's Exhibit 154 for identification.

(The document was thereupon marked Government's Exhibit 154 for identification.)

Mr. Russo: 154-A.

(The document was thereupon marked Government's Exhibit 154-A for identification.)

Mr. Russo: 154-B.

(The document was thereupon marked Government's Exhibit 154-B for identification.)

Mr. Russo: This will be Government's Exhibit 155 for identification.

(The document was thereupon marked Government's Exhibit 155 for identification.)

Mr. Russo: 155-A.

(The document was thereupon marked Government's Exhibit 155-A for identification.)

1244 Mr. Russo: 155-B.

(The document was thereupon marked Government's Exhibit 155-B for identification.)

Mr. Russo: 155-C.

(The document was thereupon marked Government's Exhibit 155-C for identification.)

Mr. Russo: This will be Government's Exhibit 156 for identification.

(The document was thereupon marked Government's Exhibit 156 for identification.)

Mr. Russo: 156-A.

(The document was thereupon marked Government's Exhibit 156-A for identification.)

Mr. Russo: Government's Exhibit No. 157 for identification.

(The document was thereupon marked Government's Exhibit 157 for identification.)

Mr. Russo: 157-A.

(The document was thereupon marked Govern-
1245 ment's Exhibit 157-A for identification.)

Mr. Russo: This will be Government's Exhibit 158 for identification.

(The document was thereupon marked Government's Exhibit 158 for identification.)

Mr. Russo: 158-A.

(The document was thereupon marked Government's Exhibit 158-A for identification.)

Mr. Russo: This will be Government's Exhibit 159 for identification.

(The document was thereupon marked Government's Exhibit 159 for identification.)

Mr. Russo: 159-A.

(The document was thereupon marked Government's Exhibit 159-A for identification.)

Mr. Russo: 159-B.

(The document was thereupon marked Government's Exhibit 159-B for identification.)

1246 Q. Now, Mr. Seybold, I show you Government Exhibits 153 with the corollary alphabetical numbers, 153-A and -B, Government Exhibit No. 154 with -A and -B, 155 with -A, -B and -C, 156 and 156-A, 157 and 157-A, 158 and 158-A, 159, 159-A and 159-B.

I ask you to examine these, please, and state whether or not they represent architect's certificates and invoices and waivers of lien for work that was done by contractors in addition to the work that is reflected by Government Exhibits 23 through 151, inclusive.

A. They are.

Q. Was any of the funds representing payments of Government Exhibits 153 through 159 disbursed by the bank for the account of Sam Achilli?

A. No.

Q. It was not?

A. No.

Q. So far as you were able to determine, does the bank

have any other waivers of lien supplied by contractors or suppliers who did work on the Red Lion?

A. No.

Q. In addition to the ones concerning which you have testified, you have none in addition to Exhibits 153 through 159, inclusive, is that correct?

1247 A. That is right.

Q. Now was the work that was done and that is reflected by Government Exhibits 153 through 159, work done in the reconstruction of the Red Lion?

A. I believe so.

Mr. Russo: I will ask that these be marked Government Exhibits 160, 160-A, and so on, for identification.

(The documents were thereupon respectively marked Government Exhibits 160, and 160-A to 160-E, inclusive, for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit 160 for identification, Mr. Seybold, and Exhibits 160-A through 160-E, inclusive, and ask you whether or not that is also a certificate of Mortimer Hawkins and waiver of lien that was supplied to the bank in connection with the construction of the Red Lion?

A. That is right.

Q. I will ask you whether or not that too was a disbursement that was not made by the bank.

A. That is right.

1248 Q. Directing your attention to Government Exhibit No. 160, purporting to be the certificate of Mortimer Hawkins, the architect, certifying that $100.00 could be paid to Elgin Glass & Mirror Company, and directing your attention to the signature in the lower right-hand corner, whose signature does that purport to be?

A. B. H.—I wouldn't pronounce it.

Q. That payment was not made to the bank, I believe you said.

A. That is right.

Q. Did Government Exhibits 153 through 160 come into the bank's possession during the course of the reconstruction of the Red Lion?

A. Yes, sir.

Q. Directing your attention now to Government Exhibit

153, which purports to be the certificate of Mortimer Hawkins, the architect, certifying that $20.50 could be paid to Carswell Floors, did that come into the bank in connection with the reconstruction of the Red Lion?

A. That is right.

Q. Directing your attention to Government Exhibit No. 154, which purports to be a certificate of Mortimer Hawkins, the architect, certifying that $1,282.41 could be disbursed to M. C. Lohbauer, I will ask you if that came
1249 into the bank's possession in connection with the reconstruction of the Red Lion?

A. Yes, sir.

Q. Directing your attention to Government Exhibit No. 153-B, what does that purport to be?

A. Waiver of lien.

Q. By whom does it purport to be signed?

A. R. W. Carswell.

Q. What date does it bear?

A. August 29, 1947.

Q. What is the amount of the waiver?

A. $29.80.

Q. Directing your attention now to Government Exhibit 154-A, will you state, please, what that purports to be?

A. Waiver of lien.

Q. What date does it bear?

A. August 20, 1947.

Q. By whom does it purport to be signed?

A. Merwin C. Lohbauer.

Q. What is the amount of the waiver?

A. $1282.41.

Q. Directing your attention now to Government Exhibit 155, which purports to be a certificate of Mortimer
1250 Hawkins, the architect, certifying that $386.14 could be paid to Clifford E. Lamp, what signature does that bear in the lower right-hand corner?

A. Clifford E. Lamp.

Q. What does the Lamp signature at that place in Government Exhibit 155 signify?

A. That he received payment.

Q. Directing your attention now to Government Exhibit 155-B, will you state, please, what that purports to be?

A. Waiver of lien.

Q. By whom does that purport to be signed?

A. Lamp Construction Company, Clifford E. Lamp.
Q. What date does it bear?
A. 23d of August, 1947.
Q. What is the amount of the waiver?
A. $3,015.12.
Q. Directing your attention to Government Exhibit 154-A, what does that purport to be?
A. Waiver of lien.
Q. What date does it bear?
A. 20th day of August, 1947.
Q. By whom does it purport to be signed?
A. Merwin C. Lohbauer.
1251 Q. What is the amount of the waiver?
A. $1282.41.
Q. I show you now Government Exhibit 156 for identification, purporting to be the certificate of Mortimer Hawkins, the architect, directing that $4,000 colld be paid to Clifford N. Smith.
Directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?
A. Clifford N. Smith.
Q. And what does Mr. Smith's signature at that point on Government Exhibit 155 purport to reflect?
A. That he received payment.
Q. Directing your attention to Government Exhibit 156-A, will you state, please, what that purports to be?
A. Waiver of lien.
Q. What date does it bear?
A. August 13, 1947.
Q. By whom does it purport to be signed?
A. Clifford N. Smith.
Q. What is the amount of the waiver?
A. $4,000.
Q. Directing your attention now to Government
1252 Exhibit 157, which purports to be a certificate of Mortimer Hawkins, the architect, certifying that payment of $4,069 could be made to A. J. Ironside, and directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?
A. A. J. Ironside.

Q. And what is the significance of Mr. Ironside's signature at that place on Government Exhibit 157?

A. Received payment.

Q. Directing your attention now to Government Exhibit 157-A, will you state, please, what that purports to be?

A. Waiver of lien.

Q. What date does it bear?

A. September 24, 1947.

Q. By whom does it purport to be signed?

A. A. J. Ironside.

Q. What is the amount of the waiver?

A. $4,069.89.

Q. I show you now Government Exhibit No. 158, purporting to be the certificate of Mortimer Hawkins, the architect, certifying that $1071.63 could be paid to Midwest Hardware Company, and directing your atten-
1253 tion to the signature in the lower right-hand corner thereof, whose signiture does that purport to be?

A. It looks like A. F. Bigelow.

Q. What does Mr. Bigelow's signature at that place on Government Exhibit 158 purport to reflect?

A. He received payment.

Q. Directing your attention now to Government Exhibit 158-A, will you state, please what that purports to be?

A. Waiver of lien.

Q. What date does it bear?

A. November 11, 1947.

Q. By whom does it purport to be signed?

A. Midwest Hardware Company, A. F. Bigelow, Vice President.

Q. What is the amount of the waiver?

A. $1071.63.

Q. Now I show you Government Exhibit 159, purporting to be the certificate of Mortimer Hawkins, the architect, Certifying that $5.96 could be paid to M. A. VanEsso, Inc., and directing your attention to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

A. M. A. VanEsso, Incorporated, John E. Van-
1254 Esso.

Q. And what does Mr. VanEsso's signature at that place on Government Exhibit 159 purport to reflect?

A. It indicates he received payment.

Q. Directing your attention to Government Exhibit 159 for identification, will you state, please, what that purports to be?

A. Waiver of lien.

Q. What date does it bear?

A. August 11, 1947.

Q. Whose signature does it bear?

A. M. A. VanEsso, Incorporated, John E. VanEsso.

Q. What is the amount of the waiver?

A. $5.96.

Q. Will you examine Government Exhibits 153 through 159 for identification, Mr. Seybold, and state whether or not the work or the waivers concerning which you have testified were given in connection with the reconstruction or rebuilding of the Red Lion?

Include Exhibit 160 in that question, too.

A. I would say they were.

Q. Directing your attention again to Government Exhibit 153 and to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

1255 A. R. W. Carswell.

Q. And what is the significance of Mr. Carswell's signature at that place on Government Exhibit 153?

A. It would indicate he received payment.

Q. Directing your attention to Government Exhibit 154 and to the signature in the lower right-hand corner thereof, whose signature does that purport to be?

A. Merwin C. Lohbauer.

Q. And what does Mr. Lohbauer's signature at that place on Government Exhibit 154 signify?

A. It would indicate he received payment.

Mr. Russo: I will ask that these documents be marked Government Exhibits 161 and 161-A, Exhibit 162 and 163 for identification, respectively.

(The documents were thereupon marked respectively Government Exhibits 161 and 161-A, 162 and 163 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 162 for identification, purporting to be a real estate loan register of the

First National Bank of Elgin. I ask you if it is a record of that bank?

1256 A. It is.

Q. Is it kept in the regular course of business?

A. Yes, sir.

Q. Is it the regular course of business for the bank to keep such records?

A. It is.

Q. Was that record made at or about the time of the transaction or events it purports to be reflect?

A. Yes.

Q. Is that record kept under your supervision?

A. It is.

Q. Does that bear a bank loan number?

A. It does.

Q. What is the number it bears?

A. No. 1613.

Q. Will you state, please, Mr. Seybold, the transaction it purports to reflect?

A. Well, it is a real estate loan of $9500 on property located at 202 Wellington Avenue, Elgin, Illinois.

Q. What date was the loan made?

A. August 15, 1947.

Q. Was there any security given for that loan?

A. There was a mortgage on the property.

1257 Q. Was the mortgage on the property given to secure a note?

A. That is right.

1258 Q. What was the number of the note?

A. 1613.

Q. Does the number of the note coincide with the bank's real estate loan register?

A. Yes, sir.

Q. Will you examine Government's Exhibit 162 for identification and state, please, whether it reflects—by the way, to whom was that loan made?

A. To Sam Achilli and Earl H. Grover.

Q. Now, will you examine Government's Exhibit No. 162 and state what the liability of Sam Achilli and Earl H. Gromer was to the First National Bank on December 31st, 1947?

A. $9,168.88.

Q. Now, will you refer to Government's Exhibit 162 and state what Sam Achilli's and Earl H. Grover's liability to the bank was on December 31st, 1948?

A. $8,068.49.

Q. Now, I show you Government's Exhibit No. 161 for identification, purporting to be a cashier's check of the First National Bank dated August 19th, 1947, bearing No. 126444 payable to the order of Earl H. Gromer in the amount of $9,500.00,

A. Yes.

1259 Q. I ask you if that is the cashier's check that was issued in making that loan?

A. It is.

Q. I now show you Government's Exhibit 161-A for identification.

A. Yes.

Q. I ask you to examine it, please, and state if Government's Exhibit 161 for identification was deposited to any account in the bank?

A. It was.

Q. To what account was it deposited?

A. Gromer & Brady.

Q. On what date was that deposited,—was that deposit made?

A. August 19th, 1947.

Q. Now, directing your attention to the reverse side of Government's Exhibit No. 161, state, please, whether or not it bears an endorsement.

A. The endorsement of Earl H. Gromer.

Q. I ask you again to refer to Government's Exhibit 161-A and state the date on which that deposit was made.

A. August 19th, 1947.

Mr. Russo: Will you mark this as Government's
1260 Exhibit 164 for identification, please.

(The document was thereupon marked Government's Exhibit 164 for identification.)

Mr. Russo: 164-A.

(The document was thereupon marked Government's Exhibit 164-A for identification.)

Mr. Russo: Will you mark this as Government's Exhibit 165 for identification.

(The document was thereupon marked Government's Exhibit 165 for identification.)

By Mr. Russo:

Q. Now, Mr. Seybold, I show you Government's Exhibit 164 for identification purporting to be a real estate loan register of the First National Bank.

A. Yes.

Q. I will ask you if that is a record of your bank?

A. It is.

Q. Is that record kept in the regular course of business?

1261 A. It is.

Q. Is it the regular course of business for the bank to keep that record?

A. It is.

Q. Was that record made at or about the time of the transaction at purports to reflect?

A. It was.

Q. Is that record kept under your custody and supervision?

A. It is.

Q. Does that record bear a loan number?

A. It does.

Q. What loan number does it bear?

A. 1471.

Q. Now, what if any transaction, Mr. Seybold, does Government's Exhibit 164 purport to reflect?

A. A mortgage loan that was made on the property located at 213 South Grove Avenue, Elgin, Illinois.

Q. What is the amount of that loan?

A. $6,000.

Q. When was the loan made?

A. March 25th, 1946.

Q. To whom was the loan made?

A. Sam Achilli, Ruth Achilli, Earl H. Gromer and

1262 Mrs. Gertrude A. Gromer.

Q. Was there a note given to secure that loan?

A. There was.

Q. What was the number of the note?

A. 1471.

Q. Does the number of the note correspond with the loan number indicated on Government's Exhibit 164?

A. It does.

Q. By whom was that note signed??

A. By Sam Achilli, Ruth Achilli, Earl H. Gromer and Mrs. Gertrude A. Gromer.

Q. Now, will you examine Government's Exhibit No. 164 for identification and state, Mr. Seybold, the liability of Sam and Ruth Achilli and Earl H. and Gertrude A. Gromer to the First National Bank as of December 31st, 1946?

A. $5,274.44.

Q. Now, will you state their liability as of December 31st, 1947?

A. $4,267.03.

Q. Will you state their liability as of December 31st, 1948?

A. $2,966.93.

Q. I now show you Government's Exhibit 165 for
1263 identification purporting to be a cashier's check of the First National Bank of Elgin dated March 27th, 1946, payable to the order of Francis McLaughlin, Ivan J. Kelly, Eleanor M. Seybold, and Earl J. Kelley in the amount of $6,000, bearing No. 120607.

A. Yes.

Q. I will ask you if that was the check that was issued in making that loan?

A. It was.

Q. Directing your attention to the reverse side of Government's Exhibit 165 for identification, state, please, whether or not it bears any endorsements, and if it does, whose endorsements it bears?

A. It bears four endorsements, Earl J. Kelly, Francis McLaughlin, Ivan J. Kelly and Eleanor M. Seybold.

Q. Who is Eleanor M. Seybold, Mr. Seybold?

A. My wife.

Q. What did that transaction relate to?

A. It related to property located at 213 South Grove Avenue.

Q. Will you state, please, whether or not the bank made payment of that $6,000 to the payees?

A. Yes, they did.

1264 Mr. Russo: Will you mark this as Government's Exhibit 166 for identification, please.

(The document was thereupon marked Government's Exhibit 166 for identification.))

Mr. Russo: Will you mark this as Government's Exhibit 167 for identification.

(The document was thereupon marked Government's Exhibit 167 for identification.)

Mr. Russo: And 167-A.

(The document was thereupon marked Government's Exhibit 167-A for identification.)

By Mr. Russo:

Q. Now, I show you Government's Exhibit 166 for identification purporting to be the real estate loan register of the First National Bank of Elgin.

A. Yes.

Q. I ask you if it is a record kept by that bank?

A. It is.

Q. Is that record kept in the regular course of
1265 business?

A. It is.

Q. Is it the regular course of business to keep such a record?

A. It is.

Q. Was that record made at or about the time of the transaction it purports to reflect?

A. That is right.

Q. Is that a record kept under your custody and supervision?

A. It is.

Q. Does Government's Exhibit 166 bear a loan number?

A. It does.

Q. Now, will you refer to Government's Exhibit 166 for identification, please, Mr. Seybold, and state what if any transaction that purports to reflect.

A. Well, it was a mortgage loan on 209 Lake Street.

Q. What is the amount of that loan?

A. $4,000.

Q. When was the loan made?

A. August 15th, 1946.

Q. To whom was the loan made?

A. Earl and Gertrude A. Grömer and Sam and Ruth Achilli.

1266 Q. Was there a note given to secure that loan?

A. There was.

Q. What is the number of the note?

A. 1509.

Q. By whom was the note signed?

A. Earl Gromer, Gertrude A. Gromer, Sam Achilli and Ruth Achilli.

Q. Was there a mortgage given on 209 Lake Street to secure payment of that note?

A. There was.

Q. Now, will you refer to Government's Exhibit 166, Mr. Seybold, and state whether or not it reflects the liability of Earl Gromer and Gertrude A. Gromer and Sam Achilli and Ruth Achilli to the First National Bank as of December 31st, 1946?

A. It does, and the balance was $3,658.34.

Q. What was their liability to the bank on December 31st, 1947?

A. $2,585.08.

Q. When was that liability extinguished?

A. August 18, 1948.

Q. And on that date did Earl H. Gromer and Gertrude A. Gromer and Sam and Ruth Achilli owe any money to the bank on that tranasction?

1267 A. No.

Q. Now, I show you Government's Exhibit 167 for identification purporting to be a cashier's check of the First National Bank of Elgin dated October 31st, 1946, bearing No. 122961 payable to the order of Earl Gromer in the amount of $4,000.00.

A. Yes.

Q. I will ask you if that cashier's check was issued to Earl Gromer and Gertrude Gromer and Sam and Ruth Achilli in making that loan?

A. It was.

Q. Now, I show you Government's Exhibit 167-A for identification purporting to be a deposit slip with the First National Bank for the account of Earl Gromer Trust Account.

A. Yes.

Q. I will ask you whether or not the check, Government's Exhibit 167 for identification, was deposited to the account as reflected in Government's Exhibit No. 167-A?

A. It was.

Q. Will you speak up, please, Mr. Seybold?

A. It was.

Q. On what date was the deposit made?

1268 A. 8-15-46.

Q. Directing your attention to the reverse side of

Government's Exhibit 167 state, please, whether or not it bears any endorsements,

A. "Pay to the order of Sam Achilli and Earl H. Gromer", and it is endorsed by Sam Achilli, Union National Bank.

Mr. Russo: Will you mark this as Government's Exhibit 168 for identification, please.

(The document was thereupon marked Government's Exhibit 168, for identification.)

Mr. Russo: 169.

(The document was thereupon marked Government's Exhibit 169, for identification.)

Mr. Russo: 170.

(The document was thereupon marked Government's Exhibit 170, for identification.

By Mr. Russo:

Q. I now show you Government's Exhibit 168 for identification, Mr. Seybold, purporting to be a cashier's
1269 check of the First National Bank dated October 31st, 1946, bearing No. 122962, payable to the order of Earl Gromer in the amount of $5,000.

A. Yes.

Q. I will ask you whether or not Government's Exhibit 168 for identification was issued by the First National Bank?

A. Yes, sir, it was.

Q. Directing your attention to the reverse side of Government's Exhibit 168 for identification, will you state, please, whether or not it bears any endorsements?

A. It does.

Q. What endorsements does it bear?

A. "Pay to the order of Sam Achilli, Earl H. Gromer and Sam Achilli, Union National Bank & Trust Company of Elgin."

1270 Q. Now, I show you Government's Exhibit 169 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated February 9th, 1948, bearing No. 128425, payable to the order of George Fritzel, in the amount of $15,000. I ask you if that was a check issued by the First National Bank of Elgin?

A. It is.

Q. Directing your attention to the reverse side thereof, I will ask you to state whether or not it bears any endorsements?

A. It does.

Q. What endorsements does it bear?

A. George Fritzel and Sam Achilli, Union National Bank & Trust Company of Elgin.

Q. I now hand you Government's Exhibit No. 170, purporting to be a cashier's check of the First National Bank of Elgin, dated July 29, 1948, bearing No. 130552, payable to the order of Hans Moeller, in the amount of $1500, and I will ask you if that was a check issued by that bank?

A. It is.

Q. Directing your attention to the reverse side thereof, I will ask you to state whether or not it bears any endorsements?

1271 A. It does.

Q. What endorsement does it bear?

A. Hans Moeller and for deposit only, Highland Motor Sales.

Mr. Russo: I will ask that this be marked Government Exhibit 171 for identification, please.

(The document was thereupon marked Government's Exhibit 171, for identification.)

By Mr. Russo:

Q. I now show you Government's Exhibit No. 171, Mr. Seybold, purporting to be a financial statement. Tell the Court and Jury, please, as best you recall, the circumstances under which this Exhibit came into the bank's possession?

A. I imagine it came into the bank's possession along with the mortgage loans to indicate what the earnings may have been of the company, both Sam Achilli personally and the Highland Motor Sales.

Q. Was that not the personal application of Sam Achilli in which he also supplied for the bank's purposes financial statements of the Highland Motor Sales and of the Elgin Acceptance Corporation?

1272 A. Yes, that is true.

Q. Directing your attention to the last page in sequence of Government's Exhibit 171, and directing your attention to the signature in the lower righthand corner thereof, whose signature does that purport to be?

A. Well, that one is Sam Achilli.

Q. Also was the information included in Government Exhibit 171 supplied to the bank by Sam Achilli in connection with his applications for loans from the bank?

A. I presume they were.

Q. Directing your attention to the last page in sequence in Government Exhibit No. 171, will you state, please, what Sam Achilli represents his net worth outside of the business to be as of the date on which Government's Exhibit 171 was made?

Mr. Batter: I object, your Honor. We have not yet identified the Exhibit by date. We don't know whether it is within the scope.

The Court: That is right. Objection sustained.

By Mr. Russo:

1273 Q. What date does Government's Exhibit No. 171 bear?

A. May 22, 1947.

Q. Now, will you answer the question?

Read the question, please.

Q. (Read by the Reporter.)

Mr. Batter: Your Honor, I think the statement speaks for itself.

The Court: I would think so, yes.

Mr. Russo: Very well, sir.

1274-1282 • • •

Mr. Batter: With respect to Government's Ex-
1283 hibit 171, your Honor, that is a financial statement dated May 22nd, 1947.

It is a series of sheets made out on the stationery of The Central National Bank in Chicago. The witness has testified that he presumes it is a record of the bank.

I fail to see how it is a record of the bank and object to its introduction, not being a statement made by—and there is attached to it statements signed by persons other than the Defendant.

Mr. Russo: If my recollection serves me, your Honor, this witness has testified that the First National Bank of Elgin received from Sam Achilli that Exhibit in connection with Mr. Achilli's application to that bank for a line of credit.

They are records of the bank submitted to the bank by Mr. Achilli. They were in the bank's custody and possession, kept in the regular course of business, and I re-

spectfully submit they are admissible and I so offer them.

1284 Mr. Batter: I do not believe that is the testimony, your Honor.

The Court: It may be received, subject to the objection.

(The document previously marked Government's Exhibit 171 for identification was thereupon received in evidence as Government's Exhibit 171.)

• • •

1285-1286 • • •

1287 MARTIN SEYBOLD, a witness heretofore called on behalf of the Government, and having been heretofore first duly sworn, resumed the stand and further testified as follows:

Direct Examination (Ctd.) by Mr. Russo.

Q. Your name is Martin Seybold?

A. Yes, sir.

Q. Are you the same Martin Seybold that was sworn and testified on last Thursday?

A. Yes, sir.

Q. And were you on the stand at the recess of the court on that day?

A. I was.

Mr. Russo: I will ask that this be marked Government Exhibit 172 for identification.

(The document was thereupon marked Government Exhibit 172 for identification.)

By Mr. Russo:

Q. Mr. Seybold, I show you Government Exhibit 172 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated December 18, 1948, bearing number 132,224, payable to the order

1288 of Sam Achilli, in the amount of $15,000.

I will ask you if that is a check, a cashier's check, issued by the First National Bank.

A. It is.

Q. Was it issued on or about the date it bears?

A. It was.

Q. Was that check subsequently paid?

A. It was.

Q. Directing your attention to the reverse side of Government Exhibit No. 172 for identification, I will ask you to state, please, whether or not it bears any endorsements.

A. It does.

Q. What endorsement does it bear?

A. Payable to Theodore Gordon, Sam Achilli, and then it is endorsed Theodore Gordon, and then various banks endorsements.

Q. Mr. Seybold, I will ask you whether or not in so far as the records of the First National Bank of Elgin are concerned, you have testified concerning every transaction and liability of Sam Achilli during the period 1945 through 1948, inclusive.

A. Yes, sir.

Mr. Russo: At this time, may it please the Court,
1289 we offer in evidence Government Exhibit No. 172.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government Exhibit 172 for identification was thereupon received in evidence as Government Exhibit 172.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Seybold. That will be all.

(Witness excused.)

1290 THEODORE GORDON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows.

Direct Examination by Mr. Russo.

Q. Your name is Theodore Gordon?

A. Right.

Q. Mr. Gordon, will you keep your voice up so that the Court and Jury may hear you too.

What is your address, please, sir?

A. 924 East Juneau Avenue, Milwaukee, Wisconsin.

Q. What is your business or occupation?

A. I am a Ford dealer in Milwaukee.

Q. What is the name of the Ford dealership?

A. Gordon Motor Company.

Q. Where is that located?
A. 2859 North Third Street, Milwaukee.
Q. That is Milwaukee, Wisconsin?
A. Correct.
Q. Mr. Gordon, do you know the defendant Sam Achilli?
A. I do.
Q. Do you see him in the court room?
A. Yes, I do.
Q. Will you point him out, please?
1291 A. (Indicating.).
Q. You are indicating the second man at the far side of defense counsel table, is that right?
A. That is right.
Q. Now directing your attention to on or about December 18, 1948, did you have any transaction with Sam Achilli?
A. I was arranging a loan of $15,000 with Sam about that time.
Q. Did you get a loan of $15,000 from him?
A. I did.
Q. In what form did you get that loan?
A. It was by a check.
Q. I show you now Government Exhibit 172 in evidence, and ask you if that is the cashier's check you referred to.
A. That is it.
Q. Directing your attention to the reverse side thereof, state, please, whether or not it bears any endorsements.
A. It does.
Q. What endorsement does it bear?
A. Theodore Gordon, Sam Achilli.
Q. From whom did you receive Government Ex-
1292 hibit No. .....?
A. From Sam Achilli.
Q. Did you receive the money?
A. I did.
Q. Now, did you ever repay that loan, Mr. Gordon?
A. I did.
Q. When?
A. I believe that was about May of 1949.
Q. In what form did you make repayment?

A. In a check, check form.

Mr. Russo: I will ask that this be marked Government Exhibit 173 for identification.

(The document was thereupon marked Government Exhibit 173 for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit 173 for identification, purporting to be a check drawn on the First Wisconsin National Bank of Milwaukee, Wisconsin, dated May 2, 1949, payable to the order of Sam Achilli, in the sum of $15,000, and purporting to be signed by Theodore Gordon.

Directing your attention to the signature in the lower right-hand corner, whose signature is that, if you
1293 know?

A. Theodore Gordon.

Q. Was your signature placed on Government Exhibit No. 173 on or about the date the check bears, May 2, 1949?

A. It was.

Q. Was the amount of this check debited to your account by the bank?

A. That is correct.

Q. It was paid by the bank?

A. That is correct.

Q. And debited to your account?

A. That is right.

Q. Now directing your attention to approximately the same time in December, did you have any other transaction with Sam Achilli?

A. The only other transaction we had was just a transaction that we were thinking about procuring an automobile agency, and the deal didn't ever materialize.

Q. During the course of that negotiation, were you present with him, or did you participate with him in securing a loan from the Union National Bank and Trust Company?

A. I was, or I did.

Q. Tell the Court and Jury, please, just how that
1294 came about.

A. Well, we were considering, or trying to buy a dealership and—

Q. What kind of dealership were you proposing to buy?

A. It was a small Chevrolet agency, and we were discussing this, and I was talking to the people that owned it. However, we couldn't come to terms and the deal neven materialized.

Q. During the course of these negotiations, did you arrange for financing?

A. We did.

Q. And as a result of that, did you sign any papers?

A. I signed a note.

Q. You signed a note?

A. Yes.

Q. And as a result of that note was a check, a cashier's check, issued payable to you, to Sam Achilli and to Ruth Achilli?

A. It was.

Q. I now show you Government Exhibit No. 95 in evidence, and ask you if that is the cashier's check to which you have referred.

A. It is.

Q. Directing your attention to the reverse side of
1295 Government Exhibit No. 95 in evidence, will you examine it, please, and state whether or not it bears any endorsements.

A. It does.

Q. What endorsements does it bear?

A. Sam Achilli, Theodore Gordon and Ruth—Sam Achilli, Theodore Gordon and Ruth Achilli.

Q. Whose signature is that of Theodore Gordon?

A. That is my signature.

Q. And when was that signature placed on there, Mr. Gordon?

A. I believe—

Q. Approximately.

A. I would say approximately about this same date—

Q. Did you ever receive—Excuse me. Finish your answer.

A. —or shortly thereafter.

Q. Did you ever receive the proceeds of that check?

A. No, we never used the proceeds of this check.

Q. After you endorsed the check, what if anything did you do with it? How did your endorsement on this check come about?

A. I believe it was endorsed to repay the loan from the bank that we didn't use.

1296 Q. Do you have any recollection at this time as to the amount of the loan that was negotiated at the bank?

A. No, I don't.

Q. Where was it that you placed your endorsement on this check?

A. I placed mine last.

Q. At what place? Where?

A. I believe it was at the bank.

Q. And who was present with you at the bank at the time that you affixed your signature?

A. As I recall, Sam and Ruth Achilli and myself.

Q. Were Sam and Ruth Achillis' endorsements placed on there in your presence?

A. I really don't recall.

Q. In addition to the note concerning which you have testified that you signed at the Union National Bank and Trust Company, did you advance any funds that are represented in this check, Government Exhibit No. 95?

A. No, I advanced no funds pertaining to that check.

Q. Do you know whether or not in connection with the procurement of Government Exhibit No. 95 there were any funds advanced by anyone or by the bank?

A. I don't understand that. I mean I don't—

1297 Q. I understand from your testimony, at the time that these negotiations were in progress, you and the defendant, Sam Achilli, and his wife, Ruth Achilli, went to the bank and there you signed a note at the bank for a loan, is that correct?

A. Correct.

Q. Now, do you know what disposition was made of the money that was borrowed on the note concerning which you have testified you, Sam Achilli and Ruth Achilli signed, and as a result of which Government Exhibit No. 95 was issued?

A. I know the loan was paid back to the bank.

Q. The loan was repaid to the bank?

A. Correct.

Q. The only thing that you don't recall is the amount of the loan, is that correct?

A. That is correct.

Q. To refresh your recollection, was it $23,000?
A. It could be.
Q. Is that your best recollection?
A. I believe it was that amount.
Mr. Russo: Thank you, sir.
At this time, may it please the Court, we offer in evidence Government Exhibits 172 and 173. Government Exhibit 95 is already in evidence.
1298 Now, just a minute, please, your Honor.
(There was a short interruption.)
Mr. Russo: We offer in evidence Government's Exhibit 173.
Mr. Batter: No objection.
The Court: It may be received.
(The document previously marked Government's Exhibit 173, for identification, was thereupon received in evidence as Government's Exhibit 173.)
By Mr. Russo:
Q. Now, Mr. Gordon, where if you know did the difference between the $35,000 represented by Government's Exhibit 95 and the $23,000 that was borrowed from the bank come from?
A. Well, I don't know.
Q. You did not supply that $12,000, did you?
A. No.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Gordon, with respect to this $15,000 transaction on December 18th, 1948, was there any other person involved in that transaction other than you and Mr.
1299 Sam Achilli?
A. Was there any other person?
Q. Yes.
A. No.
Q. What consideration was paid to the bank to issue that check, Government's Exhibit 172?
A. I don't believe there was any.
Q. You mean the bank gave the check without any consideration?
A. You mean the check I secured?
Q. Yes.

A. I don't know.

Q. Is it not a fact that Earl Gromer was involved in this transaction?

A. I don't know.

Q. Do you know Earl Gromer?

A. Yes, I do.

Q. Now, in order to procure this $35,000 check, Government's Exhibit 95, to your order and to the order of Sam and Ruth Achilli, you say you signed a note for the bank. What was the amount of that note?

A. I believe it was in the vicinity of $23,000.

Q. Do you have that note?

A. No, I don't.

1300 Q. What other consideration was paid to the bank to issue this check for $35,000?

A. Well, I extended my personal guarantee and financial statement.

Q. What was the form of your guarantee? Was it an additional note?

A. My personal guarantee and my financial statement, and at that time I extended anything that I had to cover my part of this negotiation.

Q. Did you sign a note to a bank at Gibson for the difference?

A. No.

Q. The maximum amount of obligations you signed, do I understand to be $23,000?

A. I believe it was in that vicinity.

Q. And on that $23,000 obligation the bank issued a $35,000 check?

A. My guarantee, my personal guarantee was for all or any part of that loan.

Q. What form did your guarantee take? Do you have it?

A. No, I don't.

Q. Was it returned to you when the check was returned to the bank?

A. No, it wasn't. It was just my signature on the

1301 note, and I submitted a financial statement at that time.

Q. How did the bank explain to you that they would take your note for $23,000 and your guarantee for $12,000 on all of the $35,000, instead of taking a note for $35,000?

A. Well, my responsibility—my share of responsibility is for the full amount of that $35,000 check.

Q. But you only signed a note for $23,000, is that correct?

A. As I recall.

Q. What did you pay to the bank in order to make the bank issue a check for $35,000 other than your note of $23,000?

Mr. Russo: I object, if your Honor please. The witness has answered that question. Unless counsel assures the Court that he is laying a foundation for impeachment and will offer such proof, I object.

The Court: I believe he has already answered that question, Mr. Batter.

Mr. Batter: He seems to be very confused on it.

Mr. Russo: I do not think he is confused at all.

1302 Mr. Batter: I think I am privileged to exhaust him.

The Court: The objection is well taken.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. In connection with the signature on the note concerning which Mr. Batter asked you, who signed that note?

Mr. Batter: I do not think that is proper redirect examination, your Honor.

Mr. Russo: It certainly is. You asked the question. It is proper redirect examination, if your Honor please. He brought it out on his cross examination.

The Court: He has also testified to it on direct, hasn't he?

Mr. Russo: Yes, your Honor.

The Court: Objection sustained.

Mr. Russo: That is all, Mr. Gordon. You may be excused.

(Witness excused.)

1303 BERNARD GERSHICK, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?

A. Bernard Gershick.
Q. That is spelled G-e-r-s-h-i-c-k?
A. That is correct.
Q. Where do you live?
A. 680 Algona in Elgin, Illinois.
Q. Mr. Gershick, I am having difficulty hearing you. Will you keep your voice up so the Court and jury may hear you, too?
A. Yes.
Q. What is your business?
A. The glass business.
Q. Sir?
A. The glass business.
Q. Glass business?
A. Yes.
Q. What is the name of your glass business?
A. Elgin Glass & Mirror Company.
Q. Where is that located?
1304 A. 212 Dundee Avenue, Elgin, Illinois.
Q. In the conduct of your business, Mr. Gershick, do you keep books and records?
A. We do.
Q. Are those boboks and records kept in the regular course of business?
A. Yes.
Q. Is it the regular course of business to keep such books and records?
A. Yes.
Q. Are they made at or about the time of the transaction they purport to represent?
A. When the transaction comes up it is entered in the records.
Q. Under whose custody and supervision are those books and records kept?
A. The bookkeeper.
Q. What is your capacity with the Elgin Glass & Mirror Company?
A. Manager and Vice-President.
Q. Are those records, then, under your supervision and custody?
A. At all times.
Q. Now, directing your attention, Mr. Gershick,
1305 to on about July 14th, 1948, did the Elgin Glass &

Mirror Company do any work or supply any materials in connection with the rebuilding of the Red Lion which is located about three miles south of Elgin?

A. Yes.

Q. In connection with that work did you receive a certificate from the architect, Mortimer Hawkins?

A. What do you mean by "certificat_"?

Q. An architect's certificate, authorizing the owner to pay you.

A. Yes, I did.

Q. Did you prepare an invoice in connection with the work and materials you supplied on that job?

A. Yes.

Q. Did you also sign a waiver of lien in connection with that job?

A. Yes.

Q. Now, I show you Government's Exhibit 160 in evidence, purporting to be a certificate issued by the architect, Mortimer Hawkins, on the Red Lion job dated August 7th, 1947, in the amount of $100.00

A. Yes.

Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature is 1306 that?

A. That's my signature.

Q. That does that signature at that point, at that place on Government's Exhibit 160, indicate?

A. It indicates that we have been authorized to receive payment.

Q. Did you receive payment on that?

A. Yes, I did.

Q. Now, directing your attention to Government's Exhibit 160-A, I ask you if that is the invoice to which you referred?

A. That is the statement.

Q. The statement?

A. That is the statement.

Q. Directing your attention to the writing about half way down the page, what does that indicate?

A. That is a receipted statement showing my signature on the receipt.

Q. On what date did you receive payment?

A. August 20th, 1947.

Q. Directing your attention now to Government's Exhibits 160-B, 160-C and 160-D, tell the Court and jury, please, what they purport to be.

A. Well, the first one here is an invoice for three
1307 cans of mastic for $3.00, made out to the Red Lion and architect Mortimer Hawkins.

The second one is for four mirrors that were installed, also made out to Mortimer Hawkins and the Red Lion, for $77.00 and two cans of mastic for $2.00, a total of $79.00.

The third invoice, also made out to Mortimer Hawkins and the Red Lion, is for the amount of $18.00 for a desk top and some felt pads.

Q. Do the three invoices, Government's Exhibits 160-B, 160-C and 160-D, total the amount on the statement, Government's Exhibit No. 160-A?

A. Yes, they do.

Q. Now, at or about the time you received payment of that invoice, or of those invoices and that statement, did you execute a waiver of lien?

A. Yes, I did.

Q. On what date did you execute that waiver?

A. The 20th day of August, 1947.

Q. Is Government's Exhibit 160-E in evidence the waiver of lien to which you refer?

A. That is right.

Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature is
1308 that?

A. That's mine.

Q. Do you now say that the money for the work and materials supplied on that job was received by you?

A. That is true.

Q. To whom did you look for payment of this at the time you submitted the invoices and statement, Mr. Gershick?

A. Mortimer Hawkins, the architect.

Q. Do you know whom he represented?

A. Yes.

Q. Whom did he represent?

A. Mr. Achilli of the Red Lion.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Gershick. That will be all.

(Witness excused.)

1309 JOHN DUNCAN STEWART, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is John Duncan Stewart?
A. That is right.
Q. Your last name is spelled S-t-e-w-a-r-t?
A. That is right.
Q. Where do you live, Mr. Stewart?
A. 856 North Spring, Elgin.
Q. That is Illinois?
A. That's right.
Q. What is your business or occupation?
A. Production Control Manager for the Illinois Watch Case Company.
Mr. Batter: Illinois what?
The Witness: Illinois Watch Case Company.
By Mr. Russo:
Q. Where is that business located?
A. On Dundee Avenue in Elgin. I think the number is 853, but Elgin, Illinois for an address will get it.
Q. How long have you been employed there?
A. Approximately eleven years.

1310 Q. Mr. Stewart, directing your attention to a corner lot at Oak Hill Road and Sherwood, I will ask you whether or not you were ever the owner of that property.
A. I was, Lot 10.
Q. That is Lot 10 in the Oak Hill Subdivision in Elgin?
A. That is right.
Q. When did you first acquire it?
A. The deed was dated the 30th of August, 1945.
Q. Do you still own it?
A. No, sir.
Q. What disposition if any did you make?
A. I sold it.
Q. To whom did you sell it?
A. Sam Achilli.
Q. When?
A. The short form contract date was December 9th, 1947.
Q. And for how much did you sell it? What was the consideration?

A. $2100.

Q. From whom did you receive payment?

A. I received payment from Achilli through Abelmann, his agent and my agent.

1311 Q. Now at or about the time that this transaction took place, did you sign an agreement to sell?

A. I did.

Mr. Russo: Mark this Government Exhibit 174 for identification, please.

(The document was thereupon marked Government Exhibit 174 for identification.)

By Mr. Russo:

Q. I show you now, sir, Government Exhibit 174 for identification, purporting to be a form headed, "William H. Abelmann Company (not Inc.)", dated December 9, 1949, and directing your attention to the signature in the lower left-hand corner, I ask you whose signatures they are, if you know.

A. They are mine and my wife's.

Q. Whose signature is the first one?

A. Mine.

Q. And the second one is that of Jean B. Stewart?

A. That is my wife.

Q. And she is your wife?

A. That is right.

Q. Now this purports to be a receipt of $210.00 held in escrow by Mr. Abelmann for you. Did you receive

1312 that $210.00?

A. Yes, sir.

Q. And what did that $210.00 purport to be, Mr. Stewart?

A. That purported to be earnest money to the purchase of the lot to which we are referring.

Q. Did you receive the balance of that $2100 which, I believe, is $1890?

A. Yes, sir.

Q. From whom did you receive that?

A. From Abelmann again as paid by Achilli.

Q. Did there come a time when you executed a deed conveying that property?

A. Yes, sir.

Mr. Russo: Mark this Government Exhibit 175 for identification.

(The document was thereupon marked Government Exhibit 175 for identification.)

By Mr. Russo:

Q. Mr. Stewart, I now show you Government Exhibit No. 175 for identification, purporting to be a certified photostatic copy of a warranty deed from the records of the Recorder of Deeds in and for Kane County, and directing your attention to the signatures in the lower right-
1313 had corner thereof, I will ask you whose signatures they are.

A. They are mine and my wife's again, in the same order as in the last document.

Q. Was Government Exhibit No. 175 executed on or about the date it bears, the 16th day of February, 1948?

A. Yes, sir.

Q. I will ask you now, and directing your attention to the consideration, does Government Exhibit No. 175 correctly recite the consideration that moved from Mr. Achilli to you and Mrs. Stewart?

A. That is right.

Q. What is the consideration reflected on there?

A. $2100.

Q. $2100. Now after you executed the original, of which Government Exhibit 175 for identification purports to be the photostatic copy, what did you do with the original?

A. The original was, so far as I can remember, left with Abelmann to be turned over to Mr. Achilli.

Q. And was it turned over to Mr. Abelmann for delivery to Mr. Achilli on or about the date the document bears, February 16, 1948?

A. So far as I know.

1314 Q. I believe you testified that you received the $210 as reflected on Government Exhibit No. 174 on or about the date the document bears, December 9?

A. That is right.

Q. And you received the balance of the consideration of $1890 on or about the date the deed was signed and delivered by you?

A. That is correct.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 174 and 175.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked, respectively, Government Exhibits 174 and 175 for identification

were thereupon received in evidence as Government Exhibits 174 and 175.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Stewart. That will be all.

(Witness excused.)

1315 LAMAR J: KIDWELL, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Lamar J. Kidwell?

A. That is correct.

The Reporter: Will you spell your name, please?

The Witness: L-a-m-a-r J. K-i-d-w-e-l-l.

By Mr. Russo:

Q. Where do you live, Mr. Kidwell?

A. 605 Adams Street, Elgin, Illinois.

Q. And what is your business or occupation?

A. Presently in the construction business.

Q. What is the name of the business?

A. Lamp Construction Company.

Q. What if any is your capacity with Lamp Construction Company?

A. Secretary and treasurer.

Q. Is Lamp Construction Company an individual proprietorship, a partnership or corporation?

A. An Illinois corporation.

Q. How long have you been with the Lamp Con-

1316 struction Company?

A. As Secretary and treasurer since December 16.

Q. Of what year, sir?

A. 1954.

Q. And what was your capacity prior to that time?

A. An accountant.

Q. Employed in the same organization?

A. Correct.

Q. In the conduct of the business of the Lamp Construction Company, Mr. Kidwell, does that company keep books and records?

A. Yes, sir.

Q. Are those books and records kept in the regular course of business?

A. Yes, sir.

Q. Is it the regular course of business to keep such books and records?

A. Yes, it is.

Q. Are those books and records made or the entries made on those books and records made at or about the time of the event, occurrence and transaction they purport to reflect?

A. Yes, sir.

Q. Under whose custody and supervision are
1317 those books kept?

A. Myself.

Q. In response to a subpoena duces tecum, did you bring with you books and records of the Lamp Construction Company relating to work, labor and material done and supplied by Lamp Construction Company on a job known as the Red Lion Inn, located about three miles south of Elgin?

A. Yes, sir.

Q. Do you have those books and records with you?

A. I do.

Q. Will you produce them, please?

(The witness handed documents to Mr. Russo.)

By Mr. Russo:

Q. Now, in connection with the work that you testified was done by Lamp Construction Company on the Red Lion job, were the statements issued by the Lamp and the payments made on that job reflected on your books and records?

A. They are.

Mr. Russo: I will ask that these be marked Government Exhibit 176 for identification.

(The documents were thereupon marked Govern-
1318 ment Exhibit 176 for identification.)

By Mr. Russo:

Q. Now, Mr. Kidwell, I show you Government Exhibit No. 176, which consists of a large number of sheets held together with a rubber band, and ask you if those are the books and records of Lamp Construction Company which you produced here in response to the subpoena duces tecum.

Mr. Batter: I object, your Honor. There is no evidence at all that the witness was with the company in 1947, or that the records were under his control at that time at all. As far back as the witness has gone is December, 1954. He has no personal knowledge of 1947 of the records so far as the evidence is concerned.

Mr. Russo: If the Court please, the witness is not required to have any knowledge.

The Court: You may proceed.

By Mr. Russo:

Q. Directing your attention to the billing register, Mr. Kidwell.

A. Yes, sir.

Q. Will you refer to that, please?

1319 A. Yes, sir.

Q. Directing your attention to page 42, Item 9 thereof, was there a billing made by Lamp Construction Company on the Red Lion job on that date?

A. There was a billing made to Mortimer H. Hawkins on that date.

Q. And who is Mortimer H. Hawkins, if you know?

A. He was an architect.

Q. And on what job was he the architect?

A. Red Lion, Incorporated.

Q. What was the amount of the billing?

A. $792.22.

Q. Was that amount thereafter posted to your cash receipts?

A. It was posted to our accounts receivable and then to our cash receipts.

Q. All right, sir.

Now directing your attention to page No. 40 of your cash receipts and line 27—

A. I believe you have that.

Mr. Russo: I will ask that these be marked Government Exhibit 177 for identification.

(The documents were thereupon marked Govern-

1320 ment Exhibit 177 for identification.)

By Mr. Russo:

Q. I now hand you Government Exhibit 177, consisting of a large number of sheets held together by a rubber band, and ask you if that is the cash receipts to which you refer.

A. It is.

Q. Directing your attention to page No. 40, line 27—
A. Yes, sir.
Q. Was the amount of the billing on the billing register received and posted to your accounts receivable?
A. That is correct.
Q. On what date?
A. December 26, 1946.
Q. In what amount?
A. $792.22.
Q. Did you receive payment of that amount?
A. That is correct.
Q. Now directing your attention to the billing register, page 44, line or item 17—
A. Yes, sir.
Q. Was there a billing made to Mortimer Hawkins on the Red Lion job on or about that date?
1321 A. Yes, sir.
Q. What was the amount of the billing?
A. $4324.31.
Q. Was that amount posted then to your accounts receivable?
A. That is correct.
Q. And was it thereafter posted to your cash receipts? Was it thereafter posted to your cash receipts?
A. Not that amount.
Q. Directing your attention to line 4 on page No. 43—
A. Yes, sir.
Q. Will you state, please, the amount that was posted to your cash receipts from the billing register?
A. $3,891.88.
Q. What happened to the difference between $3,891.88 and $4,324.31?
A. That was a 10 percent retainage held until the next billing was submitted.
Q. Now directing your attention again to the billing register and to page 46, item 14, was there billing on the Red Lion job on or about that date?
A. Yes, sir.
Q. What is the amount billed?
A. $2,129.71.
1322 Q. On what date was it made?
A. January 31, 1947.
Q. Was that item posted to your accounts receivable?
A. It was.

Q. And was it thereafter posted to your cash receipts?

A. Not in that amount.

Q. Directing your attention to page 45 and line 22, the cash receipts register, state, please, the amount that was posted as cash received?

A. $2,349.17.

Q. Now, what did that include, Mr. Kidwell?

A. That included the retained percentage from the previous billing plus the current billing less 10 per cent.

Q. So that consists of $2,129.31 less 10 per cent plus $432.43 retained from the previous billing, is that correct?

A. That is right.

Q. And when was that payment made?

A. February 11.

Q. What year?

A. 1947.

Q. Now, directing your attention to the billing register and to page 48, item 5, was there a billing
1323 made on that date to Mortimer Hawkins for the Red Lion job?

A. Yes, sir.

Q. What was the amount of the billing?

A. $2,966.16.

Q. And what is the date of the billing?

A. February 28, 1947.

Q. Was that thereafter posted to your accounts receivable?

A. It was.

Q. And from there was it thereafter posted to your cash receipts?

A. In a different amount again.

Q. All right, sir.

Now directing your attention to page 47, line 14—

A. Yes.

Q. —state the amount, please, that was posted.

A. $2,882.52.

Q. And on what date was that posted?

A. March 11.

Q. What year?

A. 1947.

Q. What does that $2,882.52 represent?

1324 A. The retained percentage from the previous billing plus the current billing minus 10 percent retainage.

Q. Now directing your attention to the billing register, page 49, line 26, was there a billing on the Red Lion job to Mr. Mortimer Hawkins reffected there?

A. March 31, 1947.

Q. What is the amount of the billing?

A. $4,783.94.

Q. Was that amount posted thereafter to the accounts receivable?

A. That is correct.

Q. Was there payment made that was thereafter posted to cash receipts?

A. Yes, in a different amount.

Q. Directing your attention now to page 49, line 19, will you state the amount of the billing—Oh, you have testified that.

Will you state the amount that was received in payment?

A. $4,602.16.

Q. And what does that amount represent?

A. Retainage from previous billing plus current billing minus the 10 percent.

Q. And when was that payment made?

A. April 14, 1947.

1325 Q. Directing your attention to the billing register and to page 52, line 24, will you state, please, whether or not there was a billing made on or about April 30th, 1947?

A. Yes.

Q. In what amount?

A. $12,979.35.

Q. Was that amount thereafter posted to your accounts receivable?

A. Yes, sir.

Q. Was there any payment made on that billing?

A. Yes, sir, there was.

Q. Was that payment posted to the cash receipts?

A. Yes, sir.

Q. Was that billing posted to the cash receipts?

A. Yes, it was.

Q. In what amount was the posting to the cash receipts on that billing?

A. There were two remittances.

Q. Two remittances?

A. One of them was for the retained percentage from the previous billing.

Q. In what amount?

A. In the amount of $478.39.

1326 Q. On what date, please?

A. May 12, 1947.

Q. All right, sir. The other?

A. The same date, a payment of $11,681.42.

Q. I will ask you whether or not the $478.39 payment is reflected on page No. 51, line 25?

A. That is correct.

Q. That is the payment of $11,681.42 reflected on page 51, line 26?

A. Correct.

The Court: We will take a recess at this time, ladies and gentlemen.

(Thereupon a short recess was taken, after which the following further proceedings were had herein, in open Court in the presence and hearing of the jury, to-wit:)

The Court: Proceed.

By Mr. Russo:

Q. Now, Mr. Kidwell, directing your attention again to the billing register, page 55, line 13, was there any billing on or about May 31st, 1947—

A. Yes, sir.

Q. (Continuing)—to Mortimer Hawkins on the Red Lion job?

1327 A. Yes.

Q. What was the amount of the billing?

A. $4,318.35.

Q. Was that then posted to the accounts receivable ledger?

A. Yes, sir.

Q. And thereafter posted to your cash receipts ledger?

A. Not that figure.

Q. Directing your attention to page 54, line 16—

A. Yes, sir.

Q. (Continuing)—was there payment reflected on June 9th, 1947?

A. Yes, sir.

Q. What is the amount of that payment that is reflected?

A. $3,886.51.

Q. On what line is that reflected?
A. On line 16.
Q. Directing your attention to line 17—
A. Yes, sir.
Q. (Continuing)—will you state, please, what the amount reflected on that line is?
A. $1,297.93.
1328 Q. So on that date you received a total of how much, Mr. Kidwell?
A. Well, let's see. It looks like $5,184.44.
Q. Now, directing your attention to line 16, is there any memorandum on that line as to the source of the funds?
A. Yes, there is.
Q. What is that memorandum?
A. It indicates "F. N. B., Cashier's Check."
1329 Q. What Cashier's Check, if any, is reflected there?
A. That would mean First National Bank.
Q. Directing your attention to line 17, is there any memoranda as to the source of the payment there?
A. It is dittoed the same.
Q. What does that indicate?
A. First National Bank Cashier's Check.
Q. So that in the payment of the $1,297.93 and in the payment of the $3,886.51, those payments were both made by Cashier's Checks issued by the First National Bank of Elgin, is that correct?
A. It would indicate that.
Q. Now, directing your attention to the billing register on page 57, line 8, will you refer to that, please? What is the date of that billing?
A. June 30th, 1947.
Q. What is the date—the amount of the billing?
A. $3,861.42.
Q. Was that billing posted to your accounts receivable?
A. Yes, sir.
Q. And was it thereafter posted to your cash receipts?
A. Different amounts were.
Q. In different amounts?
1330 A. That is right.
Q. Now, refer to page 58, line 13, in your cash receipts register.

A. Yes, sir.

Q. Directing your attention to July 14, 1947, was there a payment posted at or about that time on line 3?

A. Yes, there was.

Q. In what amount?

A. $431.84.

Q. And what does that amount represent?

A. It is the 10 per cent retained percentage from the previous month's billing.

Q. Directing your attention to the same page, page No. 58 and to line 4, is there any payment reflected there?

A. Yes, sir.

Q. On what date?

A. July 14, 1947.

Q. And in what amount?

A. $3,475.28.

Q. Directing your attention to page 59 of the billing register, line 20, is there a transaction reflected there involving a billing to Mortimer Hawkins on the Red Lion job?

1331 A. Yes.

Q. What date?

A. July 31, 1947.

Q. What is the amount billed?

A. $2,655.64.

Q. Was that posted to your accounts receivable?

A. It was.

Q. And was it thereafter posted to your cash receipts?

A. Again different payments were made.

Q. Directing your attention to page No. 60 in your cash receipts register, and to line 22.

A. Yes, sir.

Q. Is there a posting of money received on that job?

A. Yes, $2,628.98.

Q. That is on page 60, line 23?

A. I am sorry. Line 23 was $386.14.

Q. Line 23 is $386.14?

A. That is right.

Q. And what does that amount represent?

A. That is retained percentage from the previous months billing.

Q. And what does the $2,628.98 represent?

A. That is the payment from the current month's invoices.

1332 Q. Is that also less the 10 per cent?

A. Well, it appears that it was only 1 per cent retainage at that time.

Q. 1 per cent retainage at that point?

A. Yes. What the reason was, I wouldn't know.

Q. What is the total amount of payment made on August 23, 1947 as reflected on page 60, lines 22 and 23?

A. $3,015.12.

Q. Directing your attention to the billing register and to page 63, line 6, is there a transaction there reflecting billing to Mortimer Hawkins on the Red Lion job?

A. Yes, sir, there is.

Q. What is the date of the billing?

A. September 19, 1947.

Q. And what is the amount billed?

A. $11.28.

Q. Directing your attention to page 72, line 14.

A. Yes, sir.

Q. Is there a billing on that date on the Red Lion job to Mr. Mortimer Hawkins?

A. Yes.

Q. In what amount?

1333 A. $356.75.

Q. What is the date of that billing?

A. January 31, 1948.

Q. Directing your attention to page 73, line 21, of the cash receipts register, are there any payments reflected there on the Red Lion job?

A. Yes, there are.

Q. On what date, please?

A. February 20, 1948.

Q. And what is the date—oh, you just told me, I am sorry.

What is the amount?

A. $394.59.

Q. Will you state, please, Mr. Kidwell, whether that amount $394.59 reflects the payment of the $11.28 shown on page 63 at line 6 and the payment of the $356.75 reflected on page 72 at line 14?

A. Yes, that paid both balances.

Q. Now, will you tell us, please, Mr. Kidwell, what the total amount was that was received by the Lamp

Construction Company on the Red Lion job on its billing to Mortimer Hawkins?

A. $39,179.03.

Q. Directing your attention to a piece of prop-
1334 erty located at 75 South Grove Avenue, did the Lamp Construction Company ever do any work for Sam Achilli there?

A. We did some work at that address.

Q. What kind of work did you do?

A. Remodeling.

Q. Was that as a result of some agreement or contract between Lamp Construction Company and Sam Achilli?

A. I don't recall, but I presume it was an agreement.

Q. What was the amount of the work done at 75 South Grove Avenue by the Lamp Construction Company for Sam Achilli?

A. $5,000.

Q. Directing your attention to the cash receipts ledger and to May 14, 1948, what does your cash recepits ledger show with respect to any payments that might have been made by Sam Achilli?

A. On May 14th a remittance of $5,000 received.

Q. When was that $5,000 payment made?

A. As I stated before, May 14, 1948.

Q. Mr. Kidwell, I show you Government's Exhibits 155, 155-A, 155-B and 155-C, in evidence.

Directing your attention to Government Exhibit No. 155, which purports to be a certificate issued by Mortimer Hawkins on the Red Lion job to Clifford E.
1335 Lamp, and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that, if you know?

A. It is Clifford E. Lamp's.

1336 Q. And what does Clifford E. Lamp's signature at that place on Government's Exhibit 155 signify?

A. That the amount of payment was received.

Q. What is the amount that was shown received on Government's Exhibit 155?

A. $386.14.

Q. Directing your attention to Government's Exhibit 155-A purporting to be a certificate of Mortimer Hawkins on the Red Lion job to Clifford E. Lamp—

A. Yes.

Q. (Continuing)—and directing your attention to the signature in the lower right-hand corner thereof, whose signature is that, if you know?

A. Clifford E. Lamp's.

Q. What does Clifford E. Lamp's signature at that place on Government's Exhibit 155-A signify?

A. That the payment of the amount of the certificate was received.

Q. Directing your attention to Government's Exhibit 155-B, which purports to be a waiver of lien by Clifford E. Lamp on the Red Lion job, and purporting to be dated August 23rd, 1947, and directing your attention to the signature in the bottom portion of Government's Exhibit 155-B, will you state, please, whose signa-

1337 ture that is, if you know?

A. Clifford E. Lamp's.

Q. Was that a waiver of the amount reflected on Government's Exhibit 155-B in the sum of $3,015.12?

A. Yes, sir.

Q. Directing your attention now to Government's Exhibit 155-C, state please what that purports to be.

A. It appears to be an invoice.

Q. Whose invoice is it?

A. Clifford E. Lamp's.

Q. To whom is it directed?

A. Mortimer H. Hawkins.

Q. Now, I show you Government's Exhibits 125, 125-A and 125-B.

A. Yes.

Q. I direct your attention to Government's Exhibit 125, which purports to be a cashier's check of the First National Bank of Elgin dated June 7th, 1947, bearing No. 125519 payable to the order of Clifford Lamp in the sum of $3,886.51,

A. Yes.

Q. Directing your attention to the reverse side thereof, will you state please whether or not it bears any endorsement?

1338 A. A rubber stamp endorsement, yes.

Q. Whose endorsement does that purport to be?

A. Clifford E. Lamp.

Q. Was payment received by Clifford E. Lamp on Government's Exhibit 125?

A. From all indications, yes, sir.

Q. I show you now Government's Exhibit 125-A purporting to be a certificate of Mortimer Hawkins on the Red Lion job dated November 12th, 1947.

A. Yes.

Q. Directing your attention to the signature in the lower right-hand corner thereof, will you state, please, whose signature that is?

A. I don't know.

Q. Whose does it purport to be?

A. Well, Clifford E. Lamp's name is on there.

Q. Is there an initial underneath?

A. Yes.

Q. What does the signature, or purported signature of Clifford E. Lamp together with the initials at that place on Government's Exhibit 125-A signify?

A. That payment was received.

Q. Directing your attention now to Government's Exhibit 125-B, purporting to be a waiver of lien issued
1339 by Clifford E. Lamp to Sam Achilli dated June 9th, 1947, and directing your attention to the signature at the bottom thereof, whose signature is that, if you know?

A. Clifford E. Lamp.

Q. I direct your attention now to Government's Exhibit 126 purporting to be a cashier's check of the First National Bank of Elgin dated June 7th, 1947, bearing No. 125520 payable to the order of Clifford Lamp in the amount of $1,297.93, and to the reverse side thereof.

A. Yes.

Q. I will ask you whether or not it bears any endorsement?

A. Yes, sir, it does.

Q. What endorsement does it bear?

A. Rubber stamp, Clifford E. Lamp.

Q. Did Clifford E. Lamp receive the funds from that check?

A. Apparently so.

Q. I direct your attention to Government's Exhibit 126-A purporting to be a certificate of Mortimer Hawkins on the Red Lion job to Clifford E. Lamp and to the signature in the lower right-hand corner thereof.

A. Yes.

Q. Whose signature does that purport to be?
1340 A. I don't know. Clifford E. Lamp's name is there.
Q. Are there initials underneath there?
A. Yes, sir.
Q. What initials are there?
A. "E. W."
Q. What does Mr. Lamp's purported signature together with those initials at that point on Government's Exhibit 126-A signify?
A. That the reimbursement was received.
Q. I direct your attention now to Government's Exhibit 126-B which purports to be a waiver of lien dated June 9th, 1947, and to the signature at the bottom thereof.
A. Yes.
Q. Whose signature is that, if you know?
A. Clifford E. Lamp's.
Q. What is the amount of that waiver?
A. $1,297.93.
Q. Directing your attention now to Government's Exhibit 145 which purports to be a cashier's check dated July 12th, 1947, in the amount of $431.84, bearing No. 125998 payable to the order of Clifford E. Lamp—
A. Yes.
Q. (Continuing)—and directing your attention
1341 to the back thereof, I will ask you to state whether it bears any endorsement?
A. It does.
Q. What endorsement does it bear?
A. A rubber stamp endorsement, Clifford E. Lamp.
Q. I direct your attention now to Government's Exhibit No. 145-A, which purports to be the certificate of Mortimer Hawkins to Clifford E. Lamp for work done on the Red Lion job.
A. Yes.
Q. Directing your attention to the signature in the lower right-hand corner thereof, whose signature is that if you know?
A. Clifford E. Lamp's.
Q. What does Clifford E. Lamp's signature at that place on Government's Exhibit 145-A signify?
A. Payment in the amount of the certificate.

Q. Directing your attention now to Government Exhibit 145-B which purports to be a waiver of lien dated July 14th, 1947, on the Red Lion job, I direct your attention to the signature at the lower right-hand corner thereof.

A. Yes.

Q. Whose signature is that, if you know?

1342 A. Clifford E. Lamp's.

Q. What is the amount of that waiver?

A. $431.84.

Q. Directing your attention now to Government's Exhibit 146 purporting to be a cashier's check on the First National Bank of Elgin dated July 12th, 1947, bearing No. 125999 payable to the order of Clifford E. Lamp in the amount of $3,475.28, I direct your attention to the reverse side thereof.

A. Yes.

Q. I will ask you to state whether or not it bears any endorsement?

A. It does.

Q. What endorsement does it bear?

A. Rubber stamp, Clifford E. Lamp.

Q. I direct your attention now to Government's Exhibit 146-A purporting to be a certificate issued by Mortimer Hawkins on the Red Lion job for Clifford E. Lamp.

A. Yes.

Q. I direct your attention to the lower right-hand corner thereof. Whose signature is that?

A. Clifford E. Lamp's.

Q. What does Clifford E. Lamp's signature at that place on Government's Exhibit 146-A signify?

1343 A. It indicates payment has been made.

Q. Directing your attention to Government's Exhibit 146-B, which purports to be a waiver of lien dated July 14th, 1947, and to the signature in the lower right-hand corner thereof, whose signature is that, if you know?

A. Clifford E. Lamp's.

Q. What does Clifford E. Lamp's signature at that place on Government's Exhibit 146-B signify?

A. Well, it means that the labor and materials involved in that amount had been paid.

Q. Now, Mr. Kidwell, will you extract from the books and records the billing records and the cash receipt records concerning which you have already testified?

A. (No answer.)

Q. Do you have the ones I refer to, or do you want me to refresh your recollection?

A. Well, I can just as well leave them in order, unless you want those—

Q. Let me state the ones that you have on the billing register. Pages 42, 44, 46, 48, 49, 52, 55, 57, 59 and 63. That is the billing register.

A. All right.

Q. Now, the cash receipts are these: Pages 40,
1344 43, 45, 47, 49, 51, 54, 58, 60 and 73.

A. All right.

Q. And one more page on your billing register, page 72.

A. All right.

(The witness thereupon handed documents to Mr. Russo.)

1345 By Mr. Russo:

Q. Now you have just handed me a group of exhibits here. Are these the billing registers?

A. Yes, sir.

Q. These are the billing registers?

A. And here are the cash receipts. (Witness handed documents to Mr. Russo.)

Q. Now when I handed them to you originally, one page bore a number.

A. That is cash receipts. Here are some more to go with that.

Q. Now I show you Government Exhibit No. 177, consisting of 22 pages clipped together, and ask you if those are the cash receipts ledgers concerning which you have testified.

A. That is correct.

Mr. Russo: I will ask that these be marked Government Exhibit 178.

(The documents were thereupon marked Government Exhibit 178 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit No. 178 for identi-

fication, consisting of 24 pages clipped together,
1346 and ask you if that is the billing register concerning which you have testified.

A. Yes, sir.

Q. Mr. Kidwell, will you refer to Government Exhibit No. 177, please, and state what portion of the $39,179.03 that was received by the Lamp Construction Company on the Red Lion job was received by that company in the year 1946?

A. It appears that $792.22 would have been the only amount received in 1946.

Q. Referring to the same exhibit, state, please, what the amount received by the Lamp Construction Company on the Red Lion job was in 1947.

A. I don't have an adding machine.

Q. Do you have the figure for 1948?

A. Yes, I do.

Q. What is the figure for 1948?

A. $394.59.

Q. Now if the total amount received by the Lamp Construction Company was, as you testified, $39,179.03, would you calculate, please, from the figures that you have just given me, what the amount was that was paid in 1947?

A. It would appear that in 1947, $37,992.22 was
1347 received.

Mr. Russo: If your Honor will indulge me just a moment, please.

By Mr. Russo:

Q. Will you refer to the record that you have there and see if you have a cash receipts register for the $5,000 you testified to concerning Grove Avenue, Mr. Kidwell?

A. Yes, sir.

Q. What does this purport to be?

A. That is cash receipts register.

Q. And this one?

A. The same.

Q. Both cash receipts register?

A. That is right. This is just a continuation of the page.

Mr. Russo: Thank you.

I will ask that these be marked Government Exhibit 179 for identification.

(The documents were thereupon marked Government Exhibit 179 for identification.)

By Mr. Russo:

Q. Now is Government Exhibit 179, consisting
1348 of two pages, the cash receipts ledger of the Lamp Construction Company relating to cash received from Sam Achilli on the construction or remodeling of the premises at 203—No. 75 South Grove?

A. I believe so.

Mr. Russo: If your Honor please, the Government offers in evidence Government Exhibits 177, consisting of 22 pages, Government Exhibit 178, consisting of 24 pages, and Government Exhibit No. 179, consisting of two pages.

Mr. Batter: May I ask the witness a few questions, your Honor?

The Court: Yes.

By Mr. Batter:

Q. Are you a certified public accountant?

A. No, sir.

Q. When did you enter the employ of the Lamp Construction Company?

A. Actual employment on their payroll, I would say sometime in 1951.

Q. What was your business in 1947 and 1948?

A. I ran an accounting office of my own.

Q. In private practice?

1349 A. Yes, sir.

Q. Were?

A. In Elgin, Illinois.

Q. But not as a certified public accountant?

A. No, sir.

Q. Have you ever been employed by the Bureau of Internal Revenue?

A. Yes, sir.

Q. When?

A. 1940 through 1946.

Q. So that from 1940 through 1946 you were with the Government, 1947 and 1948 you were in private practice, and after that you became employed by the Lamp Construction Company?

A. No, that is not correct.

Q. What is correct?

A. I still have my own private business.

Q. You still have your own private business?

A. Yes.

Q. Did you make a detailed audit of the books and affairs of the Lamp Construction Company for the years 1946, '47 and '48?

Mr. Russo: I object, if your Honor please.

Mr. Batter: It goes to the witness' qualifications 1350 as to the right to testify to these records, your Honor.

Mr. Russo: He has a perfect right to testify to those records because—

Mr. Batter: I am not finished.

Mr. Russo: Go ahead.

Mr. Batter: He was not in the employ of the company at the time, he is not a certified public accountant, and the records were not made under his direction. I think I have a right to test his qualifications.

The Court: He may answer.

The Witness: What was it you wanted to know?

Mr. Batter: Read the question, please.

(Question read.)

By the Witness:

A. Not for 1946. For 1947 and thereafter I have been responsible for those records, for the keeping of them.

By Mr. Batter:

Q. In what manner were you responsible in 1947? If I understood your testimony correctly, you were in private practice at that time.

A. That is right. I had charge of the accounting 1351 of that company and prepared income tax returns and such other records as were necessary.

Q. How much time and attention did you give to the affairs of this company in the year 1947?

A. In 1947 I can't say too much. Thereafter considerable time.

Mr. Batter: I object, your Honor, to the admission of these exhibits. They are not prepared under the witness' direction. He is not a certified public accountant. He has not made an examination of the affairs of the Lamp Construction Company.

The Court: They may be received subject to the objection.

(The documents previously marked Government Exhibits 177, 178 and 179 for identification were

thereupon received in evidence as Government Exhibits 177, 178 and 179, respectively.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

(Witness excused.)

1352-1353 • • •

1354 CLARENCE P. GUBBINS, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Clarence P. Gubbins.

Q. Will you spell your last name, please?

A. G-u-b-b-i-n-s.

Q. Where do you live, Mr. Gubbins?

A. 914 Brook Street.

Q. What City?

A. Elgin.

Q. Elgin, Illinois?

A. Elgin, Illinois, yes.

Q. What is your business or occupation, Mr. Gubbins?

A. I am a merchandise manager at Ackemann's Department Store, Elgin.

Q. What is your capacity there?

A. Merchandising.

Q. How long have you been with Ackemann's Department Store?

A. About thirty years.

1355 Q. Mr. Gubbins, do you know the Defendant, Sam Achilli?

A. Yes.

Q. Will you point him out, please?

A. Over there (indicating).

Q. You are indicating the second man at the far end of defense counsel table?

A. Yes.

Q. Did you ever have any transactions with the defendant, Sam Achilli?

A. Yes, I did.

Q. Do you recall when?

A. I don't know the month, but it was 1943 or 1944.

Q. What was the nature of the transaction you had with Mr. Achilli?

A. The sale of my home at 732 Brook Street, Elgin.

Q. What was the price or consideration for which you agreed to sell your home at 732 Brook Street to Mr. Achilli?

A. $12,600.00.

Q. How was that consideration paid?

A. By check.

Q. What was the amount of the check?

A. I don't know.

Q. Is there anything from which you can refresh your recollection?

1356 A. I don't know whether you have it on the slip that you have in your hand—

Mr. Russo: Will you mark this as Government's Exhibit 180 for identification, please.

(The document was thereupon marked Government's Exhibit 180 for identification.)

By Mr. Russo:

Q. I show you Government's Exhibit 180 for identification, Mr. Gubbins, purporting to be a receipt on the letterhead of William H. Abelman, dated in July, 1944, showing a receipt from Sam Achilli of $1,260 held in escrow and to apply toward the purchase price of 732 Brook Street.

A. Yes.

Q. I ask you if that is the document to which you just made reference?

A. Yes.

Q. Directing your attention to the signature in the lower left-hand corner, the first of the two signatures, whose is that?

A. Mine.

Q. Directing your attention to the second of the 1357 two signatures, whose signature is that?

A. My wife's.

Q. Were those signatures placed on Government's Exhibit 180 for identification on or about some time in July, 1944?

A. Yes.

Q. Now, I direct your attention to the signature in the lower right-hand corner.

A. Yes.

Q. Whose signature does that purport to be?

A. Sam Achilli's.
Q. Now, did you receive from anyone the $1,260 which is purported to be reflected on that Exhibit?
A. No.
Q. How was the payment of the $1,260 made to you?
A. You mean in what form?
Q. Yes.
A. By check.
Q. All right, sir. Now, do you recall the amount of the check?
A. I do not, because it covered the business incidentals in relation to the transaction.
Q. What was the total consideration that you received from Sam Achilli for 732 Brook Street?
1358 A. Total consideration?
Q. Yes.
A. $12,600.
Q. And you received that payment?
A. Yes.
Q. Now, was there a check in the amount of $11,340 delivered to you in connection with this transaction?
A. Now, must I say yes to the exact amount or—
Q. You tell the truth as you know it, Mr. Gubbins.
A. Well, the check that I received was a final settlement with the possibility of an item of expense or two in it. I do not know what it was, so I am not sure, but it is around $11,340.
Q. Where was that check delivered to you?
A. In Mr. Gromer's office.
Q. Is that Mr. Earl H. Gromer?
A. Mr. Earl H. Gromer.
Q. And is his office located in the Elgin Tower Building in Elgin, Illinois?
A. Yes. It was at that time.
Q. Now, at the time that check was delivered to you, who was present?
A. (No answer.)
Q. If you recall.
1359 A. I just don't recall. I know that Mr. Gromer was there and I know that Mrs. Gubbins and I were there. Now, whether Mr. and Mrs. Achilli were there, I just forget.
Q. All right, sir. Now, at the time that you received that check, what if anything did you deliver to either Mr. Achilli or to someone acting in his behalf?

A. The deed and abstract to my home.
Q. By whom was the deed signed?
A. By Mrs. Gubbins and myself.
Q. To whom was the deed delivered, if you recall?
A. To Mr. Gromer.
Q. As I understand your testimony, it conveyed the property at 732 Brook Street, is that correct?
A. Yes.
Q. Now, at or about that time did you have any further transactions with Mr. Achilli?
A. Yes. He came to the house and looked over my carpet and purchased it.
Q. When was that, Mr. Gubbins?
A. Well, I would guess it was about a week later. I don't know just what the date was.
Q. Did you sell the carpet to him?
A. Yes.
1360 Q. For how much?
A. $600.00.
Q. Who paid you the $600.00?
A. Mr. Achilli.
Q. And how was payment of the $600.00 made to you?
A. By check.
Q. The $600 that you received in payment for the carpet was in addition to the $12,600 that you received for the property—
A. Yes.
Q. —is that right?
A. Yes.
Mr. Russo: Your witness.
Mr. Batter: No cross.
Mr. Russo: Thank you, Mr. Gubbins. That will be all.
The Witness: Thank you.
(Witness excused.)

H. WHEELER BRITTAIN, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

1361 Q. Your name, sir, is H. Wheeler Brittain?
A. Yes, sir.
Q. Where do you live, Mr. Brittain?

A. I live at R.R. 1, Dundee, Illinois.
Q. What is your profession?
A. Attorney-at-law.
Q. How long have you been an attorney-at-law?
A. Over thirty years.
Q. Where is your office located?
A. 100 Douglas Avenue, Elgin.
Q. I direct your attention to April 10th, 1947, Mr. Brittain. Did you represent Dr. Ernest Pistor in the sale of real estate at 75 South Grove Avenue in Elgin, Illinois?
A. Well, I did about that date. There is nothing about that date that particularly fixes it in my mind.
1362 Q. Will you relate for the Court and Jury, please, how that transaction came about?
A. Well, Dr. Pistor saw me or about the 26th of March, 1947, and told me that Mr. William H. Abelmann had sold a business building located at 75 Grove Avenue in Elgin to Mr. Sam Achilli. He told me that I should prepare a contract for the sale of that property to Mr. Achilli, which I did.
The contract itself bears date of March 26, 1947.
Q. All right, sir. What if anything occurred after that?
A. Well, the contract provided for the purchase of this property for $20,000 cash on delivery of evidence of title. The contract was subsequently executed by both Dr. and Mrs. Pistor, Ernest M. and Mabel Pistor, and appears to have been executed by Sam Achilli.
Q. Do you have a copy of that agreement with you, Mr. Brittain?
A. I do.
Q. May I have it, please?
A. (Witness produced document.)
Mr. Russo: I will ask that this be marked Government Exhibit 181 for identification.)
1363 (The document was thereupon marked Government Exhibit 181 for identification.)
By Mr. Russo:
Q. I show you Government Exhibit 181 for identification, which purports to be an agreement for warranty deed, made the 26th day of March, 1947, between Ernest M. Pistor and Mabel Pistor, husband and wife, and Sam Achilli.
A. Yes.

Q. Directing your attention to the reverse side thereof and to the signatures that appear in the upper one-fourth portion of the exhibit, will you state, please, whose signature is the first that appears on there, if you know?

A. I know. That is Dr. Ernest M. Pistor's signature.

Q. And whose is the second signature?

A. That is his wife's, Mabel Pistor's signature.

Q. Whose does the third signature purport to be?

A. The third signature purports to be Sam Achilli.

Q. Was the agreement signed on or about the date the document bears, March 26, 1947?

A. On or about that date, yes, sir.

Q. Now was payment of the consideration from
1364 the purported transferee to the transferors paid?

A. Yes, it was.

Q. After the consideration was paid, what if anything was delivered to Sam Achilli or someone purporting to act on his behalf?

A. I delivered to Mr. Joseph Wiedeman, who was Mr. Achilli's attorney, the warranty deed from Dr. Pistor and Mrs. Pistor, which ran to Sam Achilli, covering this property in question.

Mr. Russo: Mark this Government Exhibit 182 for identification, please.

(The document was thereupon marked Government Exhibit 182 for identification.)

By Mr. Russo:

Q. I now show you, Mr. Brittain, Government Exhibit 182 for identification, purporting to be a photostatic copy of a warranty deed taken from the office of the Recorder of Deeds for Kane County, Illinois, and ask you to examine it.

A. Yes.

Q. State whether it is a true and correct photostatic copy of the original that you delivered to Sam Achilli or someone acting on his behalf.

1365 A. Yes, it is.

Q. Directing your attention to the signatures in the lower righthand corner, whose signatures are those, if you know?

A. Those are the genuine signatures of Ernest M. Pistor, Mabel Pistor, and I am the attorney—rather, the notary who took the acknowledgment.

Q. And your signature appears on Government Ex-

hibit No. 182 for identification as the notary public who took the affidavit, is that correct?

A. Took the acknowledgment of the signatures.

Q. Took the acknowledgment?

A. Yes.

Q. And did you take the acknowledgment on or about the date shown thereon, April 17, 1947?

A. Well, the deed itself is dated April 8, 1947. Dr. Pistor and Mrs. Pistor left the deed with me and were not present at the closing of the deal, which was April 18.

I had the deed from April 8, the date it bears, until April 18, when it was delivered to Mr. Wiedeman, attorney for Mr. Achilli.

Q. Now directing your attention to Government Exhibit No. 182 for identification and to the purported
1366 consideration, will you examine that, please, and state whether or not it recites the true consideration that moved from Mr. Achilli to Dr. Pistor?

A. No, it does not.

Q. What consideration is recited there?

A. The consideration recited is $10.00 and other valuable consideration.

Q. What was the true consideration?

A. $20,000 less adjustment for taxes and insurance.

Q. When was it that you received the consideration on this transaction, Mr. Brittain?

A. On the date the deed was delivered, April 18, I received the balance of the consideration.

Q. What was the balance that you received on that date?

Was there anything from which you can refresh your recollection?

A. You might say that I received the entire consideration on that date because on that date there was delivered to me the note of Dr. and Mrs. Pistor which had a balance of $9300 on it, and which was a first mortgage which they had given on that property. That was returned to me marked paid and canceled.

Q. So you got the entire consideration on April
1367 18, 1947?

A. Yes, and then in addition to the $9300, I received Mr. Abelmann's check for $9700, making in all the $20,000.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 181 and 182.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked, respectively, Government Exhibits 181 and 182 were thereupon received in evidence as Government Exhibits 181 and 182.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. The recital in this deed, Government Exhibit No. 182, of $10.00 and other consideration, is of no particular significance, is it?

A. Other valuable consideration, no, that is the standard form we use in our county.

1368 Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Brittain. That will be all.

(Witness excused.)

MERVIN LOHBAUER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Mervin Lohbauer?

A. That is correct.

Q. And is Mervin spelled M-e-r-v-i-n?

A. That is right.

Q. And Lohbauer is spelled L-o-h-b-a-u-e-r?

A. That is right.

Q. Mr. Lohbauer, will you keep your voice up, please, so the Court and Jury can hear you too, please.

A. Yes, sir.

Q. What is your address, sir?

A. 641 Park Street, home address. 172 Brooks Street, business.

Q. And that is Elgin?

1369 A. Elgin.

Q. Elgin, Illinois?

A. That is right.

Q. What is your business?

A. Heating and sheet metal.
Q. What is the name of the business, Mr. Lohbauer?
A. It goes under the name of M. C. Lohbauer, Heating and Sheet Metal.
Q. How long have you been engaged in that business?
A. Since 1946.
Q. Now is M. C. Lohbauer Heating and Sheet Metal an individual proprietorship, a partnership or corporation?
A. Individual proprietorship.
Q. Now in connection with the operation of your business, Mr. Lohbauer, do you keep books and records?
A. I do.
Q. Are those books and records kept in the usual course of business?
A. Yes, sir.
Q. Is it the usual course of business for you to keep such books and records?
A. Yes, sir.
Q. Are the records made at or about the time of
1370 the transaction, occurrence or event they purport to reflect?
A. Yes, they are.
Q. As owner of M. C. Lohbauer Heating and Sheet Metal, are the books and records kept under your custody and supervision?
A. Yes, they are.
Q. Mr. Lohbauer, are you familiar with the place of business known as the Red Lion Restaurant?
A. Yes, I am.
Q. Where is it located?
A. Highway 25, three miles south of Elgin.
Q. In connection with the reconstruction of the Red Lion building in 1947, Mr. Lohbauer, did your firm have anything to do in connection with that construction?
A. Yes. We did the sheet metal and air conditioning.
Q. You did what?
A. Sheet metal work and air conditioning, which included duct work and furnishing of equipment for the air conditioning unit; also stainless steel work on the back bar and kitchen work, some counters and ventilating work and some ventilation work which included fans and duct work.

Q. Under whose supervision did you do that work?
1371 A. Under Mortimer Hawkins, the architect.
Q. All of it?
A. A portion of the work was done directly through Mr. Achilli.
Q. What portion was done under the supervision of Mr. Achilli?
A. Ventilation work in the basement in the compressor room.
Q. Did that also entail the installation of the ducts and the blower?
A. That is correct.
Q. And under whose supervision was your installation of the ventilation and duct work and the blower done?
A. Mr. Achilli.
Q. Now when was all this work done, what year?
A. 1947.
Q. Do you know Mr. Sam Achilli, the defendant?
A. Yes, I do.
Q. Do you see him in the court room?
A. Sitting over there (indicating).
Q. Is the man who is sitting, the second man who is sitting at the far side of defense table, the man you have indicated?
A. Yes, sir.
1372 Q. And he is the man that you know as Sam Achilli?
A. That is correct.
Mr. Russo: I will ask that these be marked Government Exhibits 183, 183-A, 183-B and 183-C for identification.

(The documents were thereupon marked, respectively Government Exhibits 183, 183-A, 183-B and 183-C for identification.)

By Mr. Russo:
Q. Now I show you Government Exhibit No. 183 for identification, Mr. Lohbauer, and ask you if that is a record made by M. C. Lohbauer, sheet and metal work, in connection with the work that it did on the Red Lion building.
A. It is.
Q. What does it purport to be?
A. This is a copy of the invoice.
Q. Will you speak up, please, sir?

A. This is a copy of the invoice. This is a—

Q. Just a moment. Let's talk about the invoice first. That is a copy of the invoice?

A. Yes.

Q. Is that a duplicate copy?

1373 A. That is correct.

Q. What did you do with the original?

A. That was mailed to Mr. Hawkins.

Q. What is the date of the invoice?

A. April 30, 1947.

1374 Q. What is the amount of the invoice?

A. $1,095.35.

Q. Now, I direct your attention to Government's Exhibit 183-A.

A. Yes.

Q. Will you state, please, what that purports to be?

A. That's the job work sheet.

Q. What date does it bear?

A. March 24th, 1947.

Q. Is that the material and labor that you supplied in connection with the reconstruction of the Red Lion?

A. Yes, it is.

Q. Now, I direct your attention to Government's Exhibit 183-B.

A. Yes.

Q. I ask you to state, please, what that purports to be.

A. That is a journal sheet—cash sheet—this is a cash receipt (indicating) and this (indicating) is an accounts receivable journal sheet.

Q. Government Exhibit 183-B purports to be the accounts receivable sheet of M. C. Lohbauer Company, is that right?

A. That is right.

1375 Q. What does Government's Exhibit 183-C purport to be?

A. That is a cash received journal sheet.

Q. Directing your attention to Government Exhibit 183 and Government Exhibit 183-A, is there any writing or stamp on either of those two Exhibits reflecting that payment for the work represented thereon was received?

A. On the copy it is marked "Paid."

Q. Does it bear a date?

A. Not on the copy of the invoice.

Q. Not on the copy of the invoice. Does the copy of the work sheet, Government's Exhibit 183-A, reflect whether or not payment was received?

A. It is stamped "Paid" and the date of May 7th, 1947.

Q. Whose stamp is that?

A. That is mine.

Q. What is the amount paid?

A. $1,095.35.

Q. Now, is that transaction reflected on your accounts receivable sheet?

A. Yes, it is. It is dated April 30th, marked "Red Lion, Incorporated, $1,095.35."

Q. Now, I direct your attention to Government's Exhibit 183-C.

1376 A. Yes.

Q. I will ask you if the entry on the accounts receivable sheet, Government Exhibit 183-A, is posted to Government Exhibit 183-C?

A. Yes, it is.

Q. On what date?

A. May 7th, 1947.

Q. What does that purport to reflect?

A. That we received payment on May 7th, 1947 of $1,095.35.

Q. In connection with what work?

A. The work in the reconstruction of the Red Lion.

Mr. Russo: Will you mark this as Government's Exhibit 184 for identification, please.

(The document was thereupon marked Government's Exhibit 184 for identification.)

Mr. Russo: 184-A.

(The document was thereupon marked Government's Exhibit 184-A for identification.)

1377 Mr. Russo: 184-B.

(The document was thereupon marked Government's Exhibit 184-B for identification.)

Mr. Russo: Will you mark this as Government's Exhibit 185 for identification, please.

(The document was thereupon marked Government's Exhibit 185 for identification.)

Mr. Russo: 185-A.

(The document was thereupon marked Government's Exhibit 185-A for identification.)

Mr. Russo: 185-B.

(The document was thereupon marked Government's Exhibit 185-B for identification.)

Mr. Russo: 185-C.

(The document was thereupon marked Government's Exhibit 185-C for identification.)

Mr. Russo: This next one will be Government's Exhibit 186 for identification.

1378 (The document was thereupon marked Government's Exhibit 186 for identification.)

Mr. Russo: 186-A.

(The document was thereupon marked Government's Exhibit 186-A for identification.)

Mr. Russo: 186-B.

(The document was thereupon marked Government's Exhibit 186-B for identification.)

Mr. Russo: 186-C.

(The document was thereupon marked Government's Exhibit 186-C for identification.)

Mr. Russo: Will you mark this, please, as Government's Exhibit 187 for identification.

(The document was thereupon marked Government's Exhibit 187 for identification.)

Mr. Russo: 187-A.

(The document was thereupon marked Government's Exhibit 187-A for identification.)

1379 Mr. Russo: 187-B.

(The document was thereupon marked Government's Exhibit 187-B for identification.)

Mr. Russo: 187-C.

(The document was thereupon marked Government's Exhibit 187-C for identification.)

Mr. Russo: 187-D.

(The document was thereupon marked Government's Exhibit 187-D for identification.)

Mr. Russo: This next one will be Government's Exhibit 188 for identification.

(The document was thereupon marked Government's Exhibit 188 for identification.)

Mr. Russo: 188-A.

(The document was thereupon marked Government's Exhibit 188-A for identification.)

Mr. Russo: 188-B.

(The document was thereupon marked Govern-
1380 ment's Exhibit 188-B for identification.)

Mr. Russo: 188-C.

(The document was thereupon marked Government's Exhibit 188-C for identification.)

By Mr. Russo:

Q. Now, Mr. Lohbauer, I show you Government's Exhibit 184 for identification which purports to be a statement of M. C. Lohbauer bearing invoice No. 2242.

A. Yes.

Q. I ask you if that is a record of M. C. Lohbauer Sheet Metal Works?

A. It is.

Q. Is this a duplicate original of the record?

A. That is a duplicate of the original.

Q. What happened to the original?

A. That was mailed to Mr. Achilli.

Q. Directing your attention now to Government Exhibit 184-A for identification, purporting to be a work sheet bearing No. 681, was that work done in connection with the rebuilding of the Red Lion?

A. Yes, it was.

Q. What was the amount of the work and the material represented by Government Exhibit 184?

1381 A. $421.02.

Q. When was that work and labor billed?

A. October 17th, 1947.

Q. Does Government Exhibit 184 indicate whether or not M. C. Lohbauer received payment for that work and material?

A. Yes, it does. It is stamped "Paid" with a date of October 24th, 1947.

Q. In what amount?

A. $421.02.

Q. Does Government Exhibit 184-A, the work sheet, indicate whether or not payment was received on that work?

A. Yes. It is stamped "Paid".

Q. The same date?

A. October 24th, 1947.

Q. I direct your attention to Government's Exhibit 184-B.

A. Yes.

Q. What does that purport to be?

A. That is a cash received sheet from the ledger.

Q. What does it indicate with respect to Government Exhibits 184 and 184-A?

A. It shows that we received payment on October
1382 24th, 1947, 421.02.

Q. $421.02?

A. That is correct.

Q. I show you Government Exhibit 185 for identification purporting to be a statement of M. C. Lohbauer, sold to Red Lion, Inc., Invoice No. 2210 dated May 31st, 1947.

A. Yes.

Q. Will you state, please, whether or not that is a duplicate copy of the original?

A. It is a duplicate copy of the original.

Q. What did you do with the original, if anything?

A. That was mailed to Mortimer Hawkins, the architect.

Q. Is Government Exhibit 185—does that reflect whether or not payment was received for the material and work supplied on that job?

A. It is marked "Paid", June 12th, 1947.

Q. I direct your attention to the work sheet.

A. That's marked "Paid", June 10th, 1947.

Q. That is the work sheet that related to the statement?

A. That is the work sheet related to the copy of the invoice.

Q. I direct your attention now to Government Ex-
1383 hibit 185-B.

A. Yes.

Q. What does that purport to be?

A. That is an accounts receivable sheet from the ledger.

Q. Does that contain an entry with respect to Government Exhibits 185 and 185-A?

A. It has an entry "Red Lion" and the amount of $1,128.10.

Q. That is an accounts receivable from the work done on the Red Lion by M. C. Lohbauer?

A. That is correct.

Q. I direct your attention to Government Exhibit 185-C.

A. Yes.

Q. What does that purport to be?

A. That is a cash received sheet from the journal.

Q. What does that purport to reflect?

A. That reflects that we received payment on June 10th, in the amount of $1,128.10, 1947.

Q. For what job?

A. The Red Lion reconstruction.

Q. And that is related to Government Exhibits 185, 185-A and 185-B, is that correct?

A. That is correct.

1384 Q. Now, I direct your attention to Government Exhibit 123 in evidence.

A. Yes.

Q. I will ask you if that is a check that you received in payment of that statement and for that work and labor?

A. Yes. It is a cashier's check from the First National Bank in the amount of $1,128.10 made out to me.

Q. I direct your attention to the reverse side thereof.

A. Yes.

Q. What endorsement if any does it bear?

A. It has our stamp, "For deposit in the First National Bank."

Q. I direct your attention now to Government Exhibit 123-A purporting to be the certificate from Mr. Hawkins for that work and I direct your attention to the signature in the lower right-hand corner.

A. Yes.

Q. Whose signature is that?

A. That's mine.

Q. What does your signature at that point signify?

A. It signifies I received payment.

1385 Q. I direct your attention to Government's Exhibit 123-B, purporting to be a waiver of lien and to your signature in the lower right-hand corner.

A. That is my signature.

Q. That is your signature?

A. Yes.

Q. Was that waiver given with respect to the work reflected on Government Exhibits 185, 185-A, 185-B and 185-C?

A. Yes, it was.

Q. Now, I show you Government Exhibit 186 purporting to be a duplicate copy of an invoice or statement of M. C. Lohbauer bearing No. 2228 dated July 31st, 1947.

A. Yes.

Q. I will ask you if you supplied the work and labor

indicated on that in the reconstruction of the Red Lion?

A. Yes, we did.

Q. What was the amount of the statement?

A. $1,282.41.

Q. I direct your attention to Government's Exhibit No. 186-D for identification.

A. Yes.

Q. Will you state whether or not you received 1386 payment for the work and labor?

A. That is a cash received journal sheet and we received payment on August 20th, 1947, in the amount of $1,282.41.

Q. Are Government Exhibits 186, 186-B, 186-C and 186-D, and Government Exhibits 154, 154-A and 154-B related?

A. They are.

Q. And they all relate to the same labor and same work performed on or about the date reflected by the statement, is that correct?

A. That is correct.

Q. Now, I show you Government Exhibit 187 purporting to be the duplicate copy of a statement made by M. C. Lohbauer to the Red Lion bearing No. 2249 dated June 30th, 1947.

A. Yes.

Q. I will ask you whether you supplied the work and labor on the Red Lion job as reflected on Government Exhibit 187?

A. We did.

Q. Were you paid for that work—

A. Yes, sir.

Q. —and material?

1387 A. Yes, we were.

Q. I show you Government Exhibit 132 purporting to be a cashier's check of the First National Bank of Elgin dated July 8th, 1947, bearing No. 125925 payable to the order of M. C. Lohbauer in the sum of $1,804.88.

A. Yes.

Q. I will ask you if that is a check which you received in payment of the statement and of the documents identified as Government Exhibits 187, 187-B, 187-C and 187-D?

A. Yes, it is.

Q. I show you Government Exhibits 132-A, 132-B and 132-C purporting to be the certificate of the architect, the

waiver of lien and the original statement of M. C. Lohbauer to Red Lion.

A. Yes.

Q. I ask you if they are all related?

A. Yes, they are.

Q. And they are related to the work and material reflected on Government Exhibit 187?

A. That is correct.

Q. For which you received the payment shown on Government Exhibit 132?

A. That is correct.

1388 Q. Now, I show you Government Exhibit 188 for identification purporting to be an invoice addressed to Red Lion, Inc., dated October 17th, 1947.

A. Yes.

Q. I ask you if that is a duplicate copy of an invoice in the custody of M. C. Lohbauer?

A. That is correct.

Q. What did you do with the original?

A. It was mailed to Mr. Hawkins.

Q. What does Government Exhibit 188-A purport to be?

A. A job sheet.

Q. What does Government Exhibit 188-B purport to be?

A. That's an accounts receivable sheet.

Q. What does Government Exhibit 188-C purport to be?

A. That is the cash received sheet.

Q. Did you do the work reflected on Government's Exhibits 188 and 188-A for the Red Lion?

A. Yes, we did.

Q. On or about the date that Exhibits 188 and 188-A reflect?

A. Yes.

Q. That is, on or about October 17th, 1947?

A. It was done prior to that. It was billed on that date.

1389 Q. The work was done prior to that, but the work was billed on that date?

A. That's right.

Q. I direct your attention to Government Exhibit 188-C for identification.

A. Yes.

Q. Did you receive payment for the work and labor?
A. Yes, we did.
Q. On what date?
A. We received payment February 13th, 1948.
Q. In what amount?
A. $2,799.80.

1390 Q. Directing your attention to Government Exhibit 188-C, from whom did you receive that payment?
A. I received that payment from Mr. Achilli direct.
Q. Directly?
A. Yes.
Q. From whom did you receive payment on the other transactions concerning which you had testified?
A. Through Mr. Hawkins.
Q. What amount, or what portion—what was the total amount that you received in connection with that job, Mr. Lohbauer?
A. The total amount was $8,531.56.
Q. And who did you derive that from?
A. From our records.
Q. From whom did you receive payment in that connection?
A. We received payment of $5,731.76 through Mr. Hawkins. The balance was through Mr. Achilli.
Q. In what year did you receive that $5,731.76?
A. 1947.
Q. The balance, in what year was that paid?
A. 1948.
Q. And what was the total amount of that balance?
A. $2,799.80.

1391 Mr. Russo: At this time, may it please the Court we offer in evidence Government Exhibits 183, 183-A, 183-B and 183-C; 184, 184-A and 184-B; 185, 185-A, 185-B, 185-C; 186, 186-A, 186-B, 186-C, 186-D; 187, 187-B, 187-C, 187-D; 188, 188-A, 188-B and 188-C.

Mr. Batter: We object to these exhibits, your Honor, on the ground that each of them is made out to Red Lion, Incorporated, and that as such there has been no proof of any tie-up with the defendant.

Mr. Russo: I will ask the witness two more questions, if your Honor please.

By Mr. Russo:

Q. Mr. Lohbauer, for whom did you do the work at the Red Lion?

Mr. Batter: I object, your Honor. The record speaks for itself.

The Court: He may answer.

By the Witness:

A. Mortimer Hawkins.

By Mr. Russo:

Q. And who was Mortimer Hawkins?

A. He was the architect.

1392 Q. To whom did you look for payment.

A. Mortimer Hawkins.

Q. To whom did you look for payment for the work you did under the supervision of Sam Achilli?

A. Mr. Achilli.

Q. Did you get payment on all those jobs?

A. Yes, we did.

Q. In what capacity did Mr. Hawkins act?

Mr. Batter: Object, your Honor. There is no indication that the witness knows.

Mr. Russo: He may answer if he knows.

The Witness: What was the question?

Mr. Russo: Read the question, please.

(Question read.)

By the Witness:

A. He acted as the supervising architect.

By Mr. Russo:

Q. For whom was he acting?

A. Mr. Achilli.

Mr. Russo: Now I reoffer all those exhibits.

The Court: They may be received subject to objection.

(The documents previously marked, respectively,
1393 Government Exhibits 183, 183-A, 183-B, 183-C; 184, 184-A, 184-B; 185, 185-A, 185-B, 185-C; 186, 186-A, 186-B, 186-C, 186-D; 187, 187-B, 187-C, 187-D; 188, 188-A, 188-B and 188-C for identification were thereupon received in evidence as Government Exhibits 183, 183-A, 183-B, 183-C, 184, 184-A, 184-B, 185, 185-A, 185-B, 185-C, 186, 186-A, 186-B, 186-C, 186-D, 187, 187-B, 187-C, 187-D, 188, 188-A, 188-B and 188-C.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Lohbauer.

(Witness excused.)

1394-1397 • • •

1398 FRANK MARKER, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

1399 *Direct Examination by Mr. Russo.*

Q. Will you state your name, please?
A. Frank Marker.
Q. Please spell your last name.
A. M-a-r-k-e-r.
Q. Where do you live?
A. In Elgin.
Q. What street address?
A. 63 South Alfred.
Q. Are you in business?
A. Yes.
Q. What is the name of your business?
A. Elgin Wire & Fixture Company.
Q. Where is that located?
A. 159 East Highland.

1400 Q. Is Elgin Wiring & Fixture an individual proprietorship—
A. Yes, sir.
Q. —a corporation or a partnership?
A. A partnership with my wife.
Q. A partnership with your wife?
A. Yes.
Q. How long has the partnership with your wife been in existence, Mr. Marker?
A. Since 1950.
Q. Prior to that time what was the ownership of Elgin Wiring & Manufacturing Company?
A. Charles Marker.
Q. And who is Charles Marker?
A. My dad.
Q. In the conduct of the business of Elgin Wiring & Fixture Company, did your father keep books and records?
A. A few of them.
Q. Is Mr. Marker your father—is that Charles Marker?
A. That is right.
Q. Is he living today?
A. No, sir.

1401 Q. Now the books and records that he did keep, did he keep them in the usual course of business?

A. He did.

Q. Was it the usual course of business for him to keep such records?

A. Yes.

Q. And were they made at or about the time of the transaction they purport to represent?

A. That is right.

Q. In whose custody and supervision are those records at the present time?

A. They are in my custody.

Q. Directing your attention, Mr. Marker, to about the middle of 1947, approximately June, 1947, did your father do any work for Mortimer Hawkins in connection with the reconstruction of the Red Lion building located three miles south of Elgin, Illinois?

A. He did.

Q. You did some of the work there yourself, did you not?

A. I worked for him, that is right.

Q. Under your father's supervision?

A. That is right.

Q. To whom did your father look for payment on
1402 that job?

A. Mortimer Hawkins.

Mr. Russo: Mark this Government Exhibit 189 for identification, please.

(The document was thereupon marked Government Exhibit 189 for identification.)

Mr. Russo: And this 190.

(The document was thereupon marked Government Exhibit 190 for identification.)

Mr. Russo: And this 191.

(The document was thereupon marked Government Exhibit 191 for identification.)

By Mr. Russo:

Q. Mr. Marker, I show you Government Exhibit 189 for identification, and ask you if that is a record kept by your father, Charles Marker, in the conduct of the business of the Elgin Wiring & Fixture Company.

A. It is.

Q. Now I show you Government Exhibit 124, purporting to be a cashier's check of the First National Bank of
Elgin, dated June 7, 1947, bearing number 125,518,
1403 payable to the order of Elgin Wiring & Fixture Manufacturing Company, in the amount of $800.

A. Yes, sir.

Q. Directing your attention to the reverse side thereof, I will ask you to state, please, whether or not it bears any endorsement.

A. It bears my father's name, Charles Marker.

Q. And that is your father's genuine signature?

A. That is right.

Q. Now will you refer to Government Exhibit 189 and to page 39 thereof, and point out where, if at all, the receipt of the money reflected on Government Exhibit 124 is?

A. Is that the right page here?

Oh, right here (indicating)—down here, $800.

Q. That is sixteen lines down from the top of the page, of page 37, is that correct?

A. That is right.

Q. Now I show you Government Exhibit No. 190 for identification, and ask you what that purports to be.

A. This one right here?

Q. Yes, sir.

A. This is $3,591—

1404 Q. Will you speak up so the Court and Jury can hear you too, please?

A. $3,591.42 paid.

Q. In connection with what job was that paid?

A. On the Red Lion.

Q. The same Red Lion that we have been talking about that you did the work and received payment as reflected on Government Exhibits 124 and 189, is that correct?

A. Correct.

Q. Does that purport to reflect the materials and the labor done by Elgin Wiring & Fixture Company on the Red Lion?

A. It does.

Q. Now when, if you know, did Mr. Marker, your father, Charles Marker, receive payment of $3,591.42?

A. You mean the date?

Q. Yes, sir.

A. I haven't got it here.

Q. I show you Government Exhibit 191 for identification, purporting to be a photostatic copy of a deposit slip, deposited with the First National Bank, for the account of Charles Marker, on May 3, 1948.

I will ask you if that is a true and correct copy
1405 of the original?

A. It should be.

Q. Where did you get the photostatic copy, Mr. Marker?

A. From the First National Bank.

Q. And where is the original?

A. At the First National Bank.

Q. Did you ask the bank for the original?

A. That is right.

Q. What did they tell you when you asked for it?

A. They wouldn't give it to me.

Q. What did they give you instead?

A. A photostatic copy.

Q. Now directing your attention to the photostatic copy, Government Exhibit 191 for identification, does that reflect a deposit by Charles Marker with the First National Bank on May 2, 1948, of $3,591.42?

A. It does.

Q. In whose handwriting does the writing on Government Exhibit No. 191 for identification purport to be?

A. My dad's, Charles Marker.

Q. Now I show you Government Exhibit 124-A, purporting to be the certificate issued by Mortimer Hawkins on the Red Lion job to Elgin Wiring & Fixture Manufacturing Company, and directing your attention to
1406 the signature in the lower right-hand corner thereof; whose signature is that?

A. That is my signature.

Q. And was your signature placed on there on or about the date the document bears, June 6, 1947?

A. That is right.

Q. What is the amount of the certificate?

A. $800.

Q. What does your signature at that place on Government Exhibit 124-A signify?

A. That $800 payment here on the Red Lion.

Q. And at the time that you received payment, was there a waiver of lien delivered to the architect?

A. There was one here.

Q. Directing your attention to Government Exhibit 124-B, I will ask you if that is the waiver to which you refer.

A. This one right here.

Q. Whose signature does that bear?
A. That is my dad's signature.
Q. What date does it bear?
A. June 9, 1947.
Q. What is the amount of the waiver?
A. $800.

Mr. Russo: At this time, may it please the Court,
1407 we offer in evidence Government Exhibits 189, 190 and 191.

Mr. Batter: The same objections as heretofore, your Honor. These show the Red Lion, Inc., and not the defendant, that this work was done for.

The Court: They may be received subject to the objection.

(The documents previously marked, respectively, Government Exhibits 189, 190 and 191 for identification were thereupon received in evidence as Government Exhibit 189, 190 and 191.)

1408 Mr. Batter: To save objecting, your Honor, may I have a running objection to the Red Lion, Inc. Exhibits?

The Court: Yes.
Mr. Russo: Your witness.
Mr. Batter: No cross.
Mr. Russo: Thank you, Mr. Marker.
(Witness excused.)

JOSEPH J. O'ROURKE, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Joseph J. O'Rourke?
A. Right.
Q. That is spelled O'R-o-u-r-k-e?
A. That is right.
Q. Where do you live, Mr. O'Rourke?
A. 7939 South Mozart.
Q. In what city?
A. Chicago.
Q. Chicago, Illinois?
1409 A. That is right.
Q. What is your business, sir?

A. I am manager of the premium accounting division at Continental Assurance Company.

Q. Where is Continental Assurance Company located?

A. 310 South Michigan.

Q. How long have you been associated with that company?

A. Approximately three and a half years.

Q. In the conduct of the business of Continental Assurance Company, does that company keep books and records?

A. It does.

Q. Are those books and records kept in the regular course of business?

A. That is right; they are.

Q. Is it the regular course of business for that company to keep such books and records?

A. It is.

Q. Are the transactions reflected on those records made at or about the time of the transaction they purport to reflect?

A. Yes, sir, they are; naturally.

Q. Under whose custody and supervision are those records?

1410 A. Mine for the purpose of premium records.

Q. Did you in response to a subpoena duces tecum bring with you certain books and records of the Continental Assurance Company relating to insurance policies purchase by Sam Achilli?

A. I did.

Mr. Russo: Will you mark this as Government's Exhibit 192 for identification, please.

(The document referred to was thereupon marked Government's Exhibit 192 for identification.)

Mr. Russo: 193.

(The document was thereupon marked Government's Exhibit 193, for identification.)

Mr. Russo: 194.

(The document was thereupon marked Government's Exhibit 194, for identification.)

By Mr. Russo:

Q. Now, Mr. O'Rourke, I show you Government Exhibit 192 for identification and ask you if that is a record of the Continental Assurance Company reflect-

1411 ing the issuance of a policy by that company to Sam Achilli?

A. It is.
Q. What is the policy number?
A. 1041604.
Q. On what date was that policy issued?
A. December 15th, 1946.
Q. What is the amount of the policy that was issued?
A. A $15,000 life insurance policy.
Q. Were the premiums on that policy paid annually, semi-annually, or in some other method?
A. They were paid annually.
Q. What is the amount of the annual premium on that policy?
A. $872.10.
Q. I direct your attention to February 17th, 1947.
A. Yes.
Q. Was there an annual premium paid on or about that date?
A. There was.
Q. In what amount?
A. $872.10.
Q. I direct your attention to January 5th, 1948.
A. Yes.
Q. Was there an annual premium paid on that date?
1412 A. There was.
Q. In what amount?
A. The same amount, $872.10.
Q. Now, directing your attention to December 15th, 1948, was there an annual premium paid on that or about that date?
A. (No answer.)
Q. I show you Government Exhibit 193 for identification and ask you if that reflects the payment concerning which I asked you as to December 15th, 1948?
A. December 16th.
Q. December 16th, 1948?
A. Yes.
Q. Was there an annual premium paid at that time?
A. Yes, there was.
Q. Was there anything about the premium that was paid at this time that differs from the payments that were made on the two occasions that you have previously testified about?
A. There was. That premium was $733.80.

Q. Then you say that there was a reduction in the premium?

A. A reduction in the premium amount.

Q. Was that premium paid?

1413 A. Yes.

Q. In what amount?

A. $733.80.

Q. On what date?

A. December 16th, 1948.

1414 Q. Now, I hand you Government Exhibit No. 194 for identification.

A. Yes.

Q. I ask you to examine it and state whether or not a policy was issued by the Continental Assurance Company to Sam Achilli on May 11, 1948.

A. Yes, there was a policy issued May 11, 1948.

Q. What is the policy number?

A. 348735.

Q. What is the amount of the policy?

A. $20,000.

Q. How were the premiums paid or required to be paid?

A. Annually.

Q. What was the amount of the annual premium?

A. $376.20.

Q. I direct your attention to May 28, 1948.

A. Yes.

Q. Was there a premium paid on or about that date?

A. There was.

Q. In what amount?

A. In the amount of $376.20.

Q. Now, I hand you again Government Exhibit 192 and I also hand you what purports to be a photostatic copy of Government Exhibit 192.

1415 A. Yes.

Q. I will ask you to examine to the photostatic copy and state whether or not it is a true and correct photostatic copy of the original.

A. It is.

Q. Now, I hand you Government Exhibit No. 193, and what purports to be a photostatic copy.

A. Yes.

Q. I will ask you to examine it and state whether or not the photostatic copy is a true and correct photostatic copy of the original.

A. It is.

Q. You did not produce a photostatic copy of Government Exhibit 194, is that correct?

A. That's right.

Mr. Russo: Will you mark these photostatic copies as Government's Exhibits 192 and 193, respectively.

(The photostatic copies were thereupon marked Government Exhibits 192 and 193, respectively.)

Mr. Russo: At this time, may it please the Court, we will offer in evidence what purports to be a photo-
1416 static copy of Government Exhibit 192, which now also bears the original number that is shown on the original card, so we may return the original to the Continental Assurance Company, and we also offer in evidence Government Exhibit 193 and ask to substitute for it a photostatic copy which has been marked by the Reporter as Government's Exhibit 193, which purports to be a true and correct photostatic copy of the original, and we also offer in evidence Government Exhibit 194.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked, respectively, Government Exhibits 192, 193 and 194 for identification were thereupon received in evidence as Government Exhibits 192, 193 and 194.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. O'Rourke. That will be all.

(Witness excused.)

1417-1418 • • •

1419 HAROLD E. MONEY, called as a witness herein on behalf of the Government, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Harold E. Money.

Q. How do you spell your last name?

A. M-o-n-é-y.

Q. Where do you live?

A. 1301 Welsely Drive, Albuquerque, New Mexico.

Q. Mr. Money, please keep your voice up so every member of the jury and the Court may hear you, too.
A. Yes.
Q. What is your business, please?
A. I run the Credit Collection Service, Incorporated.
Q. Where is that located?
A. 1005 North 4th Street, Albuquerque, New Mexico.
Q. How long have you been engaged in that business?
A. One year and four months.
Q. Now, prior to your connection with that company that you have just testified about, what business or occupation were you engaged in?
1420 A. The used car business.
Q. Where?
A. Albuquerque, New Mexico.
Q. Prior to your business as a used car dealer in Albuquerque, New Mexico, where were you located?
A. In Elgin, Illinois.
Q. Under what name in Elgin, Illinois were you doing business?
A. Kalamazoo Heating & Appliance.
Q. Prior to that were you engaged in the automobile business at Elgin?
A. Yes, sir.
Q. During what period of time were you engaged in the automobile business at Elgin?
A. From the year of 1936 to 1948.
Q. Under what name were you operating the automobile business?
A. One time it was Highland Avenue Motor Sales, and then it was changed to H. E. Money Motor Sales.
Q. At what location in Elgin were you doing business?
A. Well, there was more than one location.
Q. Was there a place on which you were operating a used car lot that you rented from Ben Gallina?
A. Yes.
1421 Q. During what period of time did you lease those premises from Ben Gallina?
A. From 1936 to 1938.
Q. Mr. Money, do you know the Defendant, Sam Achilli?
A. Yes, sir.

Q. Do you see him in the Court Room?
A. Yes, sir.
Q. Will you point him out, please?
A. Sitting right over there (indicating).
Q. You are indicating the third man at the far end of defense counsel table?
A. Yes, sir.
Q. During the period of time you were operating the used car business on the lot that you leased from Ben Gallina did you have occasion to employ the Defendant, Sam Achilli?
A. Yes, sir.
Q. About when was that?
A. That was in the year of 1938.
Q. What were the circumstances under which he became employed by or associated with you in that business?
A. Well—
Mr. Batter: I do not think that is material, your Honor. He was employed. What the circumstances
1422 were, I do not think are important. I object to it.
Mr. Russo: It goes, if your Honor please, to the starting point in the Government's case with reference to net worth.
Mr. Batter: He has him employed. I do not think anything else is material.
The Court: He may answer.
A. He came to my lot one night with his brother-in-law and his brother-in-law asked me if I could use him.
By Mr. Russo:
Q. What was his brother-in-law's name, if you recall, Mr. Money?
A. His first name is Henry. I don't recall his last name.
Q. Very well, sir. Go ahead.
A. I told his brother-in-law that I could use a man, so I hired him.
Q. What was the financial arrangement under which you hired him?
A. Well, as near as I could recall, it was on a commission basis.
Q. On a commission basis?
1423 A. Yes.
Q. Now, did there come a time, Mr. Money, when

Sam Achilli acquired an interest in your business?

A. Yes, sir.

Q. Tell the Court and jury, please, how that came about.

A. Well, Mr. Achilli had a 1932 Ford convertible—

Q. Will you keep your voice up, please, sir?

A. Mr. Achilli had a 1932 Ford convertible which was sold, and the money he got from that he put in the business.

Q. Was that all the money that he put into the business, in so far as you can recall?

A. Yes, sir.

Q. Approximately how much was the investment that he put into the business as the result of the sale of that 1932 Ford car you are talking about?

A. I would say from 150 to $200.

Q. Did there come a time, Mr. Money, when you sold your interest in the business to anyone?

A. Yes, sir.

Q. To whom did you sell it?

A. To Mr. Achilli.

Q. Tell the Court and Jury, please, how that came about.

1424 A. Well, we had a disagreement on buying cars so we agreed that either he buy me out or I would buy him out, and he—

Q. What happened?

A. Mr. Achilli bought me out.

Q. What was the amount for which he bought you out?

A. I would say it was in the neighborhood of from six to eight hundred dollars.

Q. In what form did Mr. Achilli make payment to you for your interest in the business?

A. He gave me—he brought a check to me.

Q. Do you recall whose check that was?

A. Yes. That was Earl Muntz'.

Q. Who is Mr. Muntz?

A. Well, Mr. Muntz was in the finance business at that time.

Q. What was the amount of that check?

A. It was between six and eight hundred dollars.

Q. After you received that check did you receive the proceeds of it?

A. Yes, sir.
Q. You were paid?
A. Yes, sir.
Q. After you were paid what did you do?
1425 A. I started up—I walked out and started up another used car lot.
Q. And you left the business and the premises in the possession of Mr. Sam Achilli, is that correct?
A. Yes, sir.
Q. Do you recall at this time, Mr. Money, the percentage that you had agreed to pay Sam Achilli at the time he first came to work with you?
A. No, sir.
Q. You do not recall?
A. No, sir.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. When did Mr. Achilli become your partner, Mr. Money?
A. In the year 1938.
Q. How long did that partnership last?
A. I would say around five or six months.
Q. Was it a profitable partnership?
A. Well, yes.
Q. Now, when you testified that Mr. Achilli paid you six to eight hundred dollars for your interest in the business, was that a half interest?
A. Yes, sir.
1426 Q. What does that $600 to $800 represent?
A. It represented the office and the equity we had in the cars, some of them. Some of them, of course, were floor plans—
Q. They were what?
A. Some of the cars were floor—well, we would borrow money on them to sell them, and some of them were—well, he give me the equity in the cars.
Q. Was the price of $600 to $800 contingent upon how many cars and your equity in the cars at the moment, at the time of the sale?
A. I didn't understand that.
Q. Was the price of $600 to $800 determined by the

amount of cars and your equity in such cars that you had at the time that you broke up the partnership?

A. Yes, sir.

Q. How big a number of cars would you at times have?

A. Oh, I would say in the neighborhood of fifteen cars.

Q. And how many cars were there on hand at the time that you sold your half interest to Mr. Achilli?

A. I don't remember.

Q. During the time of that partnership, what was the largest amount that you had invested in the partner-
1427 ship?

A. I don't remember that either.

Q. Were there occasions during that period where it would be considerably above $800?

A. Yes.

Q. How high would it run?

A. You mean my interest, or Mr. Achilli's?

Q. Your interest. It was half, wasn't it?

A. Yes, sir. Probably it would run maybe $800, $900, my half, something like that.

Q. And would Mr. Achilli's interest have run any higher than that?

A. Not that I recall.

Q. Did he finance any of the cars independently for the firm?

A. I believe he did once or twice.

Mr. Batter: That is all.

Redirect Examination by Mr. Russo.

Q. At the time that he first became a partner, as a result of the proceeds of the 1932 Ford, at that time did Sam Achilli acquire a half interest in the business?

A. Yes, sir, at that—probably—he put the money,
1428 what he sold the Ford for in the business.

Q. And he became a full half partner from the proceeds of the sale of that one car?

A. Well, yes, sir, I would say that.

Q. Then when you sold out to him for $600 to $800, you sold out your remaining half interest in the firm, is that correct?

A. Yes, sir.

Q. How many cars, if you can recall, did Sam Achilli own that were not partnership assets, if any?

A. Well, I can't recall.

Q. Then do I understand your testimony to be that at no time did the total assets of the partnership business exceed $1500 to $1600, and by assets I mean automobiles?

A. You mean automobiles?

Q. Yes, sir.

A. Repeat that again, will you?

Mr. Russo: Read the question, please.

(Question read.)

By the Witness:

A. Well, no, sir.

By Mr. Russo:

Q. What was the total value of the assets, the
1429 highest total valne, at any one time?

A. Well, I would say they never exceeded $1500 or $1600, around there. That is what I would say.

Q. They never exceed $1500 or $1600?

A. Yes, sir.

Q. And Mr. Achilli's interest in that amount then was half of $1500 or $1600, is that correct?

A. Yes, sir.

Q. Now you testified under cross examination, Mr. Money, that Sam Achilli financed one or two cars for the firm. Did I understand that testimony correctly?

A. Yes, sir.

Q. Sir?

A. Yes, sir, he bought some cars—the money, where he got it, I don't know.

Q. Was he buying for the firm or was he buying on an individual basis?

A. No, he would just use the money to buy the cars and put it on the lot.

Q. For the firm?

A. Yes.

Q. Now what was the extent of the financing, the maximum, according to your best recollection, that he could have financed these two cars for?

1430 A. Well, it would be a guess with me. I would say four or five hundred dollars.

Q. Would that be your best recollection?

A. Yes.

Q. And that was a partnership finance arrangement that was merely taken care of by Mr. Achilli, is that right?

A. Yes, sir.

Q. I believe you also testified under cross examination, Mr. Money, that the operation of this partnership was a profitable one.

To what extent was it profitable? How profitable was it?

A. Well, maybe we would make $20, $25 a week.

Mr. Batter: Make what?

The Witness: Maybe $20, $25, whatever profit we made, why we used to divide it up. Some weeks in those days I would say it would be around $20, $25, $30 a week.

By Mr. Russo:

Q. So that the total profits in any one week was $20 or $25, which was divided equally between you and your partner, is that correct?

A. Yes, sir. I would say maybe we would each
1431 draw $20 or $25 a week.

Q. You each would draw $20 or $25 a week?

A. Yes.

Q. So that the profits that were split would exceed no more than $50 a week, is that right?

A. I doubt if it would exceed any more than that.

Mr. Russo: No further questions.

Recross Examination by Mr. Batter.

Q. Was this $25 a week to each of you a set figure, or did you divide such profits as there were?

A. There was no set agreement as to the wages we would draw.

Q. You simply would draw whatever was available?

A. That is right.

Q. How high would that run sometimes?

Mr. Russo: Well, I think the question is a little vague, if your Honor please, unless he can fix any particular time.

Mr. Batter: We are within a scope of a six-month period, your Honor.

The Court: He may answer.

The Witness: Will you repeat that question?

1432 By Mr. Batter:

Q. How high at any one time would that figure run, instead of being $25 a week on an average. What is the biggest sum you withdrew at any one time during that partnership?

A. Well, I don't recall what was the biggest. I don't recall.

Q. Now on redirect examination, you left the impression that Mr. Achilli financed only one or two cars. Is that correct, or did he finance from time to time more cars?

A. That I can recall. There may have been more, but that I can remember.

Mr. Batter: All right. That is all.

Mr. Russo: Thank you, Mr. Money. That will be all.

(Witness excused.)

1433 BERNICE S. CREEDON, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, ma'am?

A. Bernice S. Creedon.

The Reporter: Will you spell your last name, please?

The Witness: C-r-e-e-d-o-n.

By Mr. Russo:

Q. Will you kindly keep your voice up so that the Court and Jury may hear you too.

A. O. K.

Q. What is your address, Mrs. Creedon?

A. My residence address?

Q. Yes.

A. 55 Center, Elgin.

Q. 55 Center Street, Elgin, Illinois?

A. That is right.

Q. What is your business?

A. I own and operate the Post Office Garage at Elgin.

Q. What is the address at Elgin where that garage is located?

1434 A. 209 East Highland Avenue.

Q. What is the nature of the business that you conduct at the Post Office Garage?

A. Well, we have a service station and automobile parking.

Q. You also sell gas?

A. Yes.

Q. What is your interest in the Post Office Garage?
A. I am the sole owner.
Q. How long have you been the sole owner?
A. August 28, 1947, when my husband died.
Q. Now prior to August 28, 1947, who operated the Post Office Garage?
A. My husband, and I assisted him.
Q. What was your husband's name?
A. John J. Creedon.
Q. Directing your attention to the year 1937, was the Post Office Garage operated by your husband at that time?
A. It was.
Q. And were you engaged in helping your husband in the operation of that garage at that time?
A. I was.
Q. In the operation of the Post Office Garage, did
1435 you keep books and records?
A. I did.
Q. Were those records kept in the regular course of business?
A. They were.
Q. And was it the regular course of business for you to keep such records?
A. It was.
Q. Were those records made at or about the time of the occurrence or event they purport to reflect?
A. They were.
Q. Under whose custody and supervision were those records kept?
A. Mine. I made them out.
Q. You made them out?
A. Yes.
Q. Now directing your attention to the year 1937, was Sam Achilli employed at the Post Office Garage?
A. He was employed by us.
Q. He was?
A. He was.
Q. Mrs. Creedon, did you in response to a subpoena duces tecum bring with you the records of the Post Office Garage relating to the employment of Sam Achilli
1436 by that garage?
A. I brought them.
Q. Do you know the defendant, Sam Achilli?
A. I do.

Q. Do you see him in the court room?
A. Yes.
Q. Will you point him out, please?
A. He is over there, to my right.
Q. Is that the third man sitting—
A. Yes, to the right.
Q. To the right?
A. Yes.
Q. The far man?
A. Yes.
Q. Is he the same Sam Achilli that was employed at the Post Office Garage in 1937?
A. He is.
Q. Mrs. Creedon, was Sam Achilli at that time known to you by any other name?
A. Well, we knew him as Sam, but when I assisted him in applying for his Social Security, why, I found out his right name was Sergio.

Mr. Russo: I will ask that this be marked Government Exhibit 195 for identification.

1437 (The document was thereupon marked Government Exhibit 195 for identification.)

Mr. Russo: And this Government 196.

(The document was thereupon marked Government Exhibit 196 for identification.)

Mr. Russo: And this 196-A.

(The document was thereupon marked Government Exhibit 196-A for identification.)

Mr. Russo: 196-B.

(The document was thereupon marked Government Exhibit 196-B for identification.)

Mr. Russo: 196-C.

(The document was thereupon marked Government Exhibit 196-C for identification.)

Mr. Russo: 196-D.

(The document was thereupon marked Government Exhibit 196-D for identification.)

Mr. Russo: 196-E.

1438 (The document was thereupon marked Government Exhibit 196-E for identification.)

Mr. Russo: 196-F.

(The document was thereupon marked Government Exhibit 196-F for identification.)

1439 By Mr. Russo:

Q. Now, Mrs. Creedon, I show you Government's Exhibit 195 for identification and Government's Exhibits 196, 196-A, 196-B, 196-C, 196-D, 196-E and 196-F for identification.

A. Yes.

Q. I ask you if they are the records of the Post Office Garage that you produced here in response to the subpoena duces tecum?

A. They are.

Q. Directing your attention to Government Exhibit 195 for identification, will you state, please, what that purports to be?

A. Well, it is a record of our receipts and disbursements, January through June of the year 1937.

Q. Directing your attention to Government Exhibit 195 for identification, does that book purport to reflect disbursements made by the Post Office Garage in connection with salaries paid to Sam Achilli?

A. It contains that information.

Q. What period of time is covered by Government's Exhibit 195 for identification?

A. Do you mean the period on Sam Achilli?

Q. Yes.

1440 A. Well, the first payment was made on January 9th through May 22nd.

Q. Does Government Exhibit 195 for identification contain all the disbursements that were made by Post Office Garage to Sam Achilli during the period of his employment by the Garage?

A. Yes.

Q. It does?

A. Yes.

Q. Now, directing your attention to Government's Exhibit 195 for identification and to January 9, 1937, will you state, please, the amount of salary that was paid to him on that date?

A. I thought it was the 9th.

Q. January 9th.

A. Yes. $13.00.

Q. What year is that?

A. 1937.

Q. I direct your attention now to January 16th, 1937.

A. Yes.

Q. Will you state, please, whether any salary was paid to him on that date?

A. Yes. $15.00.

Q. Directing your attention to January 23, 1937, 1441 was there any salary paid to him on that date?

A. Yes. $15.00.

Q. Directing your attention to January 30, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention to February 6, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention to February 13, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention to February 20, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention to February 27, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Now, directing your attention to Mareh 6th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention now to March 13th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention now to March 20th, 1442 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention to March 27th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Now, directing your attention to April 3, 1937, will you state whether or not there was any salary paid to him on that date?

A. Yes; $15.00.

Q. On March 10th, 1937, was there any salary paid to him?

A. Do you mean March 10th or April 10th?

Q. April 10th. I am sorry. April 10, 1937.

A. Yes; $15.00.

Q. Directing your attention to April 24th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Directing your attention now to May 1, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

1443 Q. On May 8th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. On May 15th, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. On May 22, 1937, was there any salary paid to him on that date?

A. Yes; $15.00.

Q. Was there any salary paid to Mr. Achilli after May 22, 1937?

A. No, there was not.

Q. When did Mr. Achilli's services with the Post Office Garage end?

A. May 22, 1937.

Q. What was the total amount of salary, Mrs. Creedon, that was paid by the Post Office Garage to Sam Achilli?

A. $298.00.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibit 195.

Mr. Batter: No objection.

The Court: It may be received.

1444 (The document previously marked Government's Exhibit 195 for identification was thereupon received in evidence as Government's Exhibit 195.)

By Mr. Russo:

Q. Now, Mrs. Creedon, at the time Sam Achilli came to Post Office Garage seeking employment, did he have a Social Security number?

A. He did not.

Q. Was there one thereafter procured for him?

A. Yes.

Q. By whom?

A. Well, I assisted; I think I filled out the blank for him, the application.

Q. From whom did you secure the information with which you filled out the blank making application for the Social Security number?

Mr. Batter: I object to that, your Honor. I do not see the pertinency of that. It is immaterial.

Mr. Russo: It goes to the same issue, if your Honor please. It shows he was unemployed prior to that time.

The Court: She may answer.

1445 The Witness: I have forgotten the question—oh. He brought me a slip of paper with the information. I don't know who—whether it was his writing, or whose, but—

By Mr. Russo:

Q. Is this (indicating) the piece of paper to which you refer, Government Exhibit 196-F?

A. That is.

Q. That piece of paper was brought to you by Sam Achilli at the time he sought employment with the Post Office Garage?

A. After he was employed; not right at the time he sought employment.

Q. At or about that time?

A. Yes.

Q. That is the information that you placed on the application for a Social Security number, is that correct?

A. That's correct.

Q. That piece of paper was brought to you by Mr. Achilli?

A. That is correct.

Mr. Russo: At this time, if your Honor please, we 1446 offer in evidence Government's Exhibit 196-F.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 196-F for identification was thereupon received in evidence as Government's Exhibit 196-F.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mrs. Croedon. That will be all.

(Witness excused.)

ERVEN JURS, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?

A. Erven Jurs.

Q. Your first name is spelled E-r-v-e-n?
A. That is right.
1447 Q. And your last name is spelled J-u-r-s?
A. That is right.
Q. Where do you live, Mr. Jurs?
A. Dundee, Illinois.
Q. Do you have a street address?
A. No.
Q. A Route number?
A. Yes; Route 2, Box 1.
Q. Mr. Jurs, will you keep your voice up, please, so the Court and jury can hear you?
A. Yes.
Q. What is your business?
A. Vice-President of the First Federal Savings & Loan.
Q. Where is that located?
A. Elgin, Illinois.
Q. What is your capacity with the First Federal Savings & Loan?
A. Vice-President.
Q. How long have you been Vice-President?
A. Since 1946.
Q. Will you describe briefly for the Court and Jury, Mr. Jurs, the nature of the business of First Federal Savings & Loan?
A. We make mortgage loans.
1448 Q. In the conduct of its business does First Federal Savings & Loan keep books and records?
A. That is right.
Q. Are those books and records kept in the regular course of business?
A. That is right.
Q. And is it the regular course of business to keep such books and records?
A. Yes.
Q. Are those books and records made at or about the time of the transaction, occurrence or event they purport to reflect?
A. That is right.
Q. Under whose custody and supervision are those books and records kept?
A. Under my custody.
Q. Mr. Jurs, do you know the Defendant, Sam Achilli?
A. Yes, I do.

Q. Do you see him in the Court Room?
A. Yes, I do.
Q. Will you point him out, please?
A. Sitting over there with the grey suit on. (Indicating.)
Q. You are indicating the man at the far end of 1449 defense counsel table?
A. That is right.
Q. Directing your attention to May 5, 1948, did you in your official capacity as Vice-President of the First Federal Savings & Loan have any transactions with the Defendant, Sam Achilli?
A. Yes, I did.
Q. Is that the Sam Achilli that you have pointed out in this Court Room?
A. Yes, it is.
Q. What was the nature of that transaction, Mr. Jurs?
A. He was trying to obtain a loan on 75 South Grove Avenue.
Q. In connection with his atempt to secure that loan, what if anything did he do?
A. He filled out an application.
Mr. Russo: Will you mark this as Government Exhibit 197 for identification, please?
(The document was thereupon marked Government's Exhibit 197 for identification.)
By Mr. Russo:
Q. I show you now Government Exhibit 197 for identification which purports to be an application for a 1450 loan to the First Federal Savings & Loan Association of Elgin.
A. Yes.
Q. I ask you if that is the application to which you referred?
A. That is right.
Q. Now, I direct your attention to the reverse side thereof and to the signature about half way down the page on the right-hand side.
A. Yes.
Q. Whose signature is that?
A. Sam Achilli's.
Q. Was Sam Achilli's signature affixed to Government Exhibit 197 on or about the date the document bears, May 4, 1948?

A. That is right.

Q. Will you state, please, Mr. Jurs, what the amount of the loan applied for was?

A. That loan was for $13,000.

Q. Now, from whom did you secure the information that is reflected on Government Exhibit No. 197 for identification?

A. From his attorney, Earl Gromer.

Q. Was the loan made to Mr. Achilli?

1451 A. Yes, it was.

Q. In what form was that loan made?

A. We issued a check.

Mr. Russo: Will you mark this check as Government's Exhibit 198 for identification, Mr. Reporter.

(The check was thereupon marked Government's Exhibit 198 for identification.)

By Mr. Russo:

Q. Now, Mr. Jurs, I show you Government Exhibit 198 for identification purporting to be a check drawn on the First National Bank of Elgin dated May 20, 1948, bearing No. 12856 payable to the order of Earl Gromer, attorney for Sam Achilli.

A. Yes.

Q. I ask you if that is the check that you have referred to?

A. That is right.

Q. And that represents the loan that was made to Sam Achilli following his application for that loan, is that right?

A. That is right.

Q. Now, directing your attention to the reverse
1452 side of Government Exhibit 198, will you state, please, whether or not it bears any endorsement?

A. It does. It bears the endorsement, "Earl Gromer, attorney for Sam Achilli."

1453 Q. Now was there any security received by the bank upon the making of that loan to Sam Achilli?

A. Just the mortgage on the building.

Q. And what did the mortgage secure?

A. I don't understand.

Q. Was there a note?

A. Yes, there was a note.

Q. And the note was secured by a mortgage, is that correct?

A. That is right.
Q. And what premises did the mortgage secure?
A. The premises at 75 South Grove Avenue.
Q. When was that loan made to Sam Achilli?
A. It was made on May 20th.
Q. Now, did First Federal Savings and Loan make a record of that transaction?
A. Yes, they did.
Mr. Russo: I will ask that this be marked Government Exhibit 199 for identification.
(The document was thereupon marked Government Exhibit 199 for identification.)
Mr. Russo: I will ask that this be marked Government Exhibit 200 for identification.
1454 (The document was thereupon marked Government Exhibit 200 for identification.)
By Mr. Russo:
Q. I show you now Government Exhibits 199 and 200 for identification, and ask you whose records they are.
A. They are the records of First Federal on the Sam Achilli loan.
Q. Are they the records that were made at or about the time the loan was made?
A. That is right.
Q. What does Government Exhibit No. 199 purport to be?
A. That is a loan in process card.
Q. And what does that indicate?
A. That indicates that the loan was set up on May 5 after it was passed by the Board, and was disbursed on May 20.
Q. And it was disbursed in the form of a check?
A. That is right.
Q. What does Government Exhibit No. 200 for identification purport to be?
A. That is the loan to Sam and Ruth Achilli.
Q. How was that loan to be repaid?
1455 A. It was to be repaid in monthly payments of $183.75.
Q. I believe that you testified that Government Exhibit No. 200 for identification is the record of payments made by Sam Achilli, is that right?
A. That is right.

Q. Now directing your attention to Government Exhibit No. 200 for identification and to June 19, 1948, did Mr. Achilli make a payment on the loan on that date?

A. That he did.

Q. In what amount?

A. $200 even.

Q. Directing your attention now to July 14, 1948, did he make a payment on that loan on that date?

A. Yes, he did.

Q. What amount?

A. $225.

Q. Directing your attention now to August 3, 1948, did he make a payment on that loan on that date?

A. Yes, he did.

Q. What amount?

A. $225.

Q. Directing your attention now to September 2, 1948, did he make a payment on that loan on that date?

A. Yes, he did.

1456 Q. What amount?

A. $225.

Q. Directing your attention now to October 4, 1948, did he make a payment on that loan on that date?

A. Yes, he did, a payment of $330.

Q. Now directing your attention to November 3, 1948, did he make a payment on that loan on that date?

A. Yes, he did, $225.

Q. Directing your attention now to December 6, 1948, did he make a payment on that loan on that date?

A. Yes, he did.

Q. What amount?

A. He made a payment of $295.

Q. What was the amount, Mr. Jurs, that was owed by Sam Achilli to the First Federal Savings and Loan Association as of December 31, 1948?

A. $11,666.58.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 197, 198, 199 and 200.

Mr. Batter: Your Honor, I object to these documents and draw the Court's attention to the fact that Exhibit 198 reads: "Earl Gromer, Attorney for Sam Achilli,"
1457 and the endorsement is: "Earl Gromer, Attorney for Sam Achilli."

There is no tracing of the funds into the defendant's hands, and no proof that Earl Gromer was the attorney for Sam Achilli.

Mr. Russo: At this time I wish to say, if your Honor please, that the connecting proof we will make. However, they are offered now as records of the First Federal Savings and Loan Association because those records show the loan was made to Sam Achilli, although the check shows disbursement to Earl Gromer as attorney for Sam Achilli.

We will show the disbursement by Mr. Gromer, by Mr. Gromer, at the proper time.

The Court: Well, I think we can withhold the admission of the exhibits until the proper time then.

Mr. Russo: Very well, your Honor.

The Court: All right.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Jurs. That will be all.

(Witness excused.)

(Recess taken.)

1458 The Court: You may proceed.

LINDO ACHILLI, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?

A. Lindo Achilli.

Q. Your first name is spelled L-i-n-d-o?

A. Yes.

Q. And your last name is spelled A-c-h-i-l-l-i?

A. Yes, sir.

Q. Where do you live, Mr. Achilli?

A. I live at 3108 Maryland Road, Rockford, Illinois.

Q. What is your business?

A. I'm a Foreman.

Q. By what company are you employed?

A. I am employed by Winnebago Cabinet Company, Rockford, Illinois.

Q. How long have you been employed there?

A. Twenty-three years.

Q. Is that in Elgin?

A. No. That's Rockford.

1459 Q. Mr. Achilli, are you related to the Defendant, Sam Achilli?

A. Yes, sir.

Q. What is the relationship between you and Sam Achilli?

A. Brother.

Q. Brothers?

A. Yes.

Q. Are you brothers by the same father?

A. Yes, sir.

Q. Is your father living, Mr. Achilli?

A. No, he isn't.

Q. Did he pass away?

A. Yes, sir.

Q. When?

A. He passed away in 1940.

Q. Now, at the time of your father's death will you state, please, whether or not he left any estate?

A. Well, as far as I know he left a policy. If there's anything else left, I don't know.

Q. Was that an insurance policy?

A. Yes, sir.

Q. What was the amount of that policy?

A. If I'm correct—I don't know if I'm correct or

1460 not—

Q. What is your best recollection?

A. It was—I don't know if it's seven or more or less, because it's a little far back for me.

Q. Your best recollection is, then, that it was approximately $700.00?

A. Well, I'm not too sure even if it's seven.

Q. Was it less than seven?

A. I couldn't say.

Q. Was it more than seven?

A. I couldn't say.

Q. But your recollection is that it was approximately $700.00?

A. Well, if you want to put it that way, I'll say—

Q. I don't want to put it that way, Mr. Achilli. I want you to put it.

A. Well, I thought at one time it would be that much—

Q. How much?
A. —but I'm not too sure.
Q. How much?
A. I really couldn't say if it was more or less, because I don't want to lie about the thing.
Q. Well, what is your best recollection?
A. Well, I really don't know how much it really
1461 was. I mean, if it was more or less.
Q. If it was more, how much more could it have been?
A. Not too much more.
Q. What do you mean by "too much more"?
A. I mean that you mentioned, what you mentioned—
Q. I am not mentioning anything, Mr. Achilli. You are mentioning.
A. Well, it's been so far back I never checked. I really don't know how much. I know there was—it wasn't written down or anything else, because he left the policy to my sister.
Q. Was it more than a thousand dollars?
A. No; I don't think so.
Q. It was not more than a thousand dollars?
A. No.
Q. I believe you just said that the beneficiary under the policy was your sister?
A. Yes.
Q. What is your sister's name?
A. Alice Santurro.
A. At the time of his death, did your father leave any debts?
A. I believe he did leave some.
Q. Were the proceeds or a part thereof used in
1462 paying your father's debts?
A. I paid some myself.
Mr. Russo: That is not the question.
By Mr. Russo:
Q. Were the proceeds of the insurance policy or a portion thereof used to pay your father's debts?
A. No. I don't think so.
Q. You don't think so?
A. No.
Q. You said that you helped to pay some of those debts?
A. Yes, sir, I did.

Q. What is your best recollection of the extent of your father's debts?

A. I couldn't tell you offhand.

Q. What is your best recollection?

A. I couldn't say.

Q. Was it a thousand dollars?

A. I really couldn't say.

Q. Was it less than a thousand dollars?

A. Maybe it was, or maybe it wasn't.

Q. Was it more than a thousand dollars?

A. I really don't know.

Q. Could it have been more than a thousand dol-
1463 lars?

A. No. I really couldn't answer that question.

Q. What is your best recollection?

A. Because it was so far back.

Q. What is your best recollection?

Mr. Batter: I think the witness has answered the question several times.

Mr. Russo: If your Honor please, this witness is related to the Defendant and apparently he is becoming hostile and evasive. I should like to proceed as by cross examination.

Mr. Batter: I do not think there has been any hostility on his part. I think he has attempted to give his best recollection and it has been pretty well exhausted.

The Court: He may answer.

The Witness: It might have been four hundred, three hundred or two hundred. I really don't know.

By Mr. Russo:

Q. Then from your testimony, I take it, if was not in excess of $500.00, is that right?

A. Maybe it wasn't.

Q. Who else besides you helped to pay off your
1464 father's debts?

A. Well, in Rockford I did pay a few debts he had.

Q. You paid off all the debts that he had in Rockford?

A. Yes, sir.

Q. Did your sister contribute to the payment of any of your father's debts?

A. I don't think so.

Q. Did your brother Sam contribute to the payment of any of your father's debts?

A. I don't remember that, if he did or not.

Q. So far as you know, did your brother Sam Achilli receive any devise or bequest from your father? That is, did he receive any money or receive any property?

A. That I don't know.

Q. You don't know about that?

A. No.

Q. You never discussed it with anyone after your father died?

A. No, sir.

Q. You never discussed the payment of your father's debts with anyone after your father died?

A. No, because I figured it was my duty.

Q. Didn't you also figure it was the duty of your
1465 brother and sister to participate in the payment of those obligations?

A. Well, you could say that, yes.

Q. Did you ask them to help you pay your father's debts?

A. No, sir.

Q. Did you or your brother or your sister—your sister, I believe you said, is Alice Santurro?

A. Yes.

Q. Did either your brother, Sam Achilli, the Defendant here, or your sister, Alice Santurro, receive any devises or bequests from any other source?

A. That I don't know.

Q. Did you?

A. No, sir.

1466 Q. Did you ever receive any devise or bequest from any other decedent or person who has died in your family?

Mr. Batter: I object to that, your Honor. What the witness may have received has nothing to do with this case.

The Court: He has already answered the question. Proceed.

By Mr. Russo:

Q. In connection with the administration of your father's estate, Mr. Achilli, was there an executor or administrator?

A. I don't think so.

Q. Directing your attention to the year 1947, did you

at that time or in that year loan any money to your brother, Sam Achilli?

A. Yes, I did.

Q. What amount?

A. In 1947 I lent him $3,000.

Q. About when in 1947 was that?

A. I can't recall.

Q. But you are certain that it was in the year, sometime during the course of the year 1947?

A. Yes, I did.

1467 Q. Did you loan him any money in 1948?

A. Yes, I did.

Q. What amount?

A. I lent him $2,000.

Q. Did your brother, Sam Achilli, ever repay that $3,000 and $2,000 loan?

A. He paid me back about two and a half years ago.

Q. The total amount?

A. Yes, sir.

Q. About two and a half years ago—that would be sometime in 1953, would it not, or would it be 1952?

A. Well, I wouldn't know.

Q. In what form did your brother pay you that money back?

A. He paid me back cash.

Q. In cash?

A. Yes.

Q. At that time did he pay you back the full amount at one time? Did he pay you back the $5,000 at one time?

A. Yes—I mean, not at one time, no, two different times.

Q. How did he pay you back?

A. $2500 at a time.

1468 Q. $2500 at a time, and both payments were made at or about or during the course of the year 1953?

A. Well, that is my—

Q. That is your best recollection?

A. That is my understanding, my remembrance, yes.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Achilli. That will be all.

(Witness excused.)

HARRY SANTURRO, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?
A. Harry Santurro.
Q. And is Santurro spelled S-a-n-t-u-r-r-o?
A. -t-u-r-r-o, right.
Q. Where do you live, Mr. Santurro?
A. 312 North Street, Elgin, Illinois.
Q. You said North Street?
1469 A. Right.
Q. By whom are you employed now?
A. (No response.)
Q. Who do you work for?
A. At the Red Lion, Red Lion Tavern.
Q. Where is that located?
A. Route 25.
Q. Is that in Elgin?
A. South of Elgin.
Q. How long have you been there, Mr. Santurro?
A. Ever since the place has been opened up.
Q. How long is that?
A. About 1947 it opened up, 1946 or '47—1947.
Q. Who employed you there?
A. I started work with Sam Achilli.
Q. Are you related in some manner to the defendant. Sam Achilli?
A. Yes, through marriage.
Q. Through marriage?
A. Right.
Q. What is the relationship? Whom did you marry?
A. I married his sister.
Q. What is his sister's name?
A. Alice.
1470 Q. When were you married?
A. 1926.

Q. Did there come a time, Mr. Santurro, and I am directing your attention now to the year 1936, when Sam Achilli came to live with you and his sister, your wife?

Mr. Batter: I object to that, your Honor. Where the

defendant lived in 1936 is unimportant, immaterial and irrelevant.

Mr. Russo: It goes to the problem of prior accumulated funds, which is a material element that the Government must prove in a net worth case, and the purpose of the examination is to establish what if any funds Mr. Achilli had at that time.

The Court: He may answer.

Mr. Batter: It is rather remote.

Mr. Russo: It isn't too remote.

You may answer, Mr. Santurro.

By Mr. Russo:

Q. Directing your attention to the year 1936, did Sam Achilli come to live with you and your wife?

A. Right.

Q. Was that in Elgin?

1471 A. Elgin.

Q. Now at the time that Sam came to live with you, was he employed? Was he working when he came to live with you?

A. No.

Q. Did you give him a job?

A. Yes.

Q. What kind of a job did you give him?

A. At the filling station.

Q. At a filling station?

A. Yes.

Q. Where was that filling station located?

A. West of Elgin.

Q. Were you the owner of that station?

A. Right.

Q. You were operating it at that time?

A. Right.

Q. How long did he work for you?

A. I don't remember.

Q. Approximately.

A. Just a short time.

Q. During the time that he worked for you, did you pay him?

A. Yes, sir.

1472 Q. How much did you pay him?

A. $15 a week.

Q. And for approximately how long did you pay him $15 a week?

A. I do not remember, sir.
Q. Approximately.
A. It was a very short time.
Q. Was it as much as a month?
A. Probably a month or so.
Q. Sir?
A. Probably a month or two.
Q. Probably a month or two?
A. Right.
Q. Now you say he worked for you about two months. What did he do after he left you?
A. He went to the Post Office Garage.
Q. He was employed by the Post Office Garage?
A. Right.
Q. Now during the time that he was working at the Post Office Garage, was he also living with you?
A. Right.
Q. During the time that he was working for the Post Office Garage and receiving his salary there, did you supply him with any money?
1473 A. No.
Q. Did you charge him anything for room and board?
A. $15 a month.
Q. $15 a month?
A. Right.
Q. How long did that arrangement continue, Mr. Santurro?
A. I just don't remember. Well, it continued until he got married.
Q. And when was it that he got married?
A. I don't remember.
Q. Approximately? What is your best recollection?
A. I don't recall.
Q. Do you know how old he was at the time he got married?
A. No, I don't.
Q. What happened after he got married? Did he leave you?
A. Natural.
Q. And he went to live with his wife some place else?
A. Right.

Q. Now, Mr. Santurro, directing your attention to the year 1942, did you have a joint venture?

A. On a property?

1474 Q. A transaction together with Sam Achilli.

A. Yes. You mean regarding that piece of property?

Q. Yes, it relates to a piece of property on Dundee Avenue.

A. Right.

Q. You had a transaction with Mr. Achilli?

A. Yes.

Q. That is right?

A. Yes.

Q. What was the nature of that transaction? Did you and he buy that property together?

A. We bought him together. We paid $7,500.

Q. How much did you pay, how much did you contribute to the payment of that $7500?

A. I paid a half and he paid a half.

Q. How was that transaction consummated? Did you pay $7500 down all at one time, or did you finance it?

A. We paid $750 down.

Q. $750 down?

A. Right.

Q. Did you finance the balance?

A. Right.

Q. And did you give a mortgage as security for the balance?

1475 A. We did—just a moment—we bought it on a contract.

Q. You bought it on a contract?

A. Right.

Q. Now where did you and Sam Achilli, the defendant, get the money with which to pay the balance of that contract?

A. That I don't remember. The loan was made out through Abelmann's office. Abelmann got the money, and I don't remember now who we got the money from.

Q. At the time the house was purchased by you and Sam, was the house rented?

A. It was all rented, yes.

Q. It was rented. What was the amount of rent you were getting a month?

A. Oh, let me see, that is quite a while back.
Q. What is your best recollection?
A. I don't remember.
Q. To refresh your recollection, did you not tell me that it was $92.50 a month?
A. That was the amount—
Q. Sir?
A. That is what we were getting. I am pretty sure that is what we were getting.
1476. Q. Is that the money which you were using to make the payments on that loan?
A. Right.
Q. Now, Mr. Santurro, did there come a time when you and the defendant, Sam Achilli, sold that property?
A. Will you say that again, please?
Q. Did there come a time when you and the defendant, Sam Achilli, sold that property?
A. We did sold it, yes.
Q. When did you sell it?
A. I don't remember when we sold it.
Q. Directing your attention to the year 1946; is that not the year in which you sold it?
A. I don't remember just what year it was sold, but it was sold.
Q. To refresh your recollection, did you not in discussing that sale with me state that it was in the year 1946?
A. I wouldn't say whether it was 1946 or 1945. I just don't remember.
1477 Q. How much did you sell the property for?
A. Fifteen thousand.
Q. How much of the $15,000 did you get?
A. Well, we each got around fifty-four, or almost—fifty-three or fifty-four hundred.
Q. Each of you got between $5,300 and $5,400?
A. Fifty-three or fifty-four or fifty-five.
Q. Fifty-three or fifty-four or—
A. Around in that neighborhood.
Q. Was the difference between $10,600 or $10,800 assumed by the person who bought the property?
A. No. It was the people who held the mortgage.
Q. Sir?
A. Is that what you mean?
Q. You testified, if I understand you correctly, that the property was sold for $15,000?

A. Right.

Q. You also testified that you and Sam Achilli, the Defendant, each got between fifty-three hundred and fifty-four hundred apiece?

A. Yes. There was still a mortgage on it.

Q. Was the balance, was the difference between what you got and what the Defendant Sam Achilli got—

A. There was—the mortgage holder got that.

1478 Q. Applied to the mortgage?

A. Yes.

Q. Now, at the time that you and the Defendant Sam Achilli owned that property, during that time, did that property suffer any sort of damage?

A. It did.

Q. What kind of damage did it suffer?

A. Well, once it was burned down completely, practically; the whole inside was gone.

Q. Did you have more than one fire?

A. We did, a lot of fires, but it went right back into the place.

Q. That was two fires altogether, as I understand it, is that correct?

A. I just don't remember. I imagine so.

Q. Is that your best recollection?

A. I don't remember.

Q. Was that property insured?

A. It was.

Q. Did you receive any money from the insurance company as a result of those fires?

A. We did.

Q. How much did you get?

A. The last check was $2,500.

1479 Q. How many checks did you get?

A. Well, that's the only one. The other one—I didn't get the other one. Whoever done the work got it.

Q. I just want to understand you clearly. You received a check for $2,500?

A. Yes, sir.

Q. And that was taken by you?

A. Well, it was made out to both of us.

Q. How much of that check did you get?

A. Twelve-fifty.

Q. You got $1,250 of the proceeds of that check?

A. Yes.

Q. Do you know whether or not there were any other checks issued by any insurance company in connection with those fires?

A. Not that one fire, no.

Q. You said there were two fires.

A. I mean, but those other fires were after or before.

Q. I see.

A. They went in a separate time, and whoever done the work got the money.

Q. All right, sir.

A. The only checks I got was the $2,500, but we had to put that back into the property again.

1480 Q. I see. Now, Mr. Santurro, did you ever loan your brother-in-law Sam Achilli, the Defendant here, any money?

A. I did.

Q. When?

A. 1947.

Q. How much did you lend him?

A. $12,000.

Q. Now, has the Defendant Sam Achilli ever paid you any or all of that money back?

A. No; no, sir.

Q. And he still owes you that as of today, $12,000?

A. Right.

Mr. Russo: Will you mark this as Government Exhibit 201 for identification, please.

(The document was thereupon marked Government's Exhibit 201 for identification.)

By Mr. Russo:

Q. Now, Mr. Santurro, I show you Government Exhibit 201 for identification purporting to be a warranty deed from Henry Santurro and Alice Santurro individually and as husband and wife to Sam Achilli

1481 and Earl H. Gromer.

A. Right.

Q. I will ask you if you have ever seen it before?

A. You showed it to me upstairs.

Q. I am showing it to you now. Have you ever seen it before?

A. I saw it upstairs in Room 450.

Q. Did you see it before then?

A. No.

Q. Directing your attention to the signature about two thirds of the way down the page, Mr. Santurro, whose signatures are they?

A. One is mine and one is my wife's.

Q. Then you have seen it before?

A. Oh. You mean at the time when I sold it?

Q. Yes.

A. Yes, sir, but I mean since then.

Q. All right, sir. The first signature is that of Henry Santurro. It that you?

A. Right.

Q. The second signature is that of Alice Santurro.

A. Right.

Q. Is that the signature of your wife?

A. Yes.

1482 Q. Were those signatures placed on Government's Exhibit 201 at or about the time the document bears, August 16th, 1948?

A. Right.

Q. Sir?

A. Right.

Q. Now, after you sold the property to Sam Achilli and Earl Gromer, did you deliver them that deed, Government Exhibit No. 201?

A. I don't remember if I signed on at Earl Gromer's office or if I signed it down to the garage.

Q. Keep your hand away from your mouth, Mr. Santurro. I am having trouble hearing you.

A. I don't remember whether I signed it—I don't remember where I signed it at.

Q. You don't remember where you signed it?

A. I signed it, but I don't remember where. If I signed it down at the garage or down at Earl Gromer's office, I don't know.

Q. What was the consideration that you received for that property?

A. $1,200.

Q. And from whom did you receive the $1,200?

A. From Highland Motor Sales.

1483 Q. From Highland Motor Sales?

A. Right.

Q. Do you mean to say that was a check made out by— a Highland Motor Sales check signed by Sam Achilli?

A. I am pretty sure, but I won't say for sure.
Q. That is your best recollection?
A. It's too far back.
Q. Now, I show you again, Mr. Santurro, Government Exhibit 201 and ask you if the property that is described on Government Exhibit 201 is the property commonly known as 630 Raymond Street?
A. That's right.
Q. Now, did you thereafter have any other transaction with Mr. Achilli, a joint venture of any sort?
A. (No answer.)
Q. I direct your attention to a piece of property at 819-821-823 Dundee Avenue.
A. That's Dundee Avenue. We already went through that one.
Q. No. The one we have been talking about is 630 Raymond.
A. Yes. That's that lot.
Q. That is the lot?
A. That's the lot.
1484 Q. Now, did you also sell the property at 819—
A. That's the one we have been through. That's the one with the three houses on it.
Q. That is the same property?
A. Right.
Q. Is 630 Raymond—
A. That was mine, I sold to them.
Q. This (indicating) was yours, and you sold this to Sam and Ruth Achilli?
A. Yes.
Q. Did you also buy a piece of property known as 819-821-823 Dundee?
A. Well, that's the same one we just went through. We bought it for seven-five and sold it for fifteen.
Q. That is the one you bought for seven-five and sold for fifteen?
A. That's the one.
Q. Directing your attention now to Government Exhibit 106 and to the reverse side thereof about half way down the page, Government Exhibit 106 purporting to be an agreement for a warranty deed—
A. Yes.

Q. (Continuing)—I will ask you whose signatures appear on there?

1485 A. Sam Achilli, Ruth, Harry Santurro and Alice Santurro.

Q. Is the last signature that of Dr. Winyard Swainson?

A. That's Swainson, the dentist. He's the one that bought it.

Q. Were the signatures of Ruth Achilli and Alice Santurro and your signatures placed on that on or about the date the document bears, the 6th day of December, 1945?

A. Well, I don't remember just when that was.

Q. Directing your attention to Government's Exhibit 110 purporting to be a certified photostatic copy of a document conveying property, the conveyance being by Harry Santurro and Alice Santurro and Sam S. Achilli and Ruth B. Achilli, his wife, to Winyard S. Swainson, and directing your attention to the signatures about two-thirds of the way down the page, whose signature is the first one?

A. This one is mine, Harry Santurro.

Q. Whose signature is that (indicating)?

A. Alice Santurro.

Q. Directing your attention to these signatures (indicating)—

A. Sam Achilli and Ruth Achilli.

1486 Q. Were those signatures placed on there on or about the date the document bears, March 15th, 1946?

A. I just don't remember. I see they're there, that's all.

Q. You signed it on or about that date, did you not?

A. We did, we did.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibit 201.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 201 for identification was thereupon received in evidence as Government's Exhibit 201.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Santurro. That will be all.

(Witness excused.)

1487 WALTER MAGNUSON, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Water Magnuson?
A. That is right.
Q. Is that spelled M-a-g-n-u-s-o-n?
A. That is correct.
Q. Where do you live?
A. 1928 South Vine Avenue, Park Ridge.
Q. That is in Illinois?
A. Yes, sir.
Q. What is your business or occupation?
A. I am secretary of the Midwest Hardware Corporation.
Q. Where is that located, please, sir?
A. 172 North Wacker Drive, Chicago.
Q. Is the Midwest Hardware Company a corporation, partnership or an individual proprietorship?
A. Corporation.
Q. You testified you are secretary of the corporation?
A. That is correct.
1488 Q. How long have you been secretary?
A. About ten years.
Q. Mr. Magnuson, are you familiar with the books and records of the Midwest Hardware Company?
A. Yes, sir.
Q. Are the books and records of that company made in the regular course of business?
A. That is correct.
Q. Is it the regular course of business for that corporation to keep such books and records?
A. Correct.
Q. And are they kept under your supervision and custody?
A. Yes, sir.
Q. Now, sir, in response to a subpoena duces tecum did you bring with you books and records of the Midwest Hardware Company relating to work that was done by it on the Red Lion job?
A. I did.
Q. Directing your attention to August 8th, 1947, did the Midwest Hardware Company enter into an agreement

to supply finished hardware to Sam Achilli in connection with the rebuilding of the Red Lion?

A. They did.

1489 Q. Now, after Midwest Hardware Company agreed to furnish hardware to Sam Achilli in the reconstruction of the Red Lion, was there a schedule of the finished hardware that you proposed to furnish prepared and supplied to Mr. Achilli?

A. There was. It was generally sent to the contractor and also to the architect.

Mr. Russo: Will you mark this as Government Exhibit 202 for identification, please?

(The booklet referred to was thereupon marked Government's Exhibit 202 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 202 for identification.

A. Yes.

Q. I ask you if that is the schedule of finished hardware that you proposed to furnish to Sam Achilli in the reconstruction of the Red Lion?

A. It is.

Q. Did you furnish to Sam Achilli in the reconstruction of the Red Lion all the hardware shown on that schedule?

1490 A. We did.

Q. Now, after Midwest Hardware had furnished to Sam Achilli the hardware for the Red Lion job, were there prepared and submitted to Sam Achilli invoices by the Midwest Hardware Company?

A. There were.

Q. To whom were those invoices submitted?

A. They were sent to the architect.

Mr. Russo: Will you mark this as Government's Exhibit 203 for identification, please.

(The document was thereupon marked Government's Exhibit 203 for identification.)

Mr. Russo: 203-A.

(The document was thereupon marked Government's Exhibit 203-A for identification.)

Mr. Russo: And 203-B.

(The document was thereupon marked Government's Exhibit 203-B for identification.)

By Mr. Russo:

Q. Now, Mr. Magnuson, I show you Government's
1491 Exhibits 203, 203-A and 203-B and ask you if those are the invoices that you have referred to?

A. They are.

1492 Q. Now I direct your attention to Government Exhibit No. 203-A for identification, purporting to be an invoice, your order number 11303-A, dated August 8, 1947, and I ask you if you supplied the material reflected thereon to Sam Achilli on the Red Lion job.

Q. Did you receive payment for that material?

A. We did.

Q. What was the amount of the payment that you received?

A. $44.95, according to this bill. There was a balance left of 35¢, which was evidently taken care of later.

Q. Now I show you Government Exhibit 230-B for identification, purporting to be an invoice, Order No. 11303-B, dated August 8, 1947.

A. Yes, sir.

Q. I will ask you if Midwest Hardware Company supplied the hardware reflected thereon to Sam Achilli in the construction of the Red Lion.

A. We did.

Q. What is the amount of that invoice?

A. $30.40.

Q. Now did you receive payment for both in-
1493 voices, Government's Exhibits 203-A and 203-B for identification?

A. We did, on April 12, 1948.

Q. In what amount?

A. $30.40 on -B and $44.95 on -A.

Q. And what is the total of both of those invoices?

A. The total of both of them would be $75.70, and the payment was $75.35.

Q. Now directing your attention to Government Exhibit No. 203 for identification, Order No. 11303, purporting to be an invoice of materials furnished by Midwest Hardware Company to Sam Achilli, care of Mort Hawkins.

A. Yes, sir.

Q. I will ask you if that reflects the material supplied as related to the schedule, Government Exhibit No. 202.

A. It does.

Q. To whom did you submit that invoice?
A. That was sent to Sam Achilli, care of Mort Hawkins.
Q. Did you receive payment on that invoice?
A. We received $1071.63 on November 12—no, November 10, 1947.
Q. What was the amount of the contract?
A. The amount of the contract was $1115.00.
1494 Q. What happened to the difference between $1115.00 and $1071.63?
A. That was carried over until April 12, at which time—
Q. That was the balance of how much?
A. $43.37.
Q. And when was that paid?
A. Well, portions of the original and the other two were sent over for collection, and they came in on the 18th of April, 1948.
Q. What was the amount that came in on April?
A. Well, the disposition isn't shown on here. The only place you would find that would be on the ledger sheets or the journal sheets.
Mr. Russo: I will ask that this be marked Government Exhibit No. 204 for identification.
(The document was thereupon marked Government Exhibit No. 204 for identification.)
Mr. Russo: And I will ask that this be marked Government Exhibit No. 205 for identification.
(The document was thereupon marked Government
1495 Exhibit 205 for identification.)
Mr. Russo: I will ask that this be marked Government Exhibit No. 206 for identification.
(The document was thereupon marked Government Exhibit 206 for identification.)
By Mr. Russo:
Q. I show you now Government Exhibit No. 204 for identification, and ask you what that purports to be.
A. That is the ledger sheet that covered the Sam Achilli account.
Q. And in whose name is that account shown?
A. Sam Achilli, care of Mortimer Hawkins.
Q. Is it further identified by name of job or anything?
A. No.
Q. Now what does that reflect with respect to payments

received by Midwest Hardware Company from Sam Achilli in connection with the material that you supplied to Sam Achilli?

A. It shows that on November 11, 1947, we received $1071.63, and on April 12, 1948, we received $88.32.
1496 On April 30, a journal entry was made covering a balance of $30.75, which is explained on the journal entry.

Q. I show you Government Exhibit 206 for identification, and ask you if that is the journal entry to which you refer. Is that the journal sheet to which you refer?

A. That is the journal sheet.

Q. Now with respect to the disposition of that $30.75, what does the journal sheet, Government Exhibit No. 206 for identification, reflect?

A. It shows that there were legal and auditing expenses of $30.75 covering the payment of the balance on the Sam Achilli account.

Q. Now I show you Government Exhibit No. 205, consisting of two pages clipped together, and ask you what that purports to be.

A. These are the cash receipt journals, sheets from the cash receipt journal. It shows that there was a payment made—let's see what the date was—on November 11, from Sam Achilli, of $1071.63. That is on folio 199 of cash receipts.

Q. Do you have any other record of cash receipts?

A. On folio 231, on April 12, 1948, it shows the
1497 two amounts of $43.37 and $44.95.

Q. Were received by Midwest Hardware Company?

A. Were received by Midwest Hardware Company.

Q. From Sam Achilli?

A. I believe those two at that time were received from him through the attorney that collected it.

Q. Directing your attention again, Mr. Magnuson, to Government Exhibit No. 206 for identification, I will ask you whether that journal entry of $30.75 indicates that the legal and auditing expenses shown on that journal sheet were withheld by the collection attorney as payment for his fee.

A. That is correct.

Q. So that you received all the amounts you have tes-

tified to with the exception of $30.75 which was charged to auditing and legal expenses?

A. That is right.

Q. Is that correct?

A. Right.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 202, 203, 203-A, 203-B, 204, and 205 which consists of two sheets clipped together, and 206.

1498 Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked, respectively, Government Exhibits 202, 203, 203-A, 203-B, 204, 205 and 206 were thereupon received in evidence as Government Exhibits 202, 203, 203-A, 203-B, 204, 205 and 206.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Magnuson. That is all.

(Witness excused.)

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1499-1500 • • •

1501 MRS. JOSEPHINE WAGNER, called as a witness herein on behalf of the Government, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mrs. Wagner, will you keep your voice up, please, so the Court and jury can hear you, too?

A. Yes.

The Reporter: How do you spell your last name, please?

The Witness: W-a-g-n-e-r.

By Mr. Russo:

Q. Where do you live, please, ma'am?

A. 227 Walnut Avenue, Elgin.

Q. Mrs. Wagner, do you know the Defendant, Sam Achilli?

A. Yes, sir.

Q. Do you see him in the Court Room?

A. Yes, sir.

Q. Will you point him out, please?

A. Right over there (indicating).
Q. Are you indicating the only man sitting at the far end of defense counsel table?
1502 A. Sir?
Q. At the far end of defense counsel table?
A. Yes, sir.
Q. Directing your attention to on or about November 18, 1946, did you have a transaction with the Defendant, Sam Achilli?
A. Yes.
Q. What was the nature of that transaction, please, ma'am?
A. We bought a home at 167 South Liberty, Elgin.
Q. You say "we". Whom do you mean by "we"?
A. My husband and I.
Q. Where is Mr. Wagner now?
A. Deceased.
Q. Deceased. From whom did you buy that property at 167 South Liberty in Elgin?
A. From Mr. Sam Achilli and his wife Ruth.
Q. At the time that you were negotiating this transaction did you sign a contract?
A. Yes.
Mr. Russo: Will you mark this as Government Exhibit 207 for identification, please?
(The document was thereupon marked Govern-
1503 ment's Exhibit 207 for identification.)
By Mr. Russo:
Q. I show you now, Mrs. Wagner, Government Exhibit 207 for identification.
A. Yes.
Q. I ask you to examine it and then state, please, whether or not that is the agreement to which you have referred?
A. That is the agreement.
Q. Directing your attention to the signatures on the reverse side thereof and to the two signatures on the bottom, there appear to be four there.
A. Yes.
Q. Whose signature is the third signature that appears to be there?
A. My husband's.
Q. Whose is the fourth signature that appears to be there?

A. My own.

Q. Were your and your husband's signature placed on Government's Exhibit 207 on or about the date the document bears, November 18th, 1946?

A. Yes.

1504 Q. Whose signature does the first signature appearing thereon purport to be?

A. Sam Achilli.

Q. Whose does the second purport to be?

A. His wife Ruth.

Q. At the time of this transaction, Mrs. Wagner, did you make any down payment?

A. $1,350.

Q. Did you make that down payment of $1,350 on or about the 18th day of November, 1946?

A. Yes.

Q. What was the total consideration for that property at 167 South Liberty?

A. $13,500.

Q. About when did you pay the remainder of that consideration?

A. At the closing of the deal, which was about thirty days later.

Q. And at that time what if anything did you and your husband do?

A. (No answer.)

Q. Did you pay the remainder of the consideration?

A. Yes, we did.

Q. At that time did you receive a deed—

1505 A. Yes.

Q. —from Mr. Achilli?

A. Yes, we did.

Q. I will ask you if the property described in Government Exhibit 207 is the property that you have identified as 167 South Liberty Street?

A. Yes.

Q. Now, do you recall where the down payment was paid?

A. That was paid to the attorney that took care of it.

Q. What is the name of the attorney?

A. Robert Kimmler.

Q. Who handled the transaction, if you know, for the Defendant Sam Achilli?

A. Earl Gromer.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government's Exhibit 207.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 207 for identification, was thereupon received in evidence as Government's Exhibit 207.)

1506 By Mr. Russo:

Q. Mrs. Wagner, I am not clear in my own mind whether I asked you what the date was on which you paid the balance of the consideration. Could you state that, please?

A. At the closing of the deal. We paid the balance when we got the deed, which was about 30 days later, I think.

Q. Would that be in 1946 or 1947?

A. That would be in 1946.

Q. In 1946?

A. Yes.

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, ma'am. That will do.

(Witness excused.)

1507 WILLIAM H. ABELMANN, called as a witness herein on behalf of the Government, having been first duly sworn was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name, sir, is William H. Abelmann?

A. Yes, sir; that is correct.

Q. Is that spelled A-b-e-l-m-a-n?

A. -m-a-n-n.

Q. How old are you, Mr. Abelmann?

A. Seventy-two.

Q. Where do you live, sir?

A. 1015 Douglas Avenue, Elgin, Illinois.

Q. What is your business?

A. Real estate and insurance.

Q. Do you have an office?

A. 515 Professional Building.

Q. Is that in Elgin, too?

A. Pardon?
Q. Is that in Elgin?
A. That is in Elgin, yes, sir.
Q. How long have you been in the business?
A. Myself, since 1913.
1508 Q. Mr. Abelmann, do you know the Defendant, Sam Achilli?
A. Yes, sir.
Q. Will you point him out, please, sir?
A. The gentleman at the end of the table.
Q. The second man sitting at the far end of defense counsel table?
A. Yes, sir.
Q. Did you ever have any transaction with or for or on behalf of Sam Achilli?
A. I did on several occasions, yes, sir.
Q. What did those transactions involve?
A. Sales of real estate.
Q. Now, in the conduct of your business, Mr. Abelmann, did you keep books and records?
A. I did, yes, sir.
Q. Were those books and records kept in the regular course of business?
A. Yes, sir.
Q. Was it the regular course of busines for you to keep such records?
A. Yes, sir.
1509 Q. And are those records kept under your custody and supervision?
A. Yes, sir.
Q. Now, Mr. Abelmann, directing your attention to April 15, 1947, did you have a transaction with Sam Achilli relating to the purchase by him of a piece of property from Dr. Pistor?
A. Yes, sir.
Q. And what is the address of that property?
A. 75 South Grove Avenue.
Mr. Russo: I will ask that this be marked Government Exhibit 208 for identification.
(The document was thereupon marked Government Exhibit 208 for identification.)
By Mr. Russo:
Q. I show you Government Exhibit No. 208 for identification, which purports to be a closing statement of

Pistor-Achilli deal, and I will ask you if that is one of the records that you keep in your business.

A. This record here is not my own record, but this is the record of Mr. Brittain. But my statement shows this record, my ledger account, of course.

Q. All right, sir.

1510 Q. Now will you tell the Court and Jury, Mr. Abelmann, what that transaction involved?

A. That transaction involved a piece of property at 75 South Grove Avenue, Elgin, Illinois, for $20,000.

Q. Who was the purchaser?

A. The purchaser was Mr. Sam Achilli.

Mr. Russo: Mark this Government Exhibit 209 for identification.

(The document was thereupon marked Government Exhibit 209 for identification.)

Mr. Russo: Mark this Government Exhibit 210 for identification.

(The document was thereupon marked Government Exhibit 210 for identification.)

Mr. Russo: And mark this Government Exhibit No. 211 for identification.

(The document was thereupon marked Government Exhibit 211 for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit 209 for 1511 identification, and ask you if that is one of your records?

A. Yes, sir.

Q. Directing your attention to Government Exhibit No. 209 for identification and to that portion that is entitled, "Dr. Pistor, Grove Avenue."

A. That refers to the 75—

Q. What does that record reflect, Mr. Abelmann?

A. The statement of Mr. Achilli's purchase.

Q. Does it reflect the money that was received by you?

A. That is right, yes, sir.

Q. From whom did you receive that money?

A. From Mr. Sam Achilli.

Q. How much money did you receive from him?

A. $10,700.

Q. Is there a record on Government Exhibit 209 for

identification reflecting the disbursement that was made on that transaction?

A. Yes, sir. It shows the balance due Mr. Pistor of $10,700.

Q. When was it, directing your attention to March the 26th, did you receive any money from Sam Achilli on that date?

1512 A. Yes, sir, $700.

Q. Will you look again and see if you received any more?

A. And $4900.

Q. And that is a total of how much?

A. That would be $5600.

Q. Did you thereafter receive any more money from Mr. Achilli?

A. Yes, on August 1, $100.

Q. And did you—

A. And made a loan on April 17 of $5,000.

Q. Where did you receive the $5600 concerning which you testified? Where did you get that money?

A. At his residence.

Q. He gave it to you at his home?

A. That is right.

Q. I believe you testified that on August 1st, 1947, you received annother $100 from Mr. Achilli, is that correct?

A. That is right.

Q. Directing your attention to April 17, 1947, did you have another transaction with Mr. Achilli?

A. Yes, I made him a loan of $5,000.

Q. Directing your attention now to April 17,
1513 1947, did you make any disbursements for Mr. Achilli?

A. I did. I gave a check to Mr. Brittain for $9,700 in behalf of Dr. Pistor.

Q. And who is Mr. Brittain?

A. He is an attorney who represented Dr. Pistor.

Q. Now I show you Government Exhibit 210 for identification, and ask you if that is one of your records?

A. That is my record, yes, sir. That is the record of the loan made and the amount paid.

Q. That is the record of the $5,000 loan?

A. $5,000, yes, sir.

Q. And on what date was that loan made?
A. On July 1st, on or about July 1st.
Q. That is a loan, as I understand it, that you made to Mr. Achilli in connection with his purchase of the property from Dr. Pistor?
A. Yes, sir.
Q. For 75 South Grove Avenue?
A. That is correct, yes, sir.
Q. And what is the date of that loan?
A. It is—I can't say exactly what the date is—it was on April 17 I made the loan, $5,000.
Q. April 17, 1947?
A. Yes, sir.
1514 Q. Was that loan repaid to you by Mr. Achilli?
A. Yes, it was repaid to me.
Q. When was it repaid, Mr. Abelmann?
A. July 1, 1947.
Q. Now, sir, I show you Government Exhibit 211, and ask you if that is one of your records.
A. It is, yes, sir.
Q. It purports to be two ledger sheets clipped together.
A. That is right, yes, sir.
Q. What does that record purport to be, Mr. Abelmann?
A. That shows the returns on the property which are accredited to Sam Achilli from the tenants in the building, some cash items and insurance credit.
Q. Does it also reflect some money due to Mrs. Timm?
A. Mrs. Timm, yes, the party that held the loan.
Q. Was that an indebtedness of Sam Achilli?
A. That is right, yes, sir.
Q. What was the original amount of the loan to Sam Achilli?
A. $9300, that he assumed on the original loan, on the purchase.
Q. What were the circumstances under which
1515 Sam Achilli acquired that loan?
A. At the time it was closed with Dr. Pistor, there was a balance of $9300 that he assumed.
Q. At the time he acquired the property from Dr. Pistor, he acquired an obligation of $9300, is that right?
A. That is right, yes, sir.
Q. Now was that $9300 a part of the consideration

of the purchase price of the property commonly known as 75 South Grove?

A. That is right, yes, sir.

Q. Mr. Abelmann, what was the total amount of the payments made, total amount of the principal payments made on behalf of Sam Achilli during the year 1947?

A. $800.

Q. What was the balance due on the loan at December 31, 1947?

A. $8500.

Q. Was that balance of $8500 paid during the year 1948?

A. Yes, sir.

Q. Was there any balance due on December 31, 1948?

A. No, sir.

Q. It was paid in full at that time?

1516 A. All paid, yes.

Q. When was the final payment made?

A. Let me see—it was made on May 21, 1948. I wouldn't swear my date would be exact, but within a day or two, probably.

Mr. Russo: I will ask that this be marked Government Exhibit 212 for identification.

(The document was thereupon marked Government Exhibit 212 for identification.)

Mr. Russo: I will ask that this be marked Government Exhibit No. 213 for identification.

(The document was thereupon marked Government Exhibit 213 for identification.)

By Mr. Russo:

Q. Now I direct your attention to Government Exhibit 212 for identification, which purports to be a duplicate original of a sales contract, and I ask you if you have ever seen that before.

A. I have, yes, sir.

Q. Is that a true duplicate copy of the original?

A. That is correct, yes, sir.

1517 Q. Whose handwriting appears thereon?

A. Mr. Daryl Day, my salesman at the time.

Q. Was this prepared in the usual and ordinary course of business?

A. Yes.

Q. What purpose was this prepared for, that is, Government Exhibit 212 for identification?

A. Purchase of a piece of property, a lot in Oak Hill Subdivision.

Q. Did it also serve as a contract and receipt?

A. A contract and receipt, yes, sir.

Q. For what property does it purport to be a receipt?

A. Oak Hill Subdivision lot.

Q. And what transaction does it reflect?

A. It reflects that he made a payment at the time of $210 on the purchase price.

Q. To whom did he make that payment?

A. He made it to Mr. Day or to myself.

Q. Now what property does that relate to?

A. That relates to the property in the Oak Hill Subdivision purchased of Mr. Stewart.

Q. It was purchased by Mr. Stewart?

A. Purchased of, from Mr. Stewart.

Q. Mr. Achilli bought that from Mr. Stewart?

1518 A. That is right.

Q. What was the total purchase price?

A. $2,100.

Q. And what was the date of that purchase?

A. December 9, 1948.

Q. Is that about the same date on which you received the $210?

A. Pardon? I didn't understand.

Q. Is that about the same date on which you received the $210?

A. Yes.

Q. December 9, 1947.

A. Yes, sir.

Q. Now I show you Government Exhibit No. 213 for identification, and I ask you if this is one of your records.

A. Yes, sir.

Q. Directing your attention to the middle portion of Government Exhibit No. 213 for identification, entitled, "John B. Stewart."

A. That reflects the credit given him, the $2100, Mr. Stewart, and the expenses for abstract, revenue, commission, and a check given back to him for $1983.25 balance.

1519 Q. Does that reflect the transaction between Sam Achilli and John Stewart?

A. Correct, yes, sir.

Q. And when was final payment received in that transaction?

A. February 16.

Q. What was the amount that you received from Mr. Stewart?

A. $1890.

Mr. Russo: I will ask that this be marked Government Exhibit No. 214 for identification.

(The document was thereupon marked Government Exhibit 214 for identification.)

Mr. Russo: I will ask that this be marked Government Exhibit No. 215 for identification.

(The document was thereupon marked Government Exhibit 215 for identification.)

Mr. Russo: I will ask that this document be marked Government Exhibit No. 216 for identification.

1520 (The document was thereupon marked Government Exhibit 216 for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit No. 214 for identification, and directing your attention to November 29, 1945.

A. Yes, sir.

Q. Did you have a transaction with Sam Achilli on that date?

A. Yes, sir.

Q. Directing your attention to Government Exhibit 214 for identification, what does that purport to be, Mr. Abelmann?

A. It is a contract of purchase between Dr. Swainson and Sam Achilli and Ruth Achilli.

Q. For what property?

A. Property up on Dundee Avenue, Nos. 819, 821 and 823 Dundee Avenue, Elgin, Illinois.

Q. Does it also purport to be a receipt of money?

A. Receipt for their earnest money payment of $1500.

Q. Now directing your attention to the signatures in the lower right-hand corner of Government Exhibit
1521 No. 214, whose signature is that?

A. That is my signature.

Q. Directing your attention to the signatures in the lower left-hand corner, whose signatures are they?

A. Mr. Sam Achilli and Ruth Achilli.

Q. And was your signature and were Sam Achilli's and Ruth Achilli's signatures placed on there on or about the date the document bears, November 29, 1945?

A. Yes.

Q. What was the total consideration for that property?

A. $15,000.

Q. And I believe you have already testified that you received $1500 as down payment from Dr. Swainson, is that right?

A. That is correct, yes, sir.

Q. Now for whom did you receive that money? For whom did you receive it?

A. For Sam Achilli.

Q. I show you Government Exhibit No. 215 for identification, and ask you if that is one of your records.

A. This is my record, yes, sir.

Q. Now directing your attention to the center
1522 portion of Government Exhibit No. 215 for identification, which is entitled Henry Santurro and Sam Achilli, did you have a transaction with him on or about April 1, 1946?

A. I did, yes, sir.

1523 Q. What was the transaction, Mr. Abelmann?

A. That's the closing transaction on that property on Dundee Avenue which is referred to before.

Q. And what is reflected on there?

A. It shows the payment received from Mr. Paulson, who was the attorney for Swainson, for $14,777.48. Do you want the distribution on that?

Q. Yes, sir. Now, on the same date what if anything happened?

A. I gave Mr. Sam Achilli a check for $5,396.98, and his brother-in-law, Mr. Santurro, $5,396.98, and paid off the balance of loan, $3,233.52, and my commission was $750.00, making a total of $14,777.48.

Q. Who is J. C. Jensen?

A. J. C. Jensen is the man that furnished the loan.

Q. Is he the person that held the mortgage?

A. The mortgage—I don't know whether he held the mortgage. It may have been on a trust deed for him. I couldn't say.

Q. But he held it at the time Sam Achilli and Santurro owned the property?

A. He held the notes, yes, sir.

Q. Now, I show you Government's Exhibit No. 216, Mr. Abelmann.

1524 A. Yes.

Q. I will ask you if that is one of your records?

A. Yes, sir. It is a record of the payments made on principal and interest.

Q. To whom were those payments made?

A. The payments were made to Mr. Jensen.

Q. He was the holder of the mortgage—

A. Yes, sir.

Q. (Continuing) —on the property concerning which you have just testified at 819 to 823 Dundee Avenue, is that right?

A. Yes, sir.

Q. Is that a record of the payments made by Mr. Achilli and Mr. Santurro on that mortgage?

A. That is correct, yes, sir.

Q What was the original amount of that mortgage?

A. $5,500.

Q. When was that loan made?

A. That was made some time in—I couldn't say the exact month, 1942. Around June, May or June; I don't recall.

Q. What was the balance due on it on December 31st, 1945?

A. $2,000 had been paid—let's see. A balance of

1525 $3,500.

Q. When was that balance paid off?

A. That balance was paid off in either March or April.

Q. What year?

A. April 1st, $3,223.46.

Q. April of what year, Mr. Abelmann?

A. 1946, but there has interest been added to it of $10.06 so the total was $3,233.52.

Q. Is that the amount of the final payment?

A. That is correct, yes.

Q. $3,233.52?

A. Yes, sir.

Q. Is that the same amount you just testified concerning the disbursement of the proceeds of the sale to Dr. Swainson?

A. Yes, sir.

Q. Now, directing your attention to Government Exhibit 180 which purports to be a real estate contract of W. H. Abelmann Company, I will ask you if this is one of your records?

A. Yes, sir.

Q. Now, I direct your attention to the signature in the lower left-hand corner.

1526 A. Yes.

Q. Whose signatures are those, if you know?

A. Clarence L. Gubbins and Caroline C. Gubbins, husband and wife.

Q. I direct your attention to the signature in the lower right-hand corner.

A. Yes.

Q. Whose signature is that?

A. Mr. Sam Achilli's.

Q. Directing your attention to July 7th, 1944, what does that transaction relate to?

A. The purchase of the property from Mr. Gubbins, his homestead, and received payment of $1,260.00.

Q. From whom did you receive that money?

A. Received it from Mr. Gubbins.

Q. For whom?

A. From whom, did you say?

Q. From whom did you get that money?

A. Mr. Sam Achilli. This deal wasn't closed by me, though. That was closed at the attorney's office.

Q. That is right, but you received $1,260?

A. That is right.

Q. From Mr. Achilli?

A. Yes.

1527 Q. Is that right?

A. That's right, yes, sir.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government Exhibits 180, 208, 209, 210, 211, which consists of two sheets clipped together, 212, 213, 214, 215 and 216.

(Mr. Russo handed the exhibits to Mr. Batter.)

Mr. Batter: No objections.

The Court: They may be received.

(The documents previously marked Government's Exhibits 180, 208, 209, 210, 211, 212, 213, 214, 215 and 216 for identification were thereupon received in evidence as Government's Exhibits 180, 208, 209, 210, 211, 212, 213, 214, 215 and 216.)

Mr. Russo: Your witness.
Mr. Batter: No cross.
Mr. Russo: Thank you, Mr. Abelmann. That will be all.

(Witness excused.)

1528 MARVIN E. AFFELD, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?
A. Marvin E. Affeld.
Q. Mr. Affeld, will you kindly keep your voice up so that the Court and jury may hear you?
A. Yes.
The Reporter: Will you spell your last name, please?
The Witness: A-f-f-e-l-d.
By Mr. Russo:
Q. What is your address, please?
A. 453 Wilcox, Elgin, Illinois.
Q. How long have you lived there?
A. That address, about six and a half years.
Q. What is your business?
A. Producer of crude oil.
Q. What is the name of the company?
A. Affeld Oil Company.
Q. Do you have an office?
1529 A. 10 South La Salle Street, Chicago.
Q. How long have you been in that business?
A. Twelve years.
Q. Any other business interests?
A. I have some race horses.
Q. How long have you had those?
A. Since last August.
Q. Mr. Affeld, do you know the Defendant Sam Achilli?
A. I do.
Q. Will you point him out, please?
A. The gentleman on the end.
Q. At the far end of defense counsel table?
A. Right.

Q. How long have you known him?
A. Ten or fifteen years.
Q. Have you ever had any transactions with the Defendant, Sam Achilli?
A. Yes.
Q. Directing your attention to November, 1948, did you have a transaction with him at or about that time?
A. Yes, I did.
Q. What was the nature of that transaction?
A. I believe at that time, in 1948, he took an interest in an oil deal down in Kentucky, bought a one-
1530 thirty-second interest in an oil well.
Q. Let me refresh your recollection. That is not the transaction I am referring to.
Did you borrow any money from Sam Achilli at or about that time?
A. Yes, I did—not from Sam Achilli; I wouldn't say I borrowed money from Sam Achilli.
Q. All right, sir. Just tell us what the transaction was with respect to borrowing money at or about that time.
A. Well, at that time I was building my home and I needed $7,500 to complete it so I talked to Mr. Achilli about it. He said he would talk to a man by the name of Mr. Gromer and I should stop down and see Mr. Gromer the next morning. I did, and Mr. Gromer arranged for the money.
Q. How much was that loan that you arranged for at that time?
A. $7,500.
Q. At the time that you arranged that loan did you give any security?
A. A trust deed.
Q. And did you also give a note—
A. Yes.
1531 Q. —securing the trust deed?
A. I did.
Mr. Russo: Will you mark this Government Exhibit 217 for identification, please?
(The document was thereupon marked Government's Exhibit 217 for identification.)
Mr. Russo: Will you mark this Government Exhibit 218 for identification please.

(The document was thereupon marked Government's Exhibit 218 for identification.)

By Mr. Russo:

Q. Mr. Affeld, I show you Government Exhibit 217 for identification purporting to be a trust deed dated November 15th, 1948, in the amount of $8,250.

A. Yes.

Q. I direct your attention to the signatures in the lower right-hand corner thereof.

A. Yes.

Q. I will ask you whose signatures they are?

A. My wife's and mine.

1532 Q. Were your signatures affixed to Government Exhibit 217 on or about the date the document bears?

A. They were.

Q. Now, I show you Government Exhibit 218 for identification which purports to be a trust deed from Marvin E. Affeld and Mary T. Affeld to George W. Glos on property described as Lot 1 in Block 9 in Grote & Waldron's Fourth Addition to Elgin, Kane County, Illinois, and ask you if that is the trust deed you gave to secure that indebtedness?

A. Yes.

Q. What was the amount of money that you received upon the execution of that note?

A. I did not receive the money. They agreed I should finish my home and turn the bills into them in the amount of $7,500.

Q. Where was that money placed, if you know?

A. That I don't know, because Mr. Gromer wrote the check. I don't know.

1533 Q. Was it credited to your account in Mr. Gromer's office?

A. Yes.

Q. And as expenses were made and bills were rendered to you, what did you do with those bills?

A. I turned them over to Mr. Gromer and he wrote the checks.

Q. And paid the bills?

A. Right.

Q. Now referring to Government Exhibit No. 217 for identification, will you state, please, whether or not that obligation was outstanding at December 31, 1948?

A. When was it paid? Yes, it was.

Q. And when was that note paid?
A. 11-28-1949.
Q. And at the time that you made payment, did you receive a release of the trust deed?
A. Yes, I did.
Mr. Russo: I will ask that this be marked Government Exhibit No. 219 for identification.
(The document was thereupon marked Government Exhibit 219 for identification.)
1534 By Mr. Russo:
Q. Now I show you Government Exhibit No. 219 for identification, purporting to be a release of deed, and ask you if that is the release to which you have referred.
A. Yes, it is.
Q. What date does it bear?
A. The 28th of November, 1949.
Q. Did you receive that deed when you extinguished your obligation on that account?
A. I did.
Q. Now did you during the year 1948 receive any money from Mr. Achilli with respect to investments made by him?
A. Yes. I received $500 on a well that we drilled in Hopkins County, Kentucky, and also $1,000 on a well in Richland County, Illinois.
Q. Directing your attention to May 11, 1948, is that the date or about the date on which you received the money that you have just testified about?
A. To the best of my recollection.
Q. That is your best recollection?
A. On or about that date.
Q. On or about that time you received $500 and
1535 $1,000 from Mr. Achilli?
A. Yes, but the $1,000 was turned over to Mr. Harry Evans. I did not receive it.
Q. But you received it from Mr. Achilli?
A. Yes.
Q. And turned it over to Mr. Harry Evans?
A. Who drilled the well, that is correct.
Mr. Russo: May it please the Court, at this time we offer in evidence Government Exhibits 217, 218 and 219.
Mr. Batter: Your Honor, these three exhibits pertain

to the $7500 loan the witness testified to. I object to their admission into evidence on the ground that there is no connection shown between this loan and the defendant, and I ask that the witness' testimony with respect to such loan be stricken from the record.

The Court: Well, I will withhold the ruling on the admission, gentlemen.

Mr. Russo: We will connect it up further, if your Honor please.

Your witness.

Mr. Batter: No cross.

1536 Mr. Russo: Thank you, Mr. Affeld. That will be all.

(Witness excused.)

HOWARD H. BOHLIN, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, sir?
A. Howard H. Bohlin.
Q. And Bohlin is spelled B-o-h-l-i-n?
A. That is right
Q. Where do you live, Mr. Bohlin?
A. San Jose, California, 441 Artist Avenue.
Q. What is your business or occupation?
A. Telephone lineman.
Q. By whom are you employed?
1537 A. Pacific Tel. & Tel.
Q. How long have you been employed by Pacific Tel & Tel.?
A. Three years and two months out there.
Q. Prior to your employment out in San Jose with Pacific Telephone & Telegraph, where did you live?
A. 678 Slade Avenue, Elgin.
Q. Mr. Bohlin, do you know Ruth Achilli?
A. My sister.
Q. Do you know the defendant, Sam Achilli?
A. He is my brother-in-law.
Q. Is your mother living?
A. No, sir.
Q. When did she pass away, Mr. Bohlin?

A. Oh; 1943.

Q. At the time that she passed away, did she leave any estate?

A. Well, we had a house. My sister took care of all that.

Q. Where were you when she passed away?

A. I can't remember now—Honolulu or Alaska, one or the other.

Q. You were overseas?

A. Overseas.

1538 Q. Were you in some branch of the Service?

A. Navy.

Q. And when did you go into the Navy?

A. March 19, 1940.

Q. Were you discharged from the Navy?

A. Yes.

Q. When?

A. 1946, March 19.

Q. Now during the time that you were overseas, in connection with the administration of the estate of your mother—what was your mother's name, by the way?

A. Edith.

Q. In connection with the administration of the estate of your mother, Edith Bohlin, did you sign any power of attorney for your sister, Ruth Achilli?

A. Yes.

Q. And after you signed that power of attorney, what if anything did you do with it?

A. If I remember right, I mailed it back to her.

Q. Now do you recall what your share of the estate of Edith Bohlin was?

A. I can't remember any more.

Q. What is your best recollection?

A. Around $3,000. I can't say right offhand.

1539 Q. That is your approximate best recollection?

A. That's all I know.

Q. Did you have any conversation with your sister about what to do with your share of the estate?

A. Well, in a letter I wrote and told her to just take care of it the best she could; that I didn't need any money, but just to make sure it was in the bank when I come out of the Navy.

Q. When you came out of the Navy did you find that the money was in the bank?

A. It was there.

Q. It was there?
A. Yes.
Q. And you received it?
A. Yes,—well, it was there.
Q. Well, did you get it?
A. I have used it, yes.
Q. You have gotten the money out and you have used it?
A. Yes.
Q. About when was it that you received that money, Mr. Bohlin?
A. When I took it out of the bank?
Q. Yes. When was it that you found it was,
1540 deposited to your credit in the bank?
A. Well, when I got out of the Navy about in March.
Q. March of what year, please, sir?
A. 1946.
Q. You found it was deposited to your account at the bank and then you proceeded to use the funds?
A. Yes.
Q. Is that correct?
A. Yes.
Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Bohlin, do you know how long that money had been deposited to your account?
A. How long it was in the bank?
Q. Prior to March, 1946.
A. I don't know how long it was put in there, no.
Mr. Batter: That is all.
Mr. Russo: No further questions, Mr. Bohlin. Thank you.
(Witness excused.)

1541-1542 •••

1543 EARL W. MUNTZ, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?
A. Earl W. Muntz.

Q. Is Muntz spelled M-u-n-t-z?
A. That is correct, sir.
Q. Where do you live, Mr. Muntz?
A. 1620 Pine Tree Lane, Winnetka.
Q. What is your business?
A. The manufacturing of television sets.
Q. How long have you been engaged in that business?
A. Since 1948.
Q. Prior to 1948 what was your business?
A. New and used automobiles.
Q. And where were you doing business, sir?
A. In Los Angeles, California.
Q. Were you engaged in any business prior to the time you were engaged in the automobile business in Los Angeles?
A. Yes, sir; from 1941 back, the new and used
1544 car business in Elgin, Illinois.
Q. Under what name, Mr. Muntz, were you doing business in Elgin, Illinois?
A. The Elgin Auto Mart and Muntz Finance Company.
Q. And for what period were you doing business as Muntz Finance Company?
A. 1938 through 1941.
Q. Was the Muntz Finance Company an individual proprietorship, partnership or corporation?
A. An individual proprietorship.
Q. Mr. Muntz, do you know the Defendant, Sam Achilli?
A. Yes, I do.
Q. Do you see him in the Court Room?
A. Yes, I do.
Q. Will you point him out, please?
A. That is Mr. Achilli (indicating).
Q. The man sitting at the far end of the counsel table?
A. Yes.
Q. Now, sir, directing your attention to the year 1939, did you in connection with the operation of the Muntz Finance Company have any transactions with the Defendant, Sam Achilli?
A. Yes.
1545 Q. What was the nature of that transaction?

A. During 1939 Muntz Finance Company handled wholesale and retail business for the Highland Motor Sales.

Q. Will you explain for the Court and jury, please, Mr. Muntz, what is the difference between retail and wholesale finance paper?

A. Well, wholesale finance is known in the trade as floor planning used or new automobiles, and retail is known as the purchase of retail conditional sales contracts when a car is sold to an individual.

Q. Do you know whether at or about that time Sam Achilli was engaged in the automobile business?

A. Yes, he was.

Q. In what capacity was he engaged in the business? As an individual proprietorship, partnership or corporation?

A. I believe it was an individualship. Mr. Achilli was operating as the Highland Motor Sales.

Q. Do you know who comprised the partnership of Highland Motor Sales at that time?

A. During the time that Muntz Finance Company was doing business with Highland Motor Sales it was an individual proprietorship.

Q. Prior to the time that it was an individual
1546 proprietorship, do you know whether or not Sam Achilli was engaged in business with anyone else as a partner?

A. Yes. Prior to the time Muntz Finance Company did business with Mr. Achilli it was operated as a partnership.

Q. Who comprised the partnership?

A. Harold Money and Sam Achilli.

Q. Do you know whether or not that partnership was dissolved, the partnership between Harold Money and Sam Achilli was dissolved, before you took on the account of Sam Achilli doing business as Highland Motor Sales?

A. I believe that the partnership was dissolved about the time that Muntz Finance Company started doing business with Sam Achilli.

Q. Will you relate for the Court and jury, Mr. Muntz, what the circumstances were that brought about the arrangement for the purchase by you on behalf of Muntz Finance Company of the retail and wholesale paper of the Defendant, Sam Achilli?

A. At the time the partnership was dissolved Muntz Finance Company took over the account of Highland Motor Sales and continued to do business with Highland Motor Sales after the partnership was dissolved.

1547 Q. Did you have any conversation with the Defendant, Sam Achilli, as to why the partnership was dissolved and why he wanted to do business with Muntz Finance Company?

A. No. If I did, it would be going back sixteen years, and I would not—

Q. Did Sam Achilli have an inventory at that time?

A. Yes, he did.

Q. And was the financing that you made for him or did for him on that inventory?

A. We financed, or floor planned, I should say, several used cars at the time that he bought out the partner that was in business with him.

Q. Did Sam tell you why he wanted you to finance him, the purpose for which he wanted you to finance him?

A. No. I don't believe he did.

Q. To refresh your recollection, Mr. Muntz, did he tell you that he wanted you to finance him so that he could buy Harold Money out?

A. Yes. He told me that he was buying Mr. Money out. That is correct.

Q. Now, what is your best recollection of the extent to which you financed him for the purpose of buying out Harold Money?

1548 A. I would judge that we gave Highland Motor Sales a line of credit, I would say between $1,500 and $3,000.

Q. And that is all you gave him?

A. Yes.

Q. A line of credit extending from $1,500 to $3,000?

A. To the best of my recollection, that is correct.

Q. Do you recall at this time whether or not you gave him any cash or a check for the purpose of buying Harold Money out?

A. Well, I am sure whatever was transacted was through a check.

Q. Yes. At that time did you finance some cars for him and turn over to him a check?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. Do you have any recollection as to the amount of the check? Approximate recollection.

Mr. Batter: I object, your Honor. I think the check is the best evidence.

The Court: Objection sustained.

1549 Mr. Russo: If your Honor please, of course, that is the best evidence, but if the best evidence is not available and the witness has a recollection, I submit that he can testify, if he knows.

The Court: There is no showing that it isn't available.

By Mr. Russo:

Q. Did the Muntz Finance Company keep books and records in the conduct of its business?

A. Yes, sir.

Q. Were those books and records kept in the regular course of business?

A. Yes, sir.

Q. Was it the regular course of business for Muntz Finance Company to keep those books and records?

A. Yes, sir.

Q. Under whose custody and control were those books kept?

A. (No response.)

Q. You were the owner of that company?

A. That is correct.

Q. Were they kept under your supervision and custody?

A. Yes, sir.

1550 Q. Are the books and records of Muntz Finance Company in existence today?

A. No, sir.

Q. What happened to them, if you know?

A. Well, I imagine that when the time was up for the length of time that they should have been kept, they were destroyed.

Q. Would you have any checks of that company in your possession today.

A. No, sir.

Q. Now you testified that you had a transaction in which you delivered a check to Mr. Achilli.

A. Yes, sir.

Q. Is that check available?

A. No, sir.

Q. Now, sir, do you have any recollection of the approximate amount of that check?

A. As I stated before, I think that it was between $1500 and $3,000, as close as I can remember the transaction.

Q. As I understood your testimony, Mr. Muntz, that was the extent of the credit?

A. That is correct.

Q. That you extended to him.

1551 A. Yes.

Q. I also understood you to say that you financed some cars for him at that time for which you gave him a check.

A. That would be the same thing, sir.

Q. The same thing?

A. Yes, sir.

Mr. Russo: Very well, sir.

Your witness:

Mr. Batter: No cross.

Mr. Russo: Thank you, sir.

(Witness excused.)

1552 ROLAND JACK HINTT, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please?

A. Roland Jack Hintt.

Q. And is your last name spelled H-i-n-t-t?

A. Right.

Q. Where do you live, Mr. Hintt?

A. Elgin, Illinois, 112 South Alfred Street.

Q. What is your business or occupation?

A. The owner of the A. J. Ironside Heating Company.

Q. Where is that located, sir?

A. In Elgin.

Q. What is your capacity or connection with that company?

A. My wife and I are owners of the business.

Q. How long generally have you been engaged in that business?

A. Myself, about ten years.

Q. Now in the conduct of the business of A. J. Ironside Company, do you keep books and records?

A. Yes, sir.

1553 Q. Is it the regular course of business for you to keep such books and records?

A. Yes, sir.

Q. And are those books and records made at or about the time of the transaction they purport to reflect?

A. Yes, sir.

Q. Are those books and records kept under your supervision and custody?

A. Yes, sir.

Q. Directing your attention to the year 1947, did the A. J. Ironside Company do any work in connection with the construction of the Red Lion building located about three miles south of Elgin?

A. Yes, sir.

Q. By whom were you retained to do that work?

A. I was not the owner at the time. Mr. Ironside was still alive.

Q. Was Mr. Ironside related to you?

A. He was my father-in-law.

Q. Do you know whether or not any work was done by A. J. Ironside Company on the Red Lion building?

A. As far as the records go, yes.

Q. Do you have the books and records of A. J. Ironside relating to the construction of the Red Lion?

1554 A. Yes, sir.

Q. May I have them, please?

A. Yes, sir. This is our deposit book, and this is the record.

Mr. Russo: I will ask that this be marked Government Exhibit No. 220 for identification.

(The document was thereupon marked Government Exhibit 220 for identification.)

Mr. Russo: And this Government Exhibit No. 221 for identification.

(The document was thereupon marked Government Exhibit 221 for identification.)

By Mr. Russo:

Q. Mr. Hintt, I show you Government Exhibit 221 for identification, purporting to be a ledger sheet headed, "Red Lion."

A. Yes, sir.

Q. Is that one of the records that was kept by the A. J. Ironside Company?

A. Yes, sir.

Q. Directing your attention to Government Ex-
1555 hibit No. 221, will you explain, please, the column that is headed, "Debit"?

A. 1947, it was draws against the job which totaled—or do you want me to list them separate?

Q. Just explain the whole thing, if you will, please.

A. Draws on the job as the contract read, the material, labor, on the construction of the building and the total was $4,403.20.

Q. $4,403.20?

A. Twenty cents.

Q. Is that right?

A. Right.

Q. What did that involve? Is that the total amount paid to that job so far as that record shows?

A. That is right.

Q. Does that record show whether or not that amount was paid, received by A. J. Ironside Company?

A. It was receipted here, I believe, by Mrs. Ironside on the ninth month, 24th day of 1947. They received this amount, $4069.00.

Q. Will you keep your voice up, please, so the Court and Jury may hear you too, Mr. Hintt?

What was the date of the payment?

A. The 9th month, 24th day of 1947.

1556 Q. And what was the amount?

A. $4,069.89.

Q. Now do you have any other record indicating whether or not that amount was deposited to the account of A. J. Ironside?

A. In our deposit book here we show that check deposited.

Q. I show you Government Exhibit No. 220, and ask you if that is the deposit slip?

A. That is the deposit slip.

Q. Now I show you Government Exhibit No. 157 in evidence, which purports to be a certificate from the architect, Mortimer Hawkins, dated September 5, 1947, in the amount of $4,069.89, made out to A. J. Ironside.

A. Yes sir.

Q. Directing your attention to the signature in the lower right-hand corner, whose signature is that, please?

A. A. J. Ironside.

Q. Will you examine it, please, and state what Mr. Ironside's signature at that place signifies?

A. "Received amount of above certificate, A. J. Ironside."

Q. Now I show you Government Exhibit No. 157-A, purporting to be a waiver of lien by A. J. Ironside for labor and material in connection with the heating contract on that building, and dated September 24, 1947.

1557

A. Yes, sir.

Q. Directing your attention to the signature in the lower righthand corner, whose signature is that, if you know?

A. A. J. Ironside.

Q. Does it appear to have been placed on there on or about the date the document bears, September 24, 1947?

A. Yes, sir.

Q. Directing your attention again to Government Exhibit No. 221 and to the 18th day of February, 1948, was there any other work done or any other moneys received on the Red Lion job by A. J. Ironside?

A. Well, there was an installation of a heater listed here on the records for $175.00 and, according to my figures, it shows it paid in 1948, February, 1948, with the 10 percent that was withheld from the original contract.

Q. And what was the total payment made on or about February 18, 1948?

A. $627.20.

Mr. Russo: May it please the Court, at this time we offer in evidence Government Exhibits 220 and 221.

1558

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked Government Exhibits 220 and 221, respectively, were thereupon received in evidence as Government Exhibits 220 and 221.)

Mr. Russo: Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Hintt.

(Witness excused.)

1559 MITCHELL A. SILAGY, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Mitchell A. Silagy, Jr.?
A. That is right.
Q. And is Silagy spelled S-i-l-a-g-y?
A. Right.
Q. What is your address, sir?
A. 184 Wellington, Elgin, Illinois.
Q. What is your business or occupation?
A. I am a thoroughbred horse trainer.
Q. How long have you been engaged in that business?
A. Oh, approximately fourteen, fifteen years.
Q. By whom are you employed?
A. Mr. Marvin E. Affeld.
Q. How long have you been employed by him?
A. Oh, since about June of last year.
Q. What was your business or occupation in the years 1946, 1947 and 1948?
A. I was in the—I had a tavern and a package liquor store.
Q. Where was that located?
1560 A. Elgin, Illinois, 15 North State Street.
Q. How long have you engaged in that business?
A. Approximately six years.
Q. What was your capacity in that business?
A. Well, at first I was a partner, and then later I became the sole owner.
1561 Q. Do you know the Defendant, Sam Achilli?
A. I do.
Q. Do you see him in the Court Room?
A. Yes, I do.
Q. Will you point him out, please?
A. (Indicating.)
Q. You are indicating the second man at the far end of the defense counsel table?
A. That is correct.
Q. About how long have you known him?
A. Oh, I have known Sam for about nine or ten years.
Q. Do you know what business he is engaged in?

A. He's an automobile dealer.
Q. Where?
A. In Elgin, Illinois.
Q. Now, Mr. Silagy, directing your attention to on or about October 16th, 1947, did you have any transaction with the Defendant, Sam Achilli, at or about that time?
A. Yes, I did.
Q. What was the nature of that transaction?
A. Well, I borrowed some money from him.
Q. How much money did you borrow?
A. I borrowed $7,000.
1562 Q. Did you have any discussion with him before you borrowed that money?
A. Yes, I did.
Q. What was that discussion?
A. Well, I went to Sam—I needed some money quite badly and I went to Sam and asked him if he would loan me some money and he told me he didn't have any loose money at that particular time, but he would discuss it with his partner and tell me later if he would grant me the loan.
Q. Did you talk with him later?
A. Well, a few days later I called him up on the telephone and he said he had talked to his partner and yes, that he would loan me the money.
Q. Then what if anything happened?
A. Well, the next morning I went down to his place of business and—
Q. Where is that?
A. It's on Lake Street, the corner of Lake and Wellington in Elgin, Illinois, Highland Motor Sales.
Q. All right, sir. Did you see Sam on that occasion?
A. Yes, I did.
Q. What occurred at that time, if anything?
A. Well, he gave me some money.
1563 Q. How much money did he give you and in what form did he give it to you?
A. Well, he gave me a $5,000 check.
Q. On whom was that check drawn?
A. Highland Motor Sales.
Q. What else did he give you if anything?
A. He gave me a $1,250 check, cashier's check, Mr. Gromer's check.
Q. What else did he give you if anything?

A. And about $750 cash.
Q. What was the total of that?
A. $7,000.
Mr. Russo: Will you mark this as Government's Exhibit 222 for identification, please.
(The document was thereupon marked Government's Exhibit 222 for identification.)
By Mr. Russo:
Q. Mr. Silagy, I show you Government Exhibit 222 for identification, purporting to be a cashier's check of the First National Bank of Elgin dated October 16th, 1947, bearing No. 127094 payable to the order of Earl H. Gromer in the amount of $1,250.
1564 A. Yes.
Q. I will ask you if that is the cashier's check to which you have referred?
A. Yes, it is.
Q. Directing your attention to the reverse side of Government Exhibit 222, I will ask you to examine it please and state whether or not it bears any endorsements?
A. Yes, it does.
Q. What endorsements does it bear?
A. It bears two endorseemnts, "Earl H. Gromer" and "Mitchell A. Silagy."
Q. Did you receive the proceeds from Government Exhibit 222, the cashier's check?
A. Yes, I did.
Q. What if any security did you give Sam Achilli and Earl Gromer for that loan?
A. I gave him a judgment note.
Q. Did you pay that judgment note when it was due?
A. No, I didn't.
Q. What happened, Mr. Silagy?
A. Well, after I failed to pay the judgment note they had my place closed by the Sheriff.
Q. They filed a suit against you, did they?
1565 A. Yes; that is correct.
Q. And got a judgment?
A. A judgment.
Q. Was that a confessed judgment note that you signed?
A. What do you mean by "confessed judgment note"?
Mr. Russo: Will you mark this as Government Exhibit 223 for identification, please.

(The document was thereupon marked Government's Exhibit 223 for identification.)

Mr. Russo: And this as Government Exhibit 223-A, for identification.

(The document was thereupon marked Government's Exhibit 223-A for identification.)

By Mr. Russo:

Q. After you failed to pay the note what if anything happened? You say they got a judgment?

A. Yes.

Q. Did you pay that judgment?

A. Yes, I did.

Q. When was that?

A. Well, February 20th, 1948, I paid $4,300. That
1566 $4,300 was partial payment. Then on April 22, 1948, I paid $4,339.56, or a total of $8,639.54 as complete payment.

Q. I show you Government Exhibit 223 and 233-A for identification, which purport to be a complaint and cognovit, that is, a confessed judgment note, and ask you if you have ever seen the original? Did you ever see the original?

A. Yes, I have.

Q. I direct your attention now to Government Exhibit 223-A.

A. Yes.

Q. I will ask you if that purports to be a copy of the note that you signed?

Mr. Batter: Just a minute. I object, your Honor. The absence of the original has not been explained to the Court.

Mr. Russo: The absence of the original is easily explained, your Honor. He paid it and it was returned to the owner.

The Court: He may answer.

Mr. Batter: He is the owner.

By Mr. Russo:

Q. Do you have the original note, Mr. Silagy?

1567 A. I must have.

Q. Do you know where it is?

A. It should be in my home.

Q. Weren't you asked to produce it this morning?

A. Yes, I was.

Q. Why didn't you?

A. Well, I must have—I had all my papers in the briefcase (indicating). Let me look through here and see if I can find it.

Q. All right.

A. I guess all I have is the judgment, the satisfied judgment.

Q. Do you know where the original note is now?

A. I should have it at home, but I cannot make a positive statement that. I still have the original note.

Q. I believe you testified that all your papers were in the folder that you have on the stand, all your papers relating to the transaction you had with Sam Achilli?

A. Yes.

Q. Is that right?

A. That's right.

Q. Is that note in that folder?

A. No, it is not; just the paid up judgment.

Q. If it is not there, is it lost or misplaced?

1568 A. It could be lost or misplaced.

Mr. Batter: Your Honor, I object to counsel asking such direct questions, leading questions. The witness has testified that he must have it at home.

The Court: Objection sustained.

By Mr. Russo:

Q. I believe you testified that you paid that note some time in April of 1948.

A. Correct.

Q. Did you receive a satisfaction of judgment—

A. Yes, sir.

Q. —at that time?

A. Yes, I did.

Mr. Russo: Will you mark this for identification as Government's Exhibit 224.

(The document was thereupon marked Government's Exhibit 224 for identification.)

By Mr. Russo:

Q. Now, I show you Government Exhibit 224 for identification.

A. Yes.

Q. I ask you if that is a satisfaction of judg-

1569 ment that you got at the time you paid Mr. Achilli and Mr. Gromer?

A. That is correct.

Mr. Russo: At this time, may it please the Court, we offer in evidence Government's Exhibits 222 and 224.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked Government's Exhibits 222 and 224, were thereupon received in evidence as Government's Exhibits 222 and 224.)

By Mr. Russo:

Q. I believe you testified, Mr. Silagy, that the amount of the loan was $7,000, is that correct?

A. That's correct.

Q. And the amount of the note you signed was—what was the amount of the note you signed?

Mr. Batter: I object, your Honor. The note speaks for itself.

Mr. Russo: If he has a recollection, your Honor, he can certainly state.

The Court: He may answer.

A. $8,500.

1569-A By Mr. Russo:

Q. I believe you said you paid back $8,639.94?

A. That is correct.

Q. What does the difference between $8,500 that you agreed to pay back for the $7,000 and the $8,639.94 represent?

A. Well, there's a $50.00 attorney fee that was on the note—

Q. Yes, sir?

A. (Continuing)—and then there was $62.40 worth of interest from 1/27/48 through to 4/20/48, and there was a $5.00 filing fee and a $1.40 Sheriff's fee.

Q. These were all expenses in connection with this litigation that you were required to pay?

A. That is correct.

Mr. Russo: Thank you, sir. Your witness.

Mr. Batter: No cross.

Mr. Russo: Thank you, Mr. Silagy.

(Witness excused.)

1570 VIVIAN ROHE, called as a witness on behalf of the Government herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Is your name Miss Vivian Rohe?
A. Yes.
Q. Is "Rohe" spelled R-o-h-e?
A. Yes.
Q. Miss Rohe, will you be kind enough to keep your voice up so the Court and jury can hear you, too, please?
A. Yes.
Q. What is your address?
A. 2730 Hampton Parkway, Evanston, Illinois.
Q. Are you employed?
A. Yes, I am.
Q. By whom?
A. The Bankers Life Company.
Q. What is the nature of the business of the Bankers Life Company?
A. Life insurance.
Q. Where is it located?
A. 120 South La Salle.
1571 Q. What is your capacity there?
A. Premium office cashier.
Q. In the conduct of its business does the Bankers Life Company keep books and records?
A. Yes.
Q. Are those books and records kept in the regular course of business?
A. Yes.
Q. Is it the regular course of business for that company to keep such records?
A. Yes.
Q. Now, are those records made at or about the time of the transaction, occurrence or event they purport to reflect?
A. Yes.
Q. Are those books and records kept under your supervision and custody?
A. Yes.
Q. Now, Miss Rohe, did you in response to a subpoena duces tecum bring with you records of the Bankers

Life Company reflecting payments made by Sam Achilli in payment of premiums on policies issued by Bankers Life Company on the lives of Sam Achilli, Ruth Achilli, Howard Achilli and James Achilli for the years
1572 1946, through 1948, inclusive?

A. Yes.

Mr. Russo: Will you mark this as Government Exhibit 225, please.

(The document was thereupon marked Government's Exhibit 225, for identification.)

Mr. Russo: 226.

(The document was thereupon marked Government's Exhibit 226, for identification.)

Mr. Russo: 227.

(The document was thereupon marked Government's Exhibit 227, for identification.)

Mr. Russo: 228.

(The document was thereupon marked Government's Exhibit 228, for identification.)

Mr. Russo: 229.

(The document was thereupon marked Government's Exhibit 229, for identification.)

Mr. Russo: 230.

1573 (The document was thereupon marked Government Exhibit 230, for identification.)

Mr. Russo: 231.

(The document was thereupon marked Government Exhibit 231, for identification.)

By Mr. Russo:

Q. Now, Miss Rohe, I show you Government Exhibit 225 and ask you if that is a record of Bankers Life Company relating to Sam Achilli?

A. Yes.

Q. Will you refer to it, please, ma'am, and state whether or not a policy was issued on the life of Sam Achilli as the insured by the Bankers Life Company on or about March 1, 1940?

A. Yes.

Q. What was the amount of the policy?

A. $2,000.

Q. What was the date on which it was issued?

A. March 1, 1940.

Q. What is the policy number?

A. 1222226.

Q. Now, during the years 1942 to 1949 inclu-
1574 sive how were the premiums on that policy paid?

A. Annually.

Q. What was the amount of the annual premium for each of the year 1943 to 1949 inclusive?

A. $64.64.

Q. Were the annual premiums for each of the years 1943 to 1949 inclusive paid?

A. Yes.

Q. Will you refer to Government Exhibit 225 for identification, please, and state where the premium notices and correspondence is sent?

A. Highland Motor Sales, 192 Wellington, Elgin, Illinois.

Q. Now, I show you Government Exhibit 226 for identification.

A. Yes.

Q. I will ask you if that is a record of Bankers Life Company?

A. Yes, it is.

Q. Will you refer to Government Exhibit 226 for identification, please, ma'am and state whether or not a policy was issued by Bankers Life Company on the life of Sam Achilli as the insured by that company?

A. Yes.

Q. What was the date on which it was issued?

1575 A. December 15th, 1942.

Q. What is the policy number?

A. 1320110.

Q. What is the amount of the policy?

A. $3,000.

Q. During the years 1943 to 1949, inclusive were premiums on that policy paid?

A. Yes.

Q. In what manner?

A. Annually.

Q. What was the amount of the annual premium for each of the years 1943 to 1949 inclusive?

A. $100.56.

Q. Was the annual premium for each of the years 1943 to 1949 inclusive paid?

A. Yes.

Q. Now, will you refer to that Exhibit, please, Gov-

ernment Exhibit 226 for identification, and state where the premium notices and correspondence were sent?

A. Highland Motor Sales, 192 Wellington Avenue, Elgin, Illinois.

Q. Now, at the time that policy was issued who was named as beneficiary under the policy?

A. Ruth H. Achilli, his wife.

1576 Q. Now, I show you Government Exhibit 227 for identification.

A. Yes.

Q. I ask you if that is a record of Bankers Life Company?

A. Yes, it is.

Q. Will you refer to Government's Exhibit 227 for identification, please, ma'am, and state whether or not a policy was issued by Bankers Life Company on the life of Sam Achilli as the insured?

A. This is—

Q. That was issued on the life of Ruth Achilli?

A. Yes.

Q. On the life of Ruth Achilli.

A. Yes, sir.

Q. What is that policy number?

A. 1332206.

Q. On what date was that policy issued?

A. June 28, 1943.

Q. What is the amount of that policy?

A. $1,000.

Q. During the years 1944 to 1949, how were the premiums on that policy paid?

A. Annually.

1577 Q. What was the amount of the annual premium for each of the years 1944 to 1949?

A. $31.59.

Q. What was the amount of the annual premium for each of those years, 1944 to 1949, inclusive, paid?

A. Yes.

Q. Where were the premium notices and correspondence in connection with that policy sent?

A. 732 Brook Street, Elgin, Illinois.

Q. At the time the policy was issued, who was named as beneficiary under that policy?

A. Sam S. Achilli, husband; otherwise, Howard Bohlin, brother.

Q. Now I show you Government Exhibit No. 228, and ask you if that is a record of Bankers Life.

A. Yes.

Q. Will you refer to it, please, ma'am, and state whether a policy was issued by Bankers Life on the life of Howard L. Achilli as insured, in care of Sam Achilli?

A. Yes.

Q. What kind of policy was that?

A. A juvenile endowment at 65.

Q. What is the policy number?

1578 A. 1356712.

Q. What is the date on which that policy was issued?

A. June 10, 1944.

Q. What is the amount of the policy?

A. $1,000.

Q. During the years 1945 to 1949, inclusive, how were the premiums paid?

A. Annually.

Q. What is the amount of the annual premium for each of the years 1944 to 1949, inclusive?

A. $16.47.

Q. Was the amount of the annual premium for each of the years 1944 to 1949, inclusive, paid?

A. Yes.

Q. Will you state, please, to whom the premium notices and correspondence were sent?

A. Care Sam Achilli, 732 Brook Street, Elgin, Illinois.

Q. At the time the policy was issued, who was named as beneficiary?

A. Sam Achilli, husband or father, if living; otherwise to Ruth, mother.

Q. I now show you Government Exhibit 229 for identification, and ask you if that is a record of Bankers

1579 Life.

A. Yes.

Q. Will you refer to it, please, and state whether or not a policy was issued by Bankers Life on the life of Howard L. Achilli as insured?

A. Yes.

Q. What is the policy number?

A. 1358702.

Q. On what date was it issued?

A. July 19, 1944.

Q. What is the amount of the policy?
A. $3,000.
Q. During the years 1945 to 1949, inclusive, how were the premiums on that policy paid?
A. Annually.
Q. What was the amount of the annual premiums for each of the years 1945 to 1949?
A. $162.93.
Q. Was the amount of the annual premium for each of those years 1945 to 1949, inclusive, paid?
A. Yes.
Q. Will you state, please, where the premium notices and correspondence on that policy were sent?
A. Care of Sam Achilli, 732 Brook Street, Elgin,
1580 Illinois?
Q. At the time the policy was issued, who was named as beneficiary?
A. Sam Achilli, father; otherwise Ruth H., mother.
Q. Are they still the beneficiaries under that policy?
A. Yes.
Q. I now show you Government Exhibit 230, and ask you if that is a record of Bankers Life.
A. Yes.
Q. Will you refer to Government Exhibit No. 230, please, and state whether a policy was issued by Bankers Life on the life of James M. Achilli, care of Sam Achilli, 192 Wellington Street, Elgin, Illinois?
A. Yes.
Q. What is the policy number?
A. 1503082.
Q. On what date was it issued?
A. January 19, 1948.
Q. What is the amount of the policy?
A. $1,000.
Q. During the year 1949, how was the premium on that policy paid?
A. Annually.
1581 Q. What was the amount of the annual premium for the year 1949?
A. $15.66.
Q. Was that premium paid?
A. Yes.
Q. To whom was the correspondence and premium notices on that policy sent?

A. Care of Sam Achilli, 192 Wellington, Elgin, Illinois.
Q. Who was named beneficiary?
A. Sam Achilli, father; otherwise Ruth, mother.
Q. Has there been any change in the beneficiary?
A. No.
Q. Now I show you Government Exhibit 231, and ask you if that is a record of Bankers Life.
A. Yes.
Q. Will you refer to it, please, and state whether or not a policy was issued by Bankers Life on the life of James M. Achilli?
A. Yes.
Q. What is the policy number?
A. 1503081.
Q. On what date was it issued?
A. January 19, 1948.
1582 Q. What is the amount of the policy?
A. $3,000.
Q. During the year 1949, how was the premium on that policy paid?
A. Annually.
Q. What is the amount of the annual premium?
A. $173.22.
Q. Was the annual premium for 1949 paid?
A. Yes.
Q. Where were the notices, premium notices and correspondence on that policy sent?
A. Care of Sam Achilli, 192 Wellington, Elgin, Illinois.
Q. At the time the policy was issued, who was named beneficiary?
A. Sam Achilli, father; otherwise Ruth, mother.
Q. Are they still beneficiaries under that policy?
A. Yes.
Q. Redirecting your attention, Miss Rohe, to Government Exhibit No. 230, was there an annual premium paid during the year 1948?
A. Yes.
Q. In what amount?
A. $15.66.
1583 Q. Redirecting your attention to Government Exhibit No. 231, was there any premium paid during the year 1948?
A. Yes.

Q. In what amount?
A. Annually, $173.22.
Q. Now did you at my request, Miss Rohe, or at the request of Mr. Weber, make a summary of the amounts of premiums that were paid on the policies concerning which you have testified?
A. Yes.
Q. Do you have that summary with you?
A. Yes, I have. (Witness handed document to Mr. Russo.)
Mr. Russo: I will ask that this be marked Government Exhibit 232 for identification.
(The document was thereupon marked Government Exhibit 232 for identification.)
By Mr. Russo:
Q. Now I hand you Government Exhibit 232 for identification, and ask you if that is the summary to which you have referred.
1584 A. Yes.
Q. Does that correctly reflect the summary of premiums made by Sam Achilli on the policies issued by Bankers Life on the lives of Sam Achilli, Ruth Achilli, Howard Achilli and James Achilli?
Mr. Batter: Just a moment. I object, your Honor. The witness has testified. This is just repetition and serves no purpose.
Mr. Russo: It serves this purpose, your Honor: It simplifies the figures in the minds of the jury, and it is an aid to them.
The Court: She may answer.
By Mr. Russo:
Q. What was the amount of premiums paid by Sam Achilli on the policies concerning which you have testified for the year 1946?
A. $376.19.
Q. What was the amount of premiums paid on the policies concerning which you have testified for the year 1947?
A. $376.19.
Q. What was the total amount of the premiums
1585 paid on the policies concerning which you have testified for the year 1948?
A. $565.07.

Mr. Russo: May it please the Court, we offer in evidence Government Exhibits 225, 226, 227, 228, 229, 230, 231 and 232.

Mr. Batter: No objection.

The Court: They may be received.

(The documents previously marked, respectively, Government Exhibits 225 to 232, inclusive, were thereupon received in evidence as Government Exhibits 225 to 232, inclusive.)

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Miss Rohe, directing your attention to Government Exhibit 225, I notice on the back of the card the dividend record.

Were those dividends used in reduction of premium, or how were they applied?

A. No. They are standing to the credit of the 1586 policy at interest.

Q. With reference to Government Exhibit 226, the dividend record on the rear of that card indicates election dividend option No. 3.

What does that mean?

A. That is he elected to leave the dividends with the company at interest.

Q. The same thing is true on Government Exhibit No. 227?

A. Yes, sir.

Q. And on Government Exhibit 228?

A. Yes, sir.

Q. And on Government Exhibit 229?

A. Yes, sir.

Q. And on Government Exhibit No. 230?

A. Yes, sir.

Q. And on Government Exhibit 231?

A. Yes, sir.

Mr. Batter: That is all.

Mr. Russo: Thank you, Miss Rohe. That will be all.

(Witness excused.)

1587 CHARLES W. CARREL, called as a witness herein on behalf of the Government having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Will you state your name, please, sir?
A. Charles W. Carrel.
Q. Where do you live, sir?
A. Fort Wayne, Indiana.
The Reporter: How do you spell your last name, please?
The Witness: C-a-r-r-e-l.
By Mr. Russo:
Q. What is your business or occupation?
A. I am Controller of the Lincoln National Life Insurance Company.
Q. Where is that located?
A. That is located in Fort Wayne, Indiana.
Q. In the conduct of its business does the Lincoln National Life Insurance Company keep books and records?
A. It does.
Q. Are they kept in the regular course of business?
1588 A. They are.
Q. Is it the regular course of business to keep such books and records?
A. It is.
Q. Are those books and records made at or about the time of the transaction, occurrence or event they purport to reflect?
A. That is correct.
Q. Are those books and records kept under your supervision and custody?
A. They are.
Q. Now, Mr. Carrel, did you in response to a subpoena duces tecum bring with you records of the Lincoln National Life Insurance Company reflecting the payments made by Sam Ackilli in payment of premiums on a policy issued by that company on the life of Sam Achilli?
A. I did.
Q. Do you have that record with you?
A. I have.
Q. May I have it, please?

A. Yes.

(The witness handed a document to Mr. Russo.)

Mr. Russo: Will you mark this as Government 1589 Exhibit 233 for identification, please?

(The document was thereupon marked Government's Exhibit 233 for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit 233 for identification and ask you if that is a record of the Lincoln National Life Insurance Company relating to a policy issued on the life of Sam Achilli?

A. It is.

Q. Will you state, please, whether or not that policy was issued on his life on or about May 3, 1946?

A. The policy was so issued.

Q. What is the amount of that policy?

A. The amount of the policy is $20,000.

Q. What is the policy number?

A. The policy number is 775114.

Q. During the year 1946 were there any premiums paid on that policy?

A. There were.

Q. How were those premiums paid?

A. Paid annually.

Q. Was that policy also in effect during the years 1590 1947 and 1948?

A. It was.

Q. What was the amount of annual premium paid on that policy in 1946?

A. The amount of the annual premium in 1946 was $746.80.

Q. When was that premium paid?

A. That premium was recorded paid May 14th, 1946.

Q. What was the amount of the annual premium for 1947?

A. The annual premium for 1947 was $746.80.

Q. Was that premium paid?

A. That premium was paid.

Q. When?

A. It was recorded paid on April 28th, 1947.

Q. Was there an annual premium paid in 1948?

A. There was.

Q. What was the amount of the annual premium?

A. That annual premium was for $746.80.
Q. Was that paid?
A. That amount was paid.
Q. Was there any refund on that payment?
A. There was a refund of $32.49 on that payment.
Q. On what date, sir?
1591 A. November 23rd, 1948.
Mr. Russo: May it please the Court, at this time we offer in evidence Government Exhibit 233.
(Mr. Russo handed Government Exhibit 233 to Mr. Batter.)
Mr. Batter: No objection.
The Court: It may be received.
(The document previously marked Government's Exhibit 233 for identification was thereupon received in evidence as Government's Exhibit 233.)
Mr. Russo: I will ask the Reporter to mark that purports to be a photostatic copy of Exhibit 233 as Government Exhibit 233-A for identification.
(The document was thereupon marked Government's Exhibit 233-A for identification.)
By Mr. Russo:
Q. Now, Mr. Carrel, I show you Government Exhibit 233-A for identification.
A. Yes.
Q. I will ask you to examine it and compare it
1592 with Government Exhibit 233.
A. Yes.
Q. State whether or not it is a true and correct photostatic copy of Government Exhibit 233.
A. It is, with certain exceptions.
Q. Do those exceptions relate to the years 1946, 1947 and 1948?
A. They do not.
Mr. Russo: At this time, may it please the Court, if defense counsel has no objection we would like to substitute Government Exhibit 233-A for identification for the original, Government Exhibit 233.
Mr. Batter: Your Honor, may I ask the witness some questions in reference to the photostat?
The Court: All right.
By Mr. Batter:
Q. I direct your attention to Government Exhibit 233-A.

A. Yes.

Q. On the reverse side I see a legend there that does not appear upon the original.

A. Yes.

Q. Can you tell me what that legend means?

1593 A. Yes, I can. At the time that this was put through the photostating process the legend on the photostat is merely a notation identifying the case on the back of the premium card.

You notice the policy number does not appear on the back of the card and it indicates also the date the "as of" date when the photostat was prepared.

Q. Are there any other variations between the photostat and the original?

A. Yes. There were several transactions recorded after this photostat was prepared.

Q. Would you point them out to me?

A. I note one here (indicating). The word "released 1/17/55" appears on our record. The photostat record which was prepared prior to that endorsement does not have that same notation.

"Released, 3-31-52" also appears on the original document which does not appear on the photostat.

Q. Are there any other variances between the original and the photostat?

A. Concerning premium payments made for 1954 and 1953.

Q. Are there any other variances?

A. I do not believe there are.

1594 Mr. Batter: Your Honor, if counsel will agree that the variances just testified to by the witnesses do appear on the original, but not on the photostat, I have no objection to the substitution of the photostat.

Mr. Russo: Well, the witness has so testified. He testified, if memory serves me correctly, that those variances do not relate to the years under indictment, 1946, 1947 and 1948.

Mr. Batter: Unless counsel will stipulate to those variances I shall have to object to the photostat, your Honor—

Mr. Russo: I won't stipulate to anything.

Mr. Batter: (Continuing)—as not being a true photostat of the original record.

The Court: Well, the objection is sustained. The original will have to be the Exhibit, I presume.

Mr. Russo: Very well, sir. That will be all, Mr. Carrel.

The Witness: Your Honor, may I say a word concerning the original record?

The Court: We will see that you get it—

The Witness: I beg your pardon.

1595 The Court: We will see that you get it back, but it will have to stay here temporarily. I presume the attorney will have another photostat made.

Mr. Russo: Yes, your Honor, we will.

The Witness: Thank you very kindly.

(The witness thereupon left the witness stand, but did not leave the Court Room.)

Mr. Russo: Pardon me, your Honor. Maybe we can take care of that right now.

Mr. Reporter, will you mark this document as Government Exhibit 233-B for identification, please.

(The document was thereupon marked Government's Exhibit No. 233-B for identification.)

(The witness thereupon resumed the witness stand.)

By Mr. Russo:

Q. Mr. Carrel, I now show you Government Exhibit 233-B for identification—

Mr. Batter: May the record show Mr. Carrel has been recalled as a witness?

Mr. Russo: Yes. I will ask him.

1596 By Mr. Russo:

Q. Are you the same Mr. Carrel who was on the stand and was sworn and testified this morning?

A. Yes, sir.

Q. You are employed by the Lincoln National Life Insurance Company—

A. Yes, sir.

Q. —at Fort Wayne, Indiana?

A. That is right.

Q. Now I show you Government's Exhibit 233-B for identification, Mr. Carrel.

A. Yes.

Q. I will ask you to compare it with Government Exhibit 233 and state whether or not Government Exhibit 233-B for identification, which purports to be a photostatic copy, is a true and correct copy of Government Exhibit 233?

A. It is.

Q. Did you make that comparison?

A. I made the comparison.

Q. Is there any variation between Government Exhibit 233 and Government Exhibit 233-B for identification?

A. There is not.

Mr. Russo: Now, if your Honor please, I make
1597 that same motion with respect to Government Exhibit 233-B for identification.

1598 Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government Exhibit 233-B for identification was thereupon received in evidence as Government Exhibit 233-B.)

Mr. Russo: And the substitution may be made, your Honor?

The Court: Yes.

Mr. Russo: Thank you, Mr. Carrel. That will be all, and I return to you now the original of Government Exhibit 233-B.

The Witness: Thank you.

(Witness excused.)

1599 EARL H. GROMER, called as a witness on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mr. Gromer, I want you to keep your voice up so that the Court and Jury can hear you.

Your full name is Earl H. Gromer?

A. It is.

Q. And is Gromer spelled G-r-o-m-e-r?

A. It is.

Q. Where do you live, Mr. Gromer?

A. 480 River Bluff Road, Elgin, Illinois.

Q. What is your business or occupation?

A. I am an attorney.

Q. Sir?

A. I am an attorney at law.

Q. Do you have any other interest besides being an attorney?

A. Yes.

Q. What interest, please? What business interest?

A. At the present time I am a co-owner in a women's ready-to-wear apparel shop. I have—

1600 Q. Do you also operate an insurance agency at the present time?

A. Yes, sir.

Q. Are you also a notary public?

A. Yes, sir.

Q. How long have you been engaged in the practice of law?

A. Since February of 1930.

Q. And where is your office located?

A. In the Tower Building, Elgin.

Q. Is it a suite?

A. It is.

Q. Will you identify the suite, please?

A. Suite D.

Q. In the Tower Building?

A. Yes, sir.

Q. How long have you been in Suite D in the Tower Building at Elgin?

A. Since 1945.

Q. How long have you been in the insurance business?

A. About 1932.

Q. How long have you been a notary public?

A. Since 1929.

1601 Q. Other than the businesses or occupations and professions that you have mentioned, are you engaged in any other business?

A. I own some property that I rent.

Q. Are you acquainted with a corporation known as Red Lion?

A. I am.

Q. Do you have any connection with that corporation in a professional capacity?

A. Yes.

Q. What capacity are you acting in?

A. We keep the accounts for the present owner or manager.

Q. Are you the attorney for the corporation?

A. Yes.

Q. Now directing your attention to about 1945 and 1946, Mr. Gromer, were you engaged in any business enterprise other than the things you have testified about at that time?

A. I was.

Q. What was the nature of that business or enterprise?

A. It was an automobile sales service company.

Q. What is the name of the company?

A. Highland Motor Sales.

1602 Q. What was your connection with it?

A. I was a co-partner.

Q. What was your partnership interest?

A. Undivided half interest.

Q. Who was your partner?

A. Mr. Sam Achilli.

Q. Do you see Sam Achilli in the court room?

A. Yes, sir.

Q. Will you point him out, please?

A. The gentleman in the gray suit on the far side of the table.

Q. Are you indicating the man on the far side of defense counsel table?

A. Yes, sir.

Q. When was that partnership formed, Mr. Gromer?

A. In the fall of 1944.

Q. Will you tell the Court and Jury, please, how the formation of that partnership came about?

A. Mr. Achilli came to my office, stated that he had an opportunity to buy the Chrysler Garage from Mr. Hoppe, who was the owner, and who had been the Chrysler dealer.

He stated that he could procure the Chrysler franchise and wanted to arrange financing it. He had a limited
1603 amount of money and wanted to know if I knew how he could finance it. After working out some details, we went over to the Union National Bank, where we arranged to finance the purchase of the building.

Q. How much money did he tell you he had at that time?

A. Six thousand dollars.

Q. And what was the discussion, if any, with respect to the amount of money that you were to invest in that partnership?

A. An equal amount.

Q. By that do you mean $6,000?

A. Yes, sir.

Q. After you had agreed to match his $6,000, I believe

you testified you went to the bank to make some loan arrangements?

A. We did.

Q. To purchase the Hoppe garage?

A. Yes, sir.

Q. Where is that garage located?

A. 192 Wellington Avenue, Elgin.

Q. Is that the same garage in which Highland Motor Sales began doing business with you as a partner?

1604 A. Yes.

Q. Now what arrangements did you make to finance the partnership and the purchase of that garage?

A. The bank agreed to loan $18,000 to go with the $12,000 the two of us had, to make $30,000, the purchase price.

Q. Was that deal consummated?

A. It was.

Q. Did you arrange then for the purchase of the Hoppe garage?

A. I did.

Q. How did that work out at the bank?

A. The bank took title to the real estate as trustee, issued beneficial certificates, one to Mr. Achilli and one to me, and then as trustee they executed a mortgage on the real estate, which was placed as collateral for the note of Mr. Achilli and myself for $18,000, our personal note.

Q. Was the partnership between you and Mr. Achilli oral or written?

A. It was oral.

Q. Was there any arrangement for drawing accounts between the partners?

A. Not at the commencement of the partnership.

1605 Q. Thereafter was there any arrangement about drawing accounts between the partners?

A. Mr. Achilli drew what we termed wages, drawing for his operating the business.

Q. Did you have any partnership drawings as such?

A. Not for work performed; only as we divided net income.

Q. Only as you divided the profits?

A. Yes.

Q. And on what basis were those profits divided, 50-50?

A. Yes, not at the same time, however. They were just charged to our respective drawing account, whatever was withdrawn, but we were entitled to 50 percent.

Q. Now how was Mr. Achilli's drawings, the amount of his drawings, determined or negotiated from time to time? How was the amount arrived at?

A. I think we discussed the first drawing that he made, and I believe that continued for a period of time. Perhaps there was conversation on the increase. But later on it wasn't a matter of discussion.

Q. What was it a matter of?

A. A matter of withdrawal and posting it on the 1606 books.

Q. Would he determine the amount that he wanted to withdraw and withdraw it without consulting you?

A. Yes, sir.

Q. Now prior to the formation of this partnership, Mr. Gromer, was Achilli engaged in any business, if you know?

A. Prior he had engaged in the automobile business on Highland Avenue in Elgin.

Q. And what was the name of the business under which he was operating there?

A. I just recall that the first name was Highland. I don't know whether it was Motor Sales or just what the name was.

Q. When you formed the partnership, did you assume the old name of the business that Mr. Achilli had been operating, and took over the name Highland Motor Sales?

A. I know we carried it on for the reason that he had been in business and used the word Highland.

Q. Now prior to the time of the formation of this partnership, do you know whether Mr. Achilli was operating as an individual, a partnership or a corporation?

A. I believe as an individual.

1607 Q. And after the partnership was formed, Mr. Gromer, where did the partnership of Gromer and Achilli begin doing business?

A. 192 Wellington Avenue.

Q. Did you begin doing business as Highland Motor Sales?

A. We did.

Q. Now after the garage property was purchased, that is, the Hoppe garage concerning which you have testified, what did you contribute to the capital assets of the partnership?

A. Well, an amount of cash with which to begin operating.

Q. And is that amount of cash that you contributed reflected on the partnership books?

A. It is.

Q. What did Mr. Achilli contribute to the partnership assets?

A. He purchased or owned some automobiles, and they went in. He purchased cars and paid for them. They were put in on the assets.

Q. And was his contribution to the partnership assets reflected on the partnership books?

A. Yes, sir.

1608 Q. Now in connection with the operation of the business of Highland Motor Sales as a partnership between you and Mr. Achilli, was there a bookkeeping system installed?

A. Yes.

Q. Who installed it?

A. I did.

Q. And under whose supervision and custody was that system kept?

A. I had rather close supervision of it for—

Q. For what period of time?

A. Four or five months.

Q. Sir?

A. Four or five months, until we broke in a bookkeeper.

Q. And for what year? What year are you talking about?

A. 1945.

Q. What books and records did you keep?

A. We had a general ledger, had a sales record, had a purchase record, had a bank account record, had accounts receivable, accounts payable. It was a double entry bookkeeping system that was prescribed by Chrysler Corporation.

1609 Q. Did you have a cash journal?

A. Yes.

Q. Did you have a card index inventory of the cars

with which you were doing business in the partnership?

A. New and used.

Q. New and used?

A. Yes.

Q. Now I ask you whether or not the general ledger is a summary of all the other books that you have mentioned?

A. Yes.

Q. What was the total length of time, as you recall, Mr. Gromer, that those books and records were kept under your immediate supervision and custody?

A. As I can best recall, it was a matter of five, six months, until the young lady who was on the job became familiar with it.

Q. And after that, under whose supervision and custody were they?

A. Well, they were at the garage. I appeared there periodically and reviewed the books, helped in closing at the end of the month, probably for another four or five months.

Q. So that as I understand your testimony, those 1610 books were under your general custody and supervision for approximately a year, is that right?

A. Yes, sir.

Q. Would that be the year 1945?

A. Yes, sir.

Q. Now after the year 1945, under whose custody and supervision were they kept?

A. Mr. Achilli's.

Q. Who was the operating partner of that partnership?

A. Mr. Achilli.

Q. Now were the books and records that you have identified by name and concerning which you have testified the same books and records that were used in preparing and filing the partnership returns of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales, for the calendar year 1945?

A. They were.

Q. I believe you testified that the same bookkeeping system was employed for the calendar years 1946, 1947 and 1948, am I right?

A. Yes, sir.

Q. Were the books and records maintained by the

partnership, Highland Motor Sales, for those years
1611 1946, 1947 and 1948, the same books and records that were used in preparing the partnership returns of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales, for the calendar years 1946, 1947 and 1948?

A. They were.

Q. How do you know that, Mr. Gromer?

A. My associate at the time, Mr. Brady, was an accountant, a C.P.A., and he prepared the returns in our office.

Q. Did you have access to those books?

A. Yes, sir.

Q. Mr. Gromer, I show you Government Exhibit No. 4 in evidence, and ask you if that is the return of the partnership, a partnership declaration return for the year 1946.

A. It is.

Q. I also show you Government Exhibit No. 5 and Government Exhibit No. 6, and I ask you to examine them, please, and state whether or not they are partnership returns of income of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales, for the years 1947 and 1948?

A. They are.

1612 Q. Directing your attention to Government Exhibit 4, will you refer to that, please, and to the last page thereof, page 4?

A. Yes.

Q. I direct your attention to the signature that appears in the lower right-hand corner.

A. Yes.

Q. Will you state whose signature that is?

A. My signature.

Q. Was your signature placed on Government Exhibit 4 on or about the date that the document bears, February 15, 1947?

A. It was.

Q. Now, after you signed that return, Mr. Gromer, what did you do with it?

A. I filed it with the Collector of Internal Revenue.

Q. Where?

A. Either in Elgin, or mailed it to Chicago.

Q. On or about what date?

A. The date it bears.
Q. On the date it bears.
A. Yes.
Q. And that date is February 2, 1947?
A. February 15, 1947.
1613 Q. February 15, 1947.
A. Yes.
Q. Now, directing your attention to page 4 of Government Exhibit No. 5 and to the signature on the lower right-hand corner of page 4—
A. Yes.
Q. (Continuing)—I will ask you to state whose signature that is?
A. That is mine.
Q. Did you place your signature on Government Exhibit 4 on or about the date that bears on the affidavit?
A. I did.
Q. March 8th, 1948, is that right?
A. Right.
Q. Now, after you filed that return—or rather, after you signed that return, what did you do with it?
A. Filed it with the Collector of Internal Revenue?
Q. Where?
A. Either in Elgin, or mailed it to Chicago.
Q. Now, directing your attention to Government Exhibit 6 and to page 4 thereof and the signature in the lower right-hand corner—
A. Yes.
Q. (Continuing)—I will ask you to examine it
1614 and state whose signature that is.
A. Mine.
Q. When was your signature affixed to Government's Exhibit No. 6?
A. On or about the date it bears, March 10th, 1949.
Q. After you signed Government's Exhibit 6, what if anything did you do with it?
A. I filed it with the Collector of Internal Revenue.
Q. Now, I direct your attention to Government Exhibit No. 4 and direct your attention to the partnership share of income and credit.
A. Yes.
Q. Will you state, please, whether according to the books and records of Highland Motor Sales the amounts

shown and distributed to Sam Achilli and Earl Gromer were distributed to each in cash?

A. They were not.

Q. How were those shares distributed?

A. It was either a cash withdrawal or a credit; on the closing of the books the respective net income to each partner was credited to his capital account.

Q. Credited to his capital account in the partnership books of Highland Motor Sales, is that right?

A. That part that was not withdrawn.

1615 Q. That part that was not withdrawn?

A. That is right.

Q. What would that part that was not withdrawn reflect generally? What did it purport to be? Drawings?

A. Please restate the question.

Q. Yes.

A. I do not know which part you are talking about.

Q. All right. We are talking about partnership distributions. Now, what distributions were made in cash and what distributions were made otherwise.

A. I cannot tell from this return.

Q. You cannot tell from that return?

A. No.

Q. Can you tell us what disposition was made of the partnership profits that were not distributed to each of the partners in cash?

A. Credited to the capital account. I believe by referring to Schedule H, mathematically it can be determined here.

Q. It was credited to the capital account of each partner?

A. Right.

Q. Is that what you are saying?

A. Yes, sir.

1616 Q. Now, does the partnership capital account as reflected in Government Exhi' it 4 reflect the invested capital plus the retained earnings of each of the partners for the year 1945, according to the books and records of Highland Motor Sales?

A. It is reflected as the partnership capital account as of the beginning of 1946, which was the same as December 30th, 1945.

Q. Did you compare the books and records, or examine the books and records of the capital assets and compare them with the return?

Mr. Batter: Just a minute, please. Will you read that question, please, Mr. Reporter?

(Question read by the Reporter.)

A. Yes.

Mr. Russo: Capital accounts.

The Witness: Yes. They were taken from it.

Mr. Russo: Very well, sir.

By Mr. Russo:

Q. What was the capital account of Sam Achilli as of December 31, 1945, as reflected on Government Exhibit 4?

A. $7,275.92.

Q. Will you refer to Government Exhibit 5 and state what the capital account of Sam Achilli was as of

1617 December 31st, 1946.

A. That is January 1, 1946.

Q. December 1st, 1946.

A. December 1st?

Q. Yes.

A. I can't tell you. It would be December 30th or January 1st. I don't know which year you want.

Q. Well, you gave me December 31st, 1945, and you told me that that was $7,275.92.

A. Right.

Q. Now, what is the capital account as of December 31st, 1946?

A. $14,989.73.

Q. Now, will you refer to Government Exhibits 5 and 6 and state what his capital account was as of December 31st, 1947?

A. $27,528.60.

Q. Now, will you refer to Government Exhibit 6 and state whether or not it reflects the capital account of Sam Achilli as of December 31st, 1948?

A. It does not.

Q. It does not?

A. No.

Q. Now, did the partnership show a profit in 1945?

1618 A. Yes.

Q. Did it show a profit in 1946?

A. Yes.

Q. Did it show a profit in 1947?

A. Yes.

Q. And in 1948?
A. Yes.

The Court: Counsel, I think we will now recess until tomorrow morning at ten o'clock. You will all return back here promptly at that time, please.

Mr. Batter: Your Honor, may the Court instruct the witness not to discuss the case with anyone?

Mr. Russo: I do not think that is quite right.

The Court: Yes. The witness is instructed not to discuss the case with anyone between now and tomorrow morning.

Mr. Russo: Very well, sir.

(Whereupon the trial of the above-entitled cause was adjourned until ten o'clock a.m. of the following day, Thursday, April 28th, 1955.)

1619 * * (Caption—No. 53-CR-154) * *

Before Hon. Win G. Knoch,
and a Jury.

Thursday, April 28, 1955,
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Russo,
appeared for the Government;
Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States vs. Achilli, the case on trial.

(Whereupon the following further proceedings were had in open Court in the presence and hearing of the jury, to-wit:)

The Court: You may proceed.

1620 EARL H. GROMER, called as a witness herein on behalf of the Government, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Your name is Earl H. Gromer?

A. It is.

Q. Are you the same Earl H. Gromer who was sworn and testified yesterday?

A. I am.

Q. You were on the witness stand at the conclusion of yesterday's session.

A. Yes, sir.

Q. Now, yesterday, Mr. Gromer, I believe you testified you discussed with Mr. Achilli the amount of the first drawing he made as wages, is that correct?

A. Yes.

Q. When did he make his first drawing?

A. I couldn't remember that, sir.

Q. In what year?

A. 1945.

Q. I believe you also testified that he later began to make drawings without consulting you, is that right?

1621 A. Yes, sir.

Q. When did he begin doing that?

A. It was later in our association, perhaps the second year.

Q. How long did that practice continue?

A. Until we dissolved.

Q. Now, I have just handed you Government Exhibits 4, 5 and 6 which are the partnership returns of income of Earl Gromer and Sam Achilli doing business as Highland Motor Sales for the calendar years 1946, 1947 and 1948 respectively.

A. Yes.

Q. Now, will you refer to them, please, and state what Sam Achilli's distributive share of the partnership profits from Highland Motor Sales according to the books and records of Highland Motor Sales as reflected on Government Exhibit No. 4 is.

A. $23,375.23.

Q. Now, will you refer to Government Exhibit No. 5

and state what his distributive share as reflected on the return according to the partnership books is for the year 1947?

A. $38,603.36.

Q. Will you refer to Government Exhibit 6 and
1622 state what his distributive share was for the calendar year 1948?

A. $38,879.26.

Q. Now, are the amounts that you mentioned for the year 1946, $23,375.23, for the year 1947, $38,603.36 and for the year 1948, $38,879.26, the amounts of net taxable income to Sam Achilli for each of those years according to the books and records of Highland Motor Sales as reflected on those returns?

A. Yes.

1623 Q. And were the amounts and figures shown on these returns, Government Exhibits 4, 5 and 6, in evidence, taken from the partnership books and records?

A. Yes.

Q. Now if Sam Achilli had any transactions with purchasers of automobiles from Highland Motor Sales which he did not record, or received money on those transactions which he did not report, or reported less money than he received, then would the partnership books and records reflect such transactions and such unreported money?

Mr. Batter: Just a moment. Your Honor, we object to that. There is no basis laid for any such question. There has been no evidence yet—

Mr. Russo: Your Honor, please, there is evidence. There is evidence of all the purchasers here who testified concerning bonus payments, black market payments.

Mr. Batter: There is no evidence—

Mr. Russo: May I finish?

The Court: He may answer.

Mr. Batter: There is no evidence that those are not records perfected on the books.

Mr. Russo: You may answer, Mr. Gromer.

1624 By the Witness:

A. Such transactions aren't reflected on the books and included in these figures.

By Mr. Russo:

Q. You say they are not?

A. Right.

Q. Then if such transactions are not recorded and the receipt of money taken in in the conduct of the partnership business is not reported, are the partnership books and records of Highland Motor Sales to the extent that such transactions and income are not reflected on those books and records accurate?

Mr. Batter: Just a moment. Your Honor, may I have a continuing objection to this entire line of questioning respecting the books, and my position that there is no evidence respecting their variance from the records. Either that, or I make an objection each time.

The Court: All right. He may answer.

By Mr. Russo:

Q. Will you answer the question, Mr. Gromer, please?

A. I kind of lost the trend.

Mr. Russo: Will you read the question, please, ma'am?

1625 (Question read.)

By the Witness:

A. If those transactions were partnership business, then the books are inaccurate.

By Mr. Russo:

Q. Then to the extent that the partnership books and records are inaccurate, are the partnership returns for the calendar years 1946, 1947 and 1948, which are based on those books and records, are those returns accurate?

A. They wouldn't be.

Q. Now, Mr. Gromer, did you have any knowledge that the partnership transactions and partnership income—Strike that.

Did you have any knowledge that the partnership transactions and partnership income was being suppressed from those books and records?

A. I had no knowledge of that.

Q. You did not?

A. No.

Mr. Batter: Your Honor, do I understand correctly that I have a running objection to this line of testimony?

The Court: Yes.

Mr. Russo: Mark this Government Exhibit 234 for

1626 identification.

(The document was thereupon marked Government Exhibit 234 for identification.)

By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government Exhibit 234 for identification, purporting to be a real estate contract between Henry W. Hopp and Sam Achilli, dated October 10, 1944, whereby Henry W. Hopp agrees to sell and Sam Achilli agrees to buy premises described as Lot 10 in Block 1 of O. Davidson's Addition to Elgin in the City of Elgin, Kane County, Illinois.

A. Yes, sir.

Q. I ask you if you have ever seen that before.

A. I have.

Q. What were the circumstances under which you first saw it?

A. At the time of the negotiation of purchase of the garage which we utimately acquired and used from Mr. Hopp.

Q. Now are the premises described in Government Exhibit 234 for identification the same premises that are commonly known as 192 Wellington in Elgin, Illinois?

A. Yes, sir.

1627 Q. Directing your attention to the signatures on the reverse side of Government Exhibit No. 234 for identification, and to the signatures in the lower left-hand portion of the upper one-third of that exhibit, whose signatures are those?

A. Sam Achilli and Henry W. Hopp.

Q. Are they the genuine signatures of Mr. Achilli and Mr. Hopp?

A. They are.

Q. And were those signatures affixed on Government Exhibit No. 234 for identification on or about the date the document bears?

A. Yes.

Q. October 10, 1944.

A. Yes.

Q. Now was the agreement reflected by Government Exhibit No. 234 for identification consummated?

A. Yes.

Q. How?

A. By delivery of deed and payment of the purchase price.

Q. Was there any transaction between the time of the agreement and the delivery of the consideration?

A. By whom?

1628 Q. By you and Mr. Achilli in connection with that property.

A. Yes.

Q. What was done?

A. We arranged to secure a loan at the Union Bank to pay for it.

Q. Did you sign a note?

A. We did.

Mr. Russo: I will ask that this be marked Government Exhibit 235 for identification.

(The document was thereupon marked Government Exhibit 235 for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit 235 for identification, and I ask you to examine it.

A. Yes, sir.

Q. Will you state, please, whether or not that is the note to which you refer?

A. It is.

Q. What is the amount of that note?

A. $18,000.

Q. And what date does it bear?

A. December 30, 1949.

1629 Q. Directing your attention to the signatures in the lower right-hand corner thereof—

A. Excuse me. That is 1944. It is due in 1949.

Q. What is the date that the note was made?

A. December 30, 1944.

Q. 1944?

A. Yes.

Q. Directing your attention to the signatures in the lower right-hand corner of Government Exhibit No. 235 for identification, whose signatures are those?

A. Sam Achilli and Earl H. Gromer.

Q. And they are the genuine signatures of Sam Achilli and Earl H. Gromer?

A. They are.

Q. Were those signatures affixed to Government Exhibit No. 235 for identification on or about the date the document bears as having been made?

A. Yes, sir.

Q. December 30, 1944?

A. Yes.

Q. Now after Government Exhibit No. 235 for identification was executed, what if anything did you do with it?

A. Delivered it to the bank.

1630 Q. To what bank?

A. Union National Bank and Trust Company of Elgin.

Q. Now was there any security given for that note?

A. Yes.

Q. What was the security that was given?

A. Trust deed note of the Union National Bank and Trust Company of Elgin as trustee.

Q. Directing your attention to Government Exhibit No. 89 in evidence, is that a true and correct photostatic copy of the trust deed that was delivered?

A. No, sir.

Q. What does Government Exhibit No. 89 purport to be?

A. That is the trust agreement that was entered into by the bank when title was conveyed to them and by Mr. Achilli and myself pertaining to the beneficial interest that was created by the conveyance.

Q. Now directing your attention to the signatures on page 6 of Government Exhibit No. 89 in evidence, and to the signatures in the lower right-hand corner thereof, whose signatures are those?

A. Sam Achilli and Earl H. Gromer.

Q. And are they the genuine signatures of Sam Achilli and Earl H. Gromer?

1631 A. A photostatic copy of them.

Q. And were those signatures affixed on the original at or about the time at or about the date the document bears?

A. Yes.

Q. December 30, 1944?

A. Yes sir.

Mr. Russo: Mark this Government Exhibit 236 for identification.

(The document was thereupon marked Government Exhibit 236 for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit No. 236 for identification purporting to be an original letter on the stationery of Earl H. Gromer Attorney at Law dated

November 24, 1944 and directed to the Union National Bank and Trust Company of Elgin, Illinois.

A. Yes, sir.

Q. I will ask you if you have ever seen that before.

A. Yes, sir.

Q. Directing your attention to the signatures about half way down the page, whose signatures are those?

A. Earl H. Gromer and Sam Achilli.

1632 Q. Were those signatures affixed on Government Exhibit No. 236 for identification on or about the date the document bears?

A. They were.

Q. November 24, 1944?

A. Yes.

Q. What if anything did you do with that original at the time that you signed it?

A. Delivered it to the bank.

Q. And what instructions did you convey to the bank by Government Exhibit No. 236 for identification?

A. Will you please repeat the question?

Q. What instructions did you convey to the bank by Government Exhibit No. 236 for identification?

A. To execute a trust deed which was described in the note of December 30, 1944, as security for the payment of the note.

Mr. Russo: Mark this Government Exhibit No. 237 for identification.

(The document was thereupon marked Government Exhibit 237 for identification.)

1633 By Mr. Russo:

Q. I show you Government Exhibit 237 for identification purporting to be a warranty deed.

A. Yes.

Q. I ask if you have ever seen that before?

A. I have.

Q. What were the circumstances under which you first saw that?

A. It was in the process of consummating the purchase of the garage building at the bank.

Q. Does Government Exhibit 237 for identification purport to be a warranty deed from Sam Achilli and Ruth Achilli conveying to the Union National Bank and Trust Company the property commonly known as 192 Wellington Street in Elgin, Illinois?

A. Yes.

Q. Now, I direct your attention to the signatures in the lower right-hand corner thereof.

A. Yes.

Q. Whose signatures are those, if you know?

A. Sam Achilli and Ruth H. Achilli.

Q. I direct your attention to the acknowledgment on the reverse side, on the upper one-quarter of the document.

A. Yes.

1634 Q. Who took that acknowledgment?

A. I did.

Q. In what capacity did you take it?

A. Notary Public.

Q. I believe you testified that the consideration that was given for that property was $30,000; am I correct?

A. Yes, sir.

Q. How was that consideration paid?

A. It was paid either by draft or check to the former owner through his attorney, Mr. Beverly.

Mr. Russo: Will you mark this as Government Exhibit 238 for identification, please.

(The document was thereupon marked Government Exhibit 238 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit 238 for identification purporting to be a bank money order, or customer's receipt for a bank money order on the Union National Bank & Trust Company of Elgin, No. 26353 dated October 10, 1944, in the sum of $10,000..

A. Yes.

Q. Have you ever seen that before?

1635 A. I have.

Q. What were the circumstances under which you saw that?

A. Well, it is the stub the bank gave us at the time we purchased the draft which was the down payment on the purchase price of the contract.

Q. That represents the down payment on the purchase price of the contract to Henry W. Hopp, is that correct?

A. That is correct.

Q. To whom was that payment made?

A. It was made to Glenn Beverly attorney for Mr. Hopp.

Q. Now, I show you Government Exhibit 97 for identification and ask you if you have ever seen that before?

A. Yes, sir.

Q. What were the circumstances under which you saw Government Exhibit 97 for identification?

A. It was at the time of the closing of the purchase from Mr. Hopp, December 30th, 1944.

Q. Government Exhibit 97 for identification purports to be a cashier's check No. 15462 dated December 30th, 1944, payable to the order of Henry Hopp in the amount of $15,000.

A. Yes.

Q. Is that the check, or one of the checks that was delivered to Mr. Hopp in partial payment or as part
1636 of the consideration for the $30,000?

A. Yes.

Q. Directing your attention to the reverse side of Government Exhibit 97, whose endorsement is that, if you know?

A. That is the signature of Henry Hopp.

Q. Now, I show you Government Exhibit 96 purporting to be a bank money order of the Union National Bank & Trust Company of Elgin, Sam Achilli remitter, dated December 30th, 1944, bearing No. 28090, payable to the order of Henry Hopp in the amount of $4,000.

A. Yes.

Q. I will ask you if you have ever seen that before?

A. Yes, I have.

Q. What does Government Exhibit 96 represent?

A. An additional portion of the purchase price of the garage building.

Q. If my arithmetic is correct, the consideration you have testified about delivering to Mr. Hopp or to Mr. Beverly totals $27,000. How was the balance of $3,000 paid?

A. It was paid through our office account, I believe, subject to adjustment for some taxes that had accrued and could not be paid.

1637 Q. What is the total outlay of consideration on the purchase price of the property?

A. You refer to the $30,000?

Q. Yes.

A. That was the purchase price.

Mr. Russo: Will you mark this as Government Exhibit 239 for identification, please?

(The document was thereupon marked Government's Exhibit 239 for identification.)

By Mr. Russo:

Q. Now, I show you Government Exhibit 239 purporting to be a warranty deed whereby Henry W. Hopp and Mathilda A. Hopp, convey to Sam Achilli Lot 10 in Block 1 of O. Davidson's Addition to Elgin in the City of Elgin, Kane County, Illinois, dated December 30, 1944.

A. Yes.

Q. I will ask you if you have ever seen Government Exhibit 239 before?

A. I have.

Q. What were the circumstances under which you saw it?

A. It was delivered at the time of the payment of the balance of the purchase price on the conveyance of
1638 the garage building.

Q. Delivered by whom and for whom?

A. Delivered by Glen R. Beverly for Henry W. Hopp.

Q. To whom?

A. The purchaser, Sam Achilli.

Q. Directing your attention to the consideration reflected on Government Exhibit 239, will you state, please, whether or not that is the true consideration?

A. The consideration stated is $10 and other good and valuable considerations.

Q. What was the true consideration?

A. $30,000.

Q. Directing your attention to the note, Government Exhibit 235, will you state, please, how the payments on that obligation to the bank were made?

A. The payments amounting to $300.00 per month were made from Highland Motor Sales account by check.

Q. Were those payments shown on the books of Highland Motor Sales as expenses in lieu of rent?

A. Either that or as rent. I don't recall.

Q. And did each of the monthly payments reflected on Government Exhibit No. 235 go to reduce the principal amount of the loan of $18,000?

A. It did.

1639 Q. Were the interest payments on that loan paid separately?

A. They were.

Q. How often were those interest payments made on that loan?

A. (No answer.)

Q. Were they made annually, semi-annually, quarterly or how?

A. I believe some are annually.

Q. What was the source of the money with which the semi-annual interest payments were made?

A. From the garage.

Q. From Highland Motor Sales?

A. Yes, sir.

Q. Now, what was the extent of your interest and Sam Achilli's interest in the property that is commonly known as 192 Wellington?

A. We each had an undivided one-half beneficial interest.

Q. And that represented an investment of how much?

A. Well, to start with, $30,000.

Q. So that each of you had an interest of $15,000, or an investment of $15,000, is that correct?

A. Subject to the mortgage.

1640 Mr. Russo: Will you mark this as Government's Exhibit 240 for identification, please.

(The document was thereupon marked Government's Exhibit 240 for identification.)

By Mr. Russo:

Q. Now, I show you Government Exhibit 240 for identification purporting to be an agreement or warranty deed between Frances McLaughlin, George McLaughlin, her husband, Ivan J. Kelly, Katherine Kelly, his wife, Eleanor M. Seybold and Martin Seybold, her husband, and Earl J. Kelly and Loretta Kelly his wife, as parties of the first part, and Sam Achilli as party of the second part.

A. Yes.

Q. I will ask you if you have ever seen that before?

A. Yes, sir.

1641 Q. Did you have an interest in that agreement?

A. I did.

Q. What was the extent of your interest?

A. Undivided one-half interest.

Q. What was the consideration that was paid to the grantors, the parties of the first part, by you and Sam Achilli?

A. $10,500.

Q. Now directing your attention to the reverse side of Government Exhibit No. 240 for identification, and to the signatures about two-thirds way down the page, will you state, please, whose signatures they are?

A. The signature of Sam Achilli, Earl H. Gromer Frances McLaughlin, George McLaughlin, Ivan J. Kelly, Katherine Kelly, Eleanor M. Seybold, Martin Seybold, Earl J. Kelly and Loretto Kelly.

Q. Were those signatures that you have just named affixed on that document on or about the date it bears?

A. It is undated.

Q. I believe you testified that the consideration was $10,500, is that right?

A. Correct.

Q. Now do you recall at this time whether or 1642 not any part of the consideration was paid at the time that the agreement was signed?

A. Yes, $500.

Mr. Russo: Mark this Government Exhibit 241 for identification, please.

(The document was thereupon marked Government Exhibit 241 for identification.)

By Mr. Russo:

Q. I show you Government Exhibit No. 241 for identification, purporting to be a warranty deed from Frances McLaughlin and others to Sam Achilli and Earl H. Gromer, conveying the westerly half of Lot 20 in Block 2 of O. Davidson's Addition to Elgin, and purporting to be dated March 25, 1946.

A. Yes, sir.

Q. I will ask you if you have ever seen Government Exhibit No. 241 for identification before.

A. I have.

Q. What were the circumstances under which you saw it?

A. At the time we closed the transaction purchasing the property from the Kelly heirs.

Q. And that is on or about the date that the 1643 document bears?

A. It is.

Q. March 25, 1946?

A. It is.

Q. Was it delivered to you on or about that date?
A. It was.
Q. What was the total consideration given for Government Exhibit No. 241 for identification?
A. $10,500.
Q. Do you recall how that consideration was paid?
A. Well, I believe the initial payment was paid out of the garage.
Q. The $500 you are talking about?
A. Yes.
Q. Yes, sir.
A. Final payment was made out of a loan secured from the bank, the First National Bank of Elgin.
Q. Now what was Mr. Achilli's share of the cost of that property at December 31, 1946?
A. Half the purchase price.
Q. And what is that?
A. $10,500.
Q. In addition to that $10,500, was there any commission paid to anyone?
1644 A. To a William Elfring.
Q. And what was the amount of the commission that was paid?
A. $500.
Q. Who paid that commission?
A. It was paid out of the garage.
Q. What was the total cost of that property to Sam Achilli and Earl Gromer?
A. $12,000.
Q. I believe you said it was $11,500 and $500—
A. $11,000—$10,500 and $500.
Q. Yes, sir.
Now what was Mr. Achilli's share in the total cost of that property at December 31, 1946?
A. One-half of the purchase price, or $5,500.
Q. One-half the purchase price, $5,500?
A. Yes.
Q. Was that true at December 31, 1947?
A. He continued to own a half interest until we dissolved.
Q. And when was it dissolved—the partnership you are talking about?
A. Yes.

Q. What year?

1645 A. I think it was 1950, 1951, I am not sure.

Q. So that his share of the cost for that property was $5,500 at 12/31/46, at 12/31/47, and 12/31/48, is that correct?

A. Well, I think we spent some money on the property for a parking lot.

Q. No, I am talking about the initial cost.

A. That is correct.

Q. Did Sam Achilli pay his share of the initial cost and did you pay your share of the initial cost? As I understand it, that was a 50-50 arrangement.

A. That is correct.

Q. Is that right?

A. Yes.

Q. Did he pay his share of the cost?

A. Well, it was paid ultimately in the mortgage payments.

Mr. Russo: I will ask that this be marked Government Exhibit No. 242 for identification.

(The document was thereupon marked Government Exhibit 242 for identification.)

By Mr. Russo:

1646 Q. Now I show you Government Exhibit No. 242, purporting to be a mortgage loan receipt book, Sam and Ruth Achilli and Mrs. Gertrude A. and Earl H. Gromer, and I will ask you if you have ever seen that before.

A. I have.

Q. What transactions are reflected in Government Exhibit No. 242 for identification?

A. That is a book that was issued by the First National Bank, and reflects the payment that were made on the mortgage which we placed with them when we bought this Kelly property.

Q. Now what is the designation or address by which the property described in Government Exhibits 241 and 242 for identification is commonly known?

A. I believe it is 213 South Grove Avenue, the address of the property.

Q. I now show you Government Exhibits 164 and 165 in evidence, and directing your attention to Government Exhibit No. 165, which purports to be a cashier check of the First National Bank, dated March 27, 1946.

A. Yes.

Q. Bearing number 120,607, and payable to the order of Frances McLaughlin and others in the amount
1647 of $6,000, I will ask you if you have ever seen that before.

A. Yes, sir.

Q. What does it purport to represent?

A. Well, it is the process of our mortgage that we put up on the property, and represents the balance of the purchase price of the lot to the sellers.

Q. Now in connection with that transaction, Mr. Gromer, did you keep any records in your office?

Strike that question.

I show you Government Exhibit No. 164 in evidence, purporting to be a real estate loan register, and ask you if you have ever seen that before.

A. I think I saw it once over at the bank.

Q. That is not a record kept by you?

A. No, sir.

Mr. Russo: I will ask that this be marked Government Exhibit 243 for identification.

(The document was thereupon marked Government Exhibit 243 for identification.)

Mr. Russo: And Government Exhibit 244 for identification.

1648 (The document was thereupon marked Government Exhibit 244 for identification.)

Mr. Russo: And Government Exhibit 245 for identification.

(The document was thereupon marked Government Exhibit 245 for identification.)

Mr. Russo: And Government Exhibit 246.

(The document was thereupon marked Government Exhibit 246 for identification.)

Mr. Russo: And Government Exhibit 247 for identification.

(The document was thereupon marked Government Exhibit 247 for identification.)

By Mr. Russo:

Q. Now I show you Government Exhibit 243 for identification, Mr. Gromer, which purports to be a contract for the sale of real estate between Walter Juby and Fern Juby, his wife, and Sarah A. Gould, a widow, to Earl

Gromer, for consideration of $8,000, and purporting to be signed by Sarah A. Gould, Fern G. Juby, Earl
1649 H. Gromer and Walter Juby.

A. Yes, sir.

Q. I will ask you if you have ever seen that before.

A. I have.

Q. Directing your attention to the signatures on the reverse side of Government Exhibit No. 243 for identification, I will ask you whose signatures they are.

A. Sarah A. Gould, Fern G. Juby, Earl H. Gromer, and Walter Juby.

Q. Were those signatures affixed to Government Exhibit No. 243 for identification on or about the date the document bears?

A. Yes.

Q. June 25, 1946.

A. They were.

Q. What was the consideration that passed, if any, at the time that Government Exhibit No. 243 for identification was executed?

A. $500.

Q. And was Government Exhibit No. 243 delivered to you on or about the date the document bears?

A. Yes.

Q. June 25, 1946?

1650 A. Yes, sir.

Q. Now I show you Government Exhibit No. 244 for identification, which purports to be a warranty deed from Sarah Gould, a widow, and Fern Juby, and Walter R. Juby, her husband, to Earl H. Gromer and Sam Achilli, purporting to convey the easterly one-half of Lot 28 in Block 2 of O. Davidson's Addition to Elgin, in Kane County, Illinois.

A. Yes.

Q. And purporting to be dated August 15, 1946.

A. Yes.

Q. I will ask you if you have ever seen that before.

A. I have.

Q. Did you see it on or about the date the document bears, August 15, 1946?

A. Yes, sir.

Q. Was Government Exhibit No. 244 for identification delivered to you?

A. It was.

Q. What was the true consideration that you gave at the time that Government Exhibit No. 244 for identification was delivered to you?

A. Well, it was paid between myself and Mr. Achilli, $8,000 total.

1651 Q. How was that consideration paid?

A. Well, by check and by proceeds of a mortgage that we put on the property.

Q. What was the amount of the mortgage?

A. I don't know.

Q. I show you Government Exhibit No. 245 for identification, purporting to be a trust deed, the grantors Earl H. Gromer and Gertrude A. Gromer, his wife, and Sam Achilli and Ruth Achilli, his wife, to George W. Glos, trustee.

A. Yes, sir.

Q. I ask you if that is the mortgage to which you refer.

A. It is.

Q. Will you refer to it now and state what the amount of the mortgage was?

A. $4,000.

Q. How was the other $4,000 paid?

A. By cash supplied either through the garage or respectively—

Q. What portion of that $4,000 was paid by you?

A. One-half.

Q. How much?

A. $4,000.

1652 Q. How much is half of $4,000, Mr. Gromer?

A. I misunderstood your question. I thought you meant of the purchase price rather than the mortgage.

Q. No, sir. I am talking about—you told me and the jury and the Court, if I recall your testimony correctly, that the total purchase price was $8,000, is that right?

A. That is correct.

Q. And that on that you financed it to the extent of $4,000, as evidenced by Government Exhibit No. 245 for identification, is that correct?

A. That is correct.

Q. So that leaves a balance of $4,000, if my arithmetic is any good, is that right?

A. That is correct.

Q. Now what portion of that $4,000 did you pay?
A. Fifty percent.
Q. And what is that amount?
A. $2,000.
Q. And what portion of it did Mr. Achilli pay?
A. Fifty percent.
Q. And what is that amount?
A. $2,000.

Q. Now directing your attention to Government
1653 Exhibit No. 245 for identification, and to the reverse side thereof, and to the signatures that appear about one-half third way down the page.
A. Yes, sir.
Q. Directing your attention to the signatures that appear on the lower right hand corner or portion thereof, whose signatures are they?
A. The signatures of Earl H. Gromer and Sam Achilli.
Q. Directing your attention to the signatures opposite on the left-hand side, whose signatures are they?
A. Ruth Achilli and Gertrude A. Gromer.
Q. Were those signatures affixed to Government Exhibit No. 245 for identification on or about the date the document bears, August 15, 1946?
A. They were.
Q. Now, Mr. Gromer, what security if any was given for the $4,000?
A. This trust deed and a note.
Q. I show you now Government Exhibit No. 246 for identification, and ask you if that is the note you refer to.
A. It is.
Q. Now will you state, please, the amount of the note?
A. $4,000.
1654 Q. And what is the date of it?
A. August 15, 1946.
Q. By whom does it purport to be signed?
A. Earl H. Gromer, Sam Achilli, Ruth Achilli, and Gertrude A. Gromer.
Q. Are they the genuine signatures of Earl H. Gromer, Sam Achilli, Ruth Achilli and Gertrude A. Gromer?
A. They are.
Q. Now I show you Government Exhibit No. 247 for identification, purporting to be a mortgage loan receipt

book in the name of Earl H. and Gertrude A. Gromer, and Sam and Ruth Achilli.

A. Yes.

Q. I ask if you have ever seen that before.

A. I have.

Q. When did you first see it?

A. On or about August 15, 1946.

Q. Is that on or about the date that the instalment note, Government Exhibit No. 246 for identification, was executed?

A. It is.

Q. Now, Mr. Gromer, will you state, please, what the total, what the share—what the share of Sam Achilli and Earl Gromer, or the interest of them was in that

1655 obligation?

A. Fifty percent each.

Q. So if my arithmetic is correct, your interest was $4,000 and the defendant, Sam Achilli's interest, was $4,000, is that right?

A. Correct.

Q. And his share of the cost then at December 31, 1946, was how much?

A. $4,000.

Q. Would that be true at December 31, 1947?

A. Yes.

Q. And at December 31, 1948?

A. Yes.

Q. Now, Mr. Gromer, will you please state what Government Exhibit No. 247 for identification purports to reflect?

A. It reflects the mortgage loan made to us by the First National Bank of Elgin on or about August 15th, 1946, and the payments made on account of the loan, principal and interest, unpaid balance of that loan.

Q. Now what was the source of the funds with which the monthly payments were made?

A. Monthly payments were made out of the Highland Motor Sales Garage account.

1656 Q. And how were those payments as they were withdrawn from Highland Motor Sales allocated on the partnership books?

A. If my recollection serves me, they were posted to this account and at the end of the year the accountant made a journal entry charging half to my capital account, or deducting it, and half to Sam's.

Q. By what designation is the property described on Government Exhibits 244, 245, 246 and 247, commonly known as?

A. It was legally described as the east half of Lot 28 in Block 2, O. Davidson's Addition to Elgin, and was known as 208 Lake Street.

A. The south side of the street.

Q. Is that 208 or 209?

A. 209.

Q. 209 Lake Street.

The Court: I think we had better take a recess, ladies and gentlemen.

(Whereupon a short recess was taken, after which the following further proceedings were had in open Court, in the presence and hearing of the jury, to-wit:)

Mr. Russo: May I proceed, your Honor?

1657 The Court: Yes.

By Mr. Russo:

Q. I show you Government Exhibits 243, 244, 245, 246 and 247, Mr. Gromer.

A. Yes.

Q. I ask you to refer to them and then I direct your attention to Government's Exhibit 167-A.

A. Yes.

Q. I will ask you to state where you deposited the $4,000 that you secured on the mortgage?

A. That was deposited in the First National Bank to the account of Earl Gromer, Trust Account.

Q. What did that Trust Account represent?

A. Well, the Trust Account is our office account. The $4,000 that was deposited in that account represents the proceeds of the loan.

Mr. Russo: Will you mark this as Government's Exhibit 248 for identification, please.

(The document was thereupon marked Government's Exhibit 248, for identification.)

Mr. Russo: 249.

1658 (The document was thereupon marked Government's Exhibit 249, for identification.)

Mr. Russo: 250.

(The document was thereupon marked Government's Exhibit 250, for identification.)

Mr. Russo: 251.

(The document was thereupon marked Government's Exhibit 251, for identification.)

Mr. Russo: 252.

(The document was thereupon marked Government's Exhibit 252, for identification.)

1659 By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government Exhibit 248 for identification, purporting to be an agreement for warranty deed, dated July 10, 1947, between Paul W. Lethin and Sam Achilli, conveying the northerly two-thirds of Lot 1 in Block 2 of O. Davidson's Addition to Elgin as per plat thereof on record in Recorder's Office of Kane County, Illinois.

A. Yes, sir.

Q. And purporting, on the other side, the reverse side, to be signed by Sam Achilli, Earl H. Gromer and Paul W. Lethin.

I will ask you if you have ever seen Government Exhibit 248 for identification before.

A. I have.

Q. Directing your attention to the signatures, I will ask you to state, please, whose signatures they are.

A. Sam Achilli, Earl H. Gromer, and Paul W. Lethin.

Q. Were Sam Achilli's and Paul W. Lethin's signatures affixed thereon in your presence?

A. I don't remember that.

Q. Were they affixed on or about the date the document bears?

A. Yes.

1660 Q. July 10, 1947?

A. Yes, sir.

Q. What is the designation or street address by which the property described in Government Exhibit No. 248 for identification is commonly known?

A. 202 Wellington Avenue, Elgin.

Q. Now what consideration, if any, passed at the time that Government Exhibit No. 248 for identification was executed?

A. $2,000.

Q. Was there any other consideration?

A. (No response.)

Q. In what form was that consideration?

A. Probably a check from the garage.

Q. Now I show you Government Exhibit No. 250 for identification, purporting to be a warranty deed, warranty deed of Paul W. Lethin to Sam S. Achilli and Earl H. Gromer, purporting to convey the northerly two-thirds of Lot 1 in Block 2 of O. Davidson's Addition to Elgin, and purporting to be signed by Paul W. Lethin on August 13, 1947.

A. Yes.

Q. I will ask you if you have ever seen that before.

A. I have.

1661 Q. And is the property described therein the property that is commonly known as 202 Wellington?

A. It is.

Q. Did you see it on or about the date the document bears?

A. Yes.

Q. August 13, 1947?

A. I did.

Q. Was Government Exhibit No. 248 for identification delivered to you?

A. Are you referring to 248?

Q. I am sorry. Government Exhibit 250 for identification, was that delivered to you.

A. It was.

Q. And was it delivered to you on or about the date the document bears?

A. Yes, sir.

Q. August 13, 1947?

A. It was.

Q. Now at that time what was the consideration given for Government Exhibit No. 250 for identification?

A. Well, an additional $12,000 purchase price, and in addition to the cash there was to be delivered to the seller a 1947 Chrysler sedan. When that was deliv-

1662 ered, I do not know.

Q. What was the value of that Chrysler sedan?

A. For the purpose of the closing, it was valuated at $2,000.

Q. Then what was the total consideration that moved in that transaction for that property?

A. $14,000.

Q. And the automobile?

A. Including it— Excuse me, and the automobile $14,000 and the automobile.

Q. $14,000 and the automobile?

A. Yes, sir.

Q. And you state that the automobile was valued at $2,000, and then tell us, please, what the total consideration was.

A. $16,000.

Q. Where did the Chrysler automobile come from?

A. Highland Motor Sales.

Q. From the stock of Highland Motor Sales?

A. Yes, sir.

Q. And where did the cash come from?

A. From the Highland Motor Sales and the proceeds of a loan from the First National Bank of Elgin.

Q. How was the amount of money that came
1663 from Highland Motor Sales allocated with respect to you and Mr. Achilli on the Highland Motor Sales books?

A. One-half to Mr. Achilli and one-half to myself.

Q. Now I show you Government Exhibit No. 251 for identification, and I will ask you if that is the trust deed that you have just referred to.

A. It is.

Q. Directing your attention to the signatures at the bottom of the page of Government Exhibit No. 251 for identification, and to the signatures on the right-hand side thereof, whose signatures are they?

A. Sam Achilli's and Ruth Achilli's.

Q. And directing your attention to the signatures on the left-hand side at the bottom of the page, whose signatures are they?

A. Earl H. Gromer and Gertrude A. Gromer.

Q. Are they the genuine signatures of Earl H. Gromer, Gertrude A. Gromer, Sam Achilli and Ruth Achilli?

A. They are.

Q. And were those signatures affixed on Government Exhibit No. 251 for identification on or about the date the document bears?

A. They were.

Q. August 15, 1947?

1664 A. Yes, sir.

Q. Was Government Exhibit No. 251 for identifi-

cation delivered to the trustee on or about the date it bears?

A. Yes, sir.

Q. August 15, 1947?

A. It was.

Q. What consideration, Mr. Gromer, moved or was given by the grantee for the trust deed?

A. $9500.

Q. And how was that consideration evidenced?

A. Oh—

Q. Strike that question.

I show you Government Exhibit No. 252 for identification, purporting to be an instalment note in the amount of $9500, dated August 15, 1947, and purporting to be signed by Sam Achilli, Ruth Achilli, Earl H. Gromer and Gertrude A. Gromer.

A. Yes, sir.

Q. I will ask if you have ever seen that before.

A. I have.

Q. What does that Government Exhibit No. 242 for identification purport to be?

A. It is an instalment note which was given to the bank for the $9500 they loaned us, and secured by the 1665 trust deed, Government Exhibit No. 251.

Q. Directing your attention to the signatures on the instalment note, Government Exhibit No. 252 for identification, whose signatures are those?

A. Sam Achilli, Ruth Achilli, Earl H. Gromer and Gertrude A. Gromer.

Q. And were the signatures that you have just named affixed on Government Exhibit No. 252 on or about the date the document bears?

A. They were.

Q. August 15, 1947?

A. Yes, sir.

Q. Now Mr. Gromer, tell me what Mr. Achilli's cost or Mr. Achilli's share of the cost of the acquisition of that property was at December 31, 1947.

A. It would be $8,000, including the automobile.

Q. And at December 31, 1948, would it be the same?

A. Yes.

Q. Directing your attention to the instalment note, Government Exhibit No. 252 for identification, were there any payments made on that obligation?

A. There were.

Q. How were those payments made?

A. Made by check from the Highland Motor Sales 1666 account to the bank.

Q. And were they made yearly, semi-annually, quarterly or month?

A. They were made monthly, applied to interest and principal.

Q. What was the source of the funds with which such monthly payments were made?

A. The garage account, Highland Motor Sales.

Q. And how on the garage account of Highland Motor Sales was the withdrawal of those funds allocated to you and to Mr. Achilli?

A. Fifty percent each.

Q. And was that note, Government Exhibit No. 252 for identification, paid and canceled?

A. It was.

Q. I show you Government Exhibit No. 249 for identification, purporting to be a receipt dated September 17, 1947, and purporting to be signed by Paul W. Lethin.

A. Yes, sir.

Q. I will ask you if you have ever seen that before.

A. I have.

1667 Q. What is that a receipt for?

A. It is a receipt for a 1947 Chrysler sedan in satisfaction of the agreement of July 10th, 1947, with Mr. Lethin.

Mr. Russo: Will your Honor indulge me just a moment, please?

The Court: Yes.

(There was a short interruption, after which the following further proceedings were had herein in open Court in the presence and hearing of the jury:)

By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government Exhibits 161 and 161-A, 161 purporting to be a cashier's check of the First National Bank dated August, 19th, 1947, bearing No. 126444 payable to the order of Earl H. Gromer in the amount of $9,500 and purporting to be endorsed by Earl H. Gromer, and Government Exhibit 161-A purporting to be a deposit slip for the account of Gromer & Grady dated August 19th, 1947, showing a deposit of $9,500.

A. Yes.
Q. I will ask you if you have ever seen these before?
A. I have.
Q. What do they relate to, Mr. Gromer?
1668 A. Well, Exhibit 161 is a bank cashier's check for $9,500, the proceeds of the note and mortgage that was given.
Q. Was that Government Exhibit 252?
A. That is right.
Q. Proceed.
A. I endorsed it and deposited it in the firm account of Gromer & Brady, $9,500 distribution.
Mr. Russo: Will you mark these as Government's Exhibits 254 and 254-A for identification.
(The documents were thereupon marked Government's Exhibits 254 and 254-A for identification.)
By Mr. Russo:
Q. Now, Mr. Gromer, I show you Government Exhibit 254 for identification, purporting to be a warranty deed from Earl M. Wilkins and Mary Wilkins his wife, to Sam Achilli and Earl Gromer, conveying certain property described as an undivided one-half interest in and to Lot 11 in Block 1 of O. Davidson's Addition to Elgin, Kane County, Illinois, and ask you if you have—strike that.
I show you Government Exhibit 253 for identification purporting to be articles of agreement made De-
1669 cember 9th, 1948, by and between Earl M. Wilkins and Mary Wilkins, his wife, and Sam Achilli and Earl Gromer, whereby Sam Achilli and Earl Gromer agree to buy property described as a one-half interest in Lot 11 in Block 1 of O. Davidson's Addition to Elgin.
A. Yes.
Q. I will ask you if you have ever seen that before?
A. I have.
Q. Did you see it on or about the date the document bears, December 9th, 1948?
A. Yes, sir.
Q. Now, I direct your attention to the signatures at the bottom of the page, on Government Exhibit 253.
A. Yes.
Q. Whose signatures are those?
A. The signatures of Sam Achilli, Earl H. Gromer, Earl Wilkins and Mary Wilkins.

Q. Were those signatures affixed to Government Exhibit 253 on or about the date the document bears, December 9th, 1948?

A. They were.

Q. Now, was there any consideration paid by Earl Gromer and Sam Achilli at the time the document was executed?

A. Yes.

Q. What was the consideration?

1670 A. $6,000 to the sellers and a $900 check to Mr. Abelmann, who was the broker.

Q. Was that consideration paid on or about the date that document bears?

A. Yes.

Q. What was the source of the funds with which the consideration was paid?

A. Highland Motor Sales.

Q. How were those funds allocated on the books and records of Highland Motor Sales with reference to Earl Gromer and Sam Achilli?

A. 50 per cent each.

Q. I show you Government Exhibit 254 for identification purporting to be a warranty deed from Earl M. Wilkins and Mary Wilkins, his wife, to Sam Achilli and Earl Gromer, and ask you if you have ever seen that document before?

A. I have.

Q. Did you see it on or about the date that the document bears?

A. I did.

Q. And is the date the document bears December 23rd, 1948?

A. It is.

1671 Q. Now, directing your attention to the consideration recited on Government Exhibit No. 254, $10.00 and other valuable consideration, will you state whether or not that reflects the true consideration that was paid for that property?

A. Well, it was $10.00 plus the valuable consideration that was paid.

Q. What was the total consideration, now?

A. $18,900.

Q. What was the amount of the down payment at the time the agreement was signed?

A. $6,000 to the seller and $900 to the broker.

Q. Now, with reference to the balance of the consideration, $12,000, how was that paid?

A. It was paid out of the proceeds of the mortgage which was secured at the Union National Bank & Trust Company on this and other property.

Q. Do you recall now what the amount of that mortgage was?

A. I believe it was $25,000.

Q. I believe you testified that the down payment was $6,900, is that correct?

A. That is correct.

Q. What was Sam Achilli's share of the down payment?

1672 A. 50 per cent.

Q. What is the amount?

A. $3,450.

Q. Was that Sam's share of the expenditure on that property as of December 31st, 1948?

A. Yes.

Mr. Russo: Will you mark this Government Exhibit 255 for identification, please.

(The document was thereupon marked Government's Exhibit 255 for identification.)

Mr. Russo: 256.

(The document was thereupon marked Government's Exhibit 256 for identification.)

Mr. Russo: 257.

(The document was thereupon marked Government's Exhibit 257 for identification.)

By Mr. Russo:

Q. Now, I show you Government Exhibit 201 purporting to be a warranty deed from Henry Santurro and Alice Santurro individually and as husband and
1673 wife, conveying to Sam Achilli and Earl Gromer property described as the northerly 71.6 feet of the easterly 115 feet of Lot 3 in Block 1, of P. Van Nostrand's Addition to Elgin in the City of Elgin, Kane County, Illinois.

A. Yes.

Q. I will ask you if you have ever seen that before?

A. I have.

Q. Did you see it on or about the date the document bears, August 16th, 1948?

A. I did.

Q. Now, I direct your attention to the signatures about two-thirds of the way down the page on Government's Exhibit 201, Mr. Gromer.

A. Yes.

Q. Whose signatures are those?

A. Henry Santurro and Alice Santurro.

Q. Were those signatures affixed to Government's Exhibit 201 on or about the date the document bears?

A. They were.

Q. Was Government's Exhibit 201 delivered to you and to Mr. Achilli?

A. It was.

Q. Was it delivered to you on or about the date the document bears?

1674 A. It was.

Q. Now, I direct your attention to the consideration reflected on Government Exhibit 201, $10.00 and other valuable considerations.

A. Yes.

Q. Will you state, please, whether or not Government Exhibit 201 recites the true consideration?

A. It recites $10.00 and other valuable consideration.

1675 Q. What was the true consideration?

A. $1,200.

Q. What was the source of the funds with which that consideration was paid?

A. Highland Motor Sales.

Q. And how was that $1,200 allocated on the books and records of Highland Motor Sales?

A. 50 per cent, to Mr. Achilli, and 50 per cent to myself.

Q. Now, what is the designation by which the property described in Government Exhibit No. 201 is commonly known as?

A. Raymond Street property, 600 Block.

Q. Is 630 Raymond Street that number?

A. Yes.

Q. Now, I show you Government Exhibit No. 255 for identification, purporting to be a ledger sheet of Howard Motor Sales, beginning with the year 1948.

A. Yes, sir.

Q. I will ask you to examine it, please, and state what that is or what it purports to be.

A. It is an account of improvements made on the dwelling that was acquired from Lethin on Wellington and removed to 630 Raymond Street.

1676 Mr. Batter: Your Honor, may I have the Reporter read back counsel's question?

Q. (Read by the Reporter.)

Mr. Batter: I object, your Honor, to any books of Highland Motor Sales being introduced in this case as the personal private papers of the Defendant. Their introduction would be a direct violation of his constitutional guarantees.

Mr. Russo: I will withdraw that question, if your Honor please.

By Mr. Russo:

Q. Directing your attention to Government Exhibit No. 253 for identification, Mr. Gromer, state what it purports to be.

A. An itemization of the expenditures that were made to improve the residence at 202 Wellington Avenue and remove it to 630 Raymond Street.

Q. Whose records is that, Mr. Gromer? From whose books and records is that taken?

A. I think it is a memorandum prepared by William F. Gromer, who supervised the moving, and it is a summation of the expenditures made by him.

Q. Who is William F. Gromer?

1677 A. My father.

Q. Is that a record of Earl H. Gromer, attorney, in Suite D, Tower Building, Elgin, Illinois?

A. You mean out of my books?

Q. Yes, sir.

A. No, sir.

Q. Whose books is it from?

A. Why, as I say, it is a recapitulation of a running account that is in the handwriting of William F. Gromer.

Q. Where does the record come from, Mr. Gromer?

A. It is a summation of individual bills that were paid out.

Q. I understand that. Is that a record of Mr. Gromer or is it a record of Gromer and Brady?

A. No, it is a record of William F. Gromer.

Q. A record of William F. Gromer?

A. Yes, sir.

Q. And you say William F. Gromer is your father?

A. Yes.

Q. Did your father disburse any money or make any improvements on the property at 628 or 638 Raymond?

A. 630 Raymond.

Q. 630 Raymond?

A. Yes, he did.

1678 Q. What was the value or the amount of expenditures made in improving that property?

A. Well, from May 31, 1948 through November 9, 1949, he expended $2,776.30.

Q. What was that date again?

A. November 9th.

Q. What year?

A. 1949.

Q. Was there any expenditure made during the year 1947? I ask you to refer to Government Exhibit No. 257 for identification, and state what that purports to be.

A. This is an account stated by Mr. Gromer to us as to the moneys expended in improving that house, removing it from Wellington Avenue to Raymond Street.

Q. And when you say "us", Mr. Gromer, who do you mean?

A. Myself and Mr. Achilli.

Q. Now I show you Government Exhibit No. 256 for identification, purporting to be a receipt from Highland Motor Sales, in the amount of $1,600, and I will ask you to state what that is.

A. That is a receipt from William F. Gromer to the Highland Motor Sales, acknowledging receipt of the $1,600 displayed in Exhibit 257.

Q. When was that expenditure made?

1679 A. Made December 27, 1948.

Mr. Russo: Will your Honor indulge me just a moment, please?

(There was a short interruption.)

By Mr. Russo:

Q. Now, I believe you testified, Mr. Gromer, that the land cost $1,200, is that correct?

A. That is correct.

Q. And you have just testified too, I believe, and you correct me if I am wrong, that the cost of the additional improvements was $1,600, is that correct?

A. That is the amount that was paid on account of improvements to that date.

Q. So state, please, what the total disbursements on that property for acquisition and for improvements was at 12/31/48, the total cost.

A. $2,800.

Q. And what was Mr. Achilli's share of that cost?

A. 50 per cent.

Q. And how much is that?

A. $1,400.

Mr. Russo: Mark this Government's Exhibit 258 for identification, please.

1680 (The document was thereupon marked Government's Exhibit 258 for identification.)

Mr. Russo: And 259.

(The document was thereupon marked Government's Exhibit 259 for identification.)

Mr. Russo: And 260 for identification.

(The document was thereupon marked Government's Exhibit 260 for identification.)

Mr. Russo: 261.

(The document was thereupon marked Government's Exhibit 261 for identification.)

Mr. Russo: 262.

(The document was thereupon marked Government's Exhibit 262 for identification.)

Mr. Russo: And 263 for identification.

(The document was thereupon marked Government's Exhibit 263 for identification.)

1681 Mr. Russo: This transaction, your Honor, is going to be rather extensive. I wonder if you want me to proceed now?

The Court: I think maybe it would be better to start at two o'clock, so we will recess now, ladies and gentlemen.

Mr. Batter: Will your Honor admonish the witness?

The Court: Pardon me?

Mr. Batter: Instruct the witness.

The Court: I instructed him yesterday and that holds over, yes.

(Whereupon the trial of the above-entitled cause was recessed until 2:00 o'clock p.m. of the same day, Thursday, April 28th, 1955.)

1682 * * (Caption—No. 53-CR-154) * *

Before Hon. Win G. Knoch,
and a Jury.

Thursday, April 28, 1955,
2:00 o'clock p.m.

Court met pursuant to recess.

Present:

Mr. Russo,
appeared for the Government;
Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States of America, vs. Achilli, the case on trial.

The Court: You may proceed.

(Whereupon the following further proceedings were had in open court in the presence and hearing of the jury, to-wit:)

1683 EARL H. GROMER, called as a witness herein on behalf of the Government, having been previously duly sworn, resumed the stand and was examined and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Now, Mr. Gromer, I show you Government Exhibit 258 for identification, purporting to be a chattel mortgage from Louis Molnar and Sylvia K. Molnar his wife, to Sam Achilli, dated August 20, 1948, purporting to convey all household goods and chattels situated at 358 Yarwood Street, Elgin, Illinois, owned by them, for consideration of $1,400. I will ask you if you have ever seen that document before.

A. I have.

Q. When was the first time you saw it and what were the circumstances under which you first saw it?

A. Well, I saw it approximately two weeks after it was executed and it was in the files of the office. It had been given to secure a $1,400 loan to Mr. Molnar.

Q. It was in the files of what office, Mr. Gromer?
A. The Elgin Acceptance Company's.
Q. What was the source of the money that was ad-
1684 vanced on that exhibit?
A. Elgin Acceptance Company, I believe.
Q. And on the books and records of the Elgin Acceptance Company how was that money allocated?
A. It was indicated as a note receivable.
Q. How were the funds allocated?
A. I don't follow you on your question, sir.
The Court: If you will pardon me, gentlemen. I will be back shortly.

(There was a short interruption, after which the following further proceedings were had in open Court in the presence and hearing of the jury, to-wit:)

1685 The Court: Proceed, please.
By Mr. Russo:
Q. Directing your attention to Government Exhibit No. 258, Mr. Gromer, to refresh your recollection, was not the source of the money that was expended on that property Highland Motor Sales'?
A. Well, it could have been. I can't know for certain. That is why I said Elgin Acceptance. Perhaps there was some inter-financing there. The records would show.
Q. Is there any record that can refresh your recollection?
A. Well, I had a file on it in the office.
Q. Do you know where that file is now?
A. I think it is in the brief case.
Q. Will you find it, please?
A. (Witness examined a number of documents.) I don't find it offhand, sir. No, sir. I can't tell from here, sir.
Q. Do you have any independent recollection as to whether it was Highland Motor Sales or Elgin Acceptance Company?
A. Well, I know ultimately that the Highland Motor Sales paid it, but this was done while I was on vacation and it was refinanced later when I got back.
1686 I don't know how the original payment was made to Mr. Molnar, out of which account. Ultimately it came out of our joint operation at the garage.
Q. Highland Motor Sales?
A. Yes, sir.

Q. On those books and records, how is that $1400 allocated?

A. Half to Mr. Achilli and half to myself.

Q. $700 to you and $700 to Mr. Achilli, is that right?

A. Yes, sir.

Q. Now I show you Government Exhibit 259, purporting to be a warranty deed from Louis Molnar and Sylvia K. Molnar, to Ruth Achilli and Sam Achilli, bearing date August 20, 1946.

Will you state, please, if you have ever seen that before?

A. I have.

Q. What were the circumstances under which you saw it?

A. Well, as part of the Molnar transaction when he was loaned the $1400, he executed this chattel mortgage and deed to a vacant lot. This is the deed to the vacant lot on Fremont Street.

Q. Is that property commonly known as 568 Fre-
1687 mont Street?

A. Yes, sir.

Q. Directing your attention to Government Exhibit No. 260, I will ask you if that is the release of the chattel mortgage which you have just referred to.

A. It is.

Q. Now I show you Government Exhibit 261, purporting to be a grant from Sam Achilli and Ruth Achilli to Earl Gromer of the property described therein.

A. Yes.

Q. I will ask you first if the property described therein is the property that is known as 568 Raymond?

A. Fremont.

Q. 568 Fremont?

A. This is a conveyance of an undivided half interest from Mr. Achilli and his wife to me of this property that Molnar had conveyed several months previous.

Q. What is the date of the conveyance?

A. November 14, 1946.

Q. Directing your attention to the signatures two-thirds of the way down the page of Government Exhibit No. 261, whose signatures are they?

A. Ruth Achilli and Sam Achilli.

Q. Were those signatures affixed on or about the
1688 date the document bears?

A. Yes, sir.

Q. November 14, 1946?

A. Yes.

Q. Now thereafter, Mr. Gromer, were there any improvements made on the premises commonly known as 568 Fremont?

A. Yes, sir.

Q. Do you have any recollection at the present time as to when those improvements were made?

A. At the time that the house on Grove Avenue purchased from Seybold was moved.

Q. Would that be sometime about the middle of the year 1948?

A. 1947 or 1948. I am not certain without reference to the file.

1689 Q. Directing your attention to Government Exhibits 262 and 263, will you refer to them please, and state whether or not your recollection is refreshed by them.

A. It is.

Q. What was the year?

A. Beginning in April of 1948.

Q. What was the date of those improvements?

A. Well, the house was moved to the new location, and then—

Q. From what location was it moved and to what location was it moved?

A. From 213 Grove Avenue to 568 Fremont Street. After it was moved it was remodeled.

Q. What was the cost of moving and remodeling the property at 568 Fremont?

A. These statements carry a balance and show a credit. It would have to have some addition to arrive at a total.

Q. Is there any other record that you know of that will refresh your recollection as to the cost of moving the house and improving that property?

A. By reference to these I can advise what was paid on account.

Q. Will you do that, sir.

A. $2,500 was paid, August 18, 1948.

1690 Q. What was that for?

A. On account of accrued costs at the time it was

paid. There had been accrued $3,990.59 through August 13th.

Q. What other costs were there in the moving and improving of that property?

A. Subsequent to that date there was accrual of additional charges.

Q. How much?

A. Well, I will have to have a paper and pencil to calculate it for you.

Q. Were the additional charges paid in 1948 or 1949?

A. There was a small refund from the Illinois Bell Telephone Company from a deposit that was given at the time of moving. That was additional payment on account, but I believe the charge was reflected in the deposit in the other column. Then there was accrued costs through December 16th that don't have a sub on it because the total is as of May, 1949.

Q. Can you by reference to Exhibits 263 and 262 calculate the total cost and the—the total of the cost of the property and the movement of the house from 213 Grove to 568 Fremont and the improvements thereon as of December 31, 1948?

1691 A. I can't give it without spending some time here. It is quite a column.

Q. Go ahead and calculate it, sir.

A. Thank you.

Mr. Russo: Do you need some paper?

The Witness: No. I need an adding machine.

Mr. Russo: That I cannot supply you with.

By Mr. Russo:

Q. Just a moment, Mr. Gromer. Perhaps I can expedite this. Directing your attention to Government Exhibit 262, will you state what the item reflected as of June 5, 1948, reflects?

A. It reflects a payment of $2,500 on account of accrued improvement costs.

Q. Now, directing your attention to Government Exhibit 263, will you state, please, what the item reflected as of August 18th, 1948, reflects?

A. Well, that is the same entry as here. This is a recap of this original billing.

Q. You testified there was a credit to the phone company or refund from the phone company?

A. Yes.

1692 Q. What was the credit or the refund?

A. It was a credit given by the telephone company, a refund.

Q. In what amount?

A. $211.03.

Q. What was the total cost on the basis of the figures you have mentioned of the movement of the house to and the improvement of the property at 568 Fremont?

A. $1,400 acquisition cost, $2,500 paid on account of improvement cost, the offsetting credit of $211.03, net of $3,688.97.

1693 Q. What is that final figure?

A. $3688.97.

Q. Now how was that figure, how was that cost allocated—

What was the source of the money of that expenditure?

A. Highland Motor Sales.

Q. Was that allocated to your account and to Mr. Achilli's account on the books of Highland Motor Sales?

A. Yes, sir.

Q. How was it allocated?

A. Fifty percent to each of us.

Q. Can you tell us now, Mr. Gromer, what was the value of the property after the house was installed on its new foundation at 568 Fremont Street was?

A. $3688.97.

Q. And what was Mr. Achilli's share in the cost of that movement and improvement?

A. $1844.48.

Q. Mr. Gromer, did there come a time when the partnership returns of income were being investigated by the Internal Revenue Service?

A. Yes.

Q. Did there come a time when Mr. Weber, Ralph A. Weber, of the Internal Revenue Service, came to

1694 visit you in connection with that investigation?

A. Yes.

Q. What was the substance of that conversation as you recall it, the substance?

Mr. Batter: I object to that, your Honor; pure hearsay and not binding upon the defendant.

Mr. Russo: The man was a partner in Highland Motor Sales, if your Honor please.

The Court: He may answer.

Mr. Russo: We will tie it up.

The Court: He may answer.

By the Witness:

A. He advised that the Service was making an investigation of the return on the business operation of the partners.

By Mr. Russo:

Q. Was there any request made of you by Mr. Weber for access to the partnership books?

A. Yes.

Q. Did you make those books available to Mr. Weber?

A. I did.

Q. Did Mr. Weber make any threats or promises to you with respect to those books and records?

1695 A. None.

Q. Was there any coercion or duress on the part of Mr. Weber to secure access to those books?

A. No, sir.

Q. Did you make those books available to him freely and voluntarily?

A. To the best of my ability.

Q. Now where were the books at the time that Mr. Weber requested them, Mr. Gromer?

A. 192 South Wellington Avenue.

Q. Did you discuss with Mr. Achilli the making available of the partnership books to Mr. Weber?

A. Yes.

Q. Did Mr. Achilli consent to making those books and records available?

A. They were available in the first instance, yes.

Mr. Russo: I will ask that this be marked Government Exhibit 264 for identification.

(The document was thereupon marked Government Exhibit 264 for identification.)

By Mr. Russo:

Q. I show you now Government Exhibit No. 264 for identification, purporting to be a ledger sheet entitled,

1696 "Partners Investments (Sam Achilli)" bearing Account Number 286A.

A. Yes, sir.
Q. I will ask you if you have ever seen that before.
A. I have.
Q. What is that record, Mr. Gromer?
A. This is an original page from the initial books which I set up when we started the partnership.
Q. Was Government Exhibit No. 264 for identification kept in the regular course of business?
A. Yes.
Q. Was it—
Mr. Batter: Your Honor, I object to any reference to any presentation of that document at all. It is one of the private papers of the defendant, and according to the constitutional rights is not available to anyone nor can anyone waive his constitutional rights for him.
The Court: I will hear argument on that in chambers.
Mr. Russo: Very well, sir.
The Court: The jury might as well recess very
1697 shortly, and then return to the jury box, please.
(Whereupon the following proceedings were had in chambers, out of the presence and hearing of the jury:)
Mr. Batter: If the Court please, we have heretofore submitted to the Court a memorandum of law on the question of partnership records and their being the private property and papers of the individual partners.
The matter has been passed upon in several cases, including In re Subpoena Duces Tecum, 81 Fed. Supp. 418, wherein the Court says:
"In general it may be properly said that each partner in a partnership is a co-owner of all partnership property with equal rights of possession and with no other power of possession without consent of the other partners.
"Ownership and possession is shared. It is nonetheless personal. It cannot be denied that the records here subpoenaed are the common personal papers of the
partners, but the right of the people to be secure in
1698 their persons, houses, papers and effects is recognized and protected by the Fourth Amendment.
"While the right is personal, it is not so limited that more than one person may not exercise it with respect to the same papers and effects. It is only

when a group or an association of persons is so impersonal in the scope of its membership and activities that it cannot represent the purely private or personal interests of its constituents that the right is unavailable.

"I am of the opinion that the doctrine of United States *vs.* White, Supra, (unincorporated labor union) cannot be extended to the member of a partnership such as 'O. Casperson & Sons,' whose only purpose is to conduct the personal business of the partners. . . ."

1699 In United States *v.* Lawn and six others, the matter again arose, and in United States *v.* Bradley, 268 Fed. 59, the Court said:

"The petitioners having been illegally deprived of their books and papers are entitled to have them returned to their possession, and not only that but to have every memorandum taken therefrom, every photostatic copy," and so on.

I am going over this hastily but I want to give this to you. The cases In re Subpoena Duces Tecum, 81 Fed. Supp. 418, and U. S. *v.* Lawn, 115 Fed. Supp. 674, and U. S. *v.* Bradley, 268 Fed. 59, cover the question of partnership papers expressly and cover them as being the individual papers of the individual partners, and one partner cannot waive on behalf of another partner the privilege attending to those papers.

Mr. Russo: If your Honor please, may I have, Mr. Batter, your affidavit in support of the motion to suppress that you have been discussing? I have sent for it, 1700 but if you have it, it will save time.

(Mr. Batter handed document to Mr. Russo.)

Mr. Russo: This, if your Honor please, is defendant counsel's copy of an affidavit sworn to and subscribed by the defendant, and attached and a part of a motion to suppress evidence.

In this affidavit, Mr. Achilli says that from January 1, 1945, until July, 1951, he and Earl H. Gromer conducted an automobile business in the City of Elgin, Illinois, as co-partners under the name of Highland Motor Sales; that sometime during the year 1948 or 1949, two men appeared at deponent's place of business, and after identifying themselves as Mr. Weber and Mr. Hall, stated

they were from the Internal Revenue Bureau and wanted to check his books;

That deponent advised Messrs. Weber and Hall that he did not have the books in his possession, that Mr. Gromer, his partner, had them; and that thereupon deponent telephoned to Mr. Gromer, advised him of the presence
1701 of Messrs. Weber and Hall, and said Gromer directed deponent to send the agents to his, Gromer's, office. This deponent did;

That about a week later, the said Gromer brought the books and records back to the Highland Motor Sales premises, and Messrs. Weber and Hall appeared and continued their investigation.

1702 Mr. Gromer testified that he made those books and records available to the Agents; that he had discussed it with Mr. Achilli, and that Mr. Achilli consented to the examination of those books by the agents.

Now, there are two cases only that I want to cite to your Honor. One is Nicola *vs.* United States, in 72 Fed. 2d, 780, at page 784. It is a Third Circuit case.

In that case, in response to the rhetorical question:

> "Was it necessary for the Defendant to invoke it—that is, the privilege against self-incrimination—in the first place before the Revenue Agent or could he wait until his trial on indictment for attempting to evade and defeat a part of his income tax?"

In that connection the Court said under the authority of McKnight *vs.* United States, CCA, 115 Fed. 972, 981, Nasansky *vs.* United States Supra—and I will give you the citation on that, if your Honor wants it—and United
1703 States *vs.* Murdock, 284 U. S. 141, 148, 149, 52 Supreme Court 63, 65, 76 Lawyers Edition 210, 82 ALR 1376; it was necessary for him to claim immunity before the Government Agent and refuse to produce his books. After the Government had gotten possession of the information with his consent, it was too late for him then to claim constitutional immunity.

The other case that I desire to call to your Honor's attention is United States *vs.* Johnson, 76 Federal Supplement 538, at pages 540, 541. It is a Middle District of Pennsylvania case, and the opinion was written by Judge James Alger Fee. He was a District Judge at that time, and at the present time he is a Circuit Judge of the Ninth Circuit Court of Appeals.

In language both cogent and classic, this is what Judge Fee said. This is in connection with a Grand Jury, but the situation is analogous:

"The privilege against self-incrimination is neither accorded to the passive resistant nor the person who
1704 is ignorant of his rights nor to one indifferent thereto. It is a fighting clause. Its benefits can be retained only by sustained combat. It cannot be claimed by attorney or solicitor. It is valid only when insisted upon by a beligerant claimant in person.

"The one who is persuaded by honeyed words or moral suasion to testify or produce documents rather than make a list ditch stand simply loses the protection. He must refuse to answer or produce and test the matter in contempt proceedings or by habeas corpns. The holdings in the cases of this type cited by the Defendant are sound, but they do not apply here because the witness in this case did not resist. He acquiesced."

1705 Mr. Batter stated that those papers were illegally procured and that the Defendant was deprived of them. The testimony of Mr. Gromer, the Defendant's partner negatives and dispels and contravenes and contradicts that statement.

The books and records of Highland Motor Sales were made availtble to the Agents freely, willingly, voluntarily, without coercion, duress or anything else, and I submit, if your Honor please, that the document that we are talking about is admissible.

Mr. Batter: Now, if your Honor please, I would like to call to your attention a more recent case on the subject, the case of the United States *vs.* Isadore Wolrich, decided in the United States District Court, Southern District of New York, February 8th of this year.

That case is extremely important in the matter before us in this respect, and that is why I requested a
1706 hearing on those motions at the time. Revenue Agent Weber is a Special Agent and did not disclose that in his call upon Mr. Achilli.

The Official Manual of Instructions, which I hope to bring before this Court through Agent Weber when he takes the stand, specifically provides the following, and I am reading from the Court's decision:

"It appears that when the alleged statement was made that the examination was a routine one it was part of

what was denominated in the Manual"—in the Manual of Instructions for Revenue Agents—"as a joint investigation conducted by a Special Agent who is stated to be responsible for the criminal feature of the case and for the procurement of proof to establish the criminal charge should the prosecution be authorized, and the Revenue Agent who is responsible for the audit feature of the case and the preparation of the report with reference to proof to support the ad valorem addition to the tax, and that it was a Revenue Agent rather than a Special
1707 Agent who was alleged in this case to have made the statement that the examination was a routine one."

Here the affidavit of Mr. Achilli discloses that Revenue Agent Weber, who is a Special Agent, and Revenue Agent Hall called upon him to conduct the ordinary examination against which there would have been no privilege, but the Manual provides that the Special Agent enters the case only for the purpose of criminal prosecution and only after it is ascertained that the particular case is one in which criminal prosecution may result.

Under these circumstances, the Court held in the Wolrich case, it took cognizance of the duty of Special Agents and said that a Special Agent masquerading as a regular Agent without disclosing his special purpose, as is said in some of these cases, is endeavoring to procure outside of a court of law what cannot be procured in
1708 a court of law, that is, the privilege against self-incrimination.

1709 Now, these documents cannot be produced in court unless they are voluntarily given by the defendant, unless he waives his constitutional rights.

Now, Special Agent Weber, masquerading as an ordinary agent, imposes and practices a fraud upon the taxpayer when he does that, and any consent given under those circumstances and conditions isn't a consent.

It is that particular situation that the Court in the Wolrich case concluded made it advisable to hold further hearings and determine exactly what the facts were, because the manual of instructions is very specific, as it is set forth in that case there. It is a document that I have been trying to get. It is confidential and cannot be procured except by subpoena and it is my intention to bring it before the Court by subpoena when Weber takes the stand.

That manual of instructions will show that it is ordinary procedure and regular procedure, for the revenue agent making an investigation to investigate; then, if
that revenue agent becomes cognizant of a fraudu-
1710 lent condition or fears there may be fraud, what he
does then is report it to his chief, who in turn takes it up with his special agent in charge, and then that special agent in charge then concludes this is a likely fraud case and assigns a special agent to the job.

But for a special agent to walk in on a taxpayer masquerading as a regular agent when his specific purpose and object is only to corral evidence to determine whether or not there should be a criminal prosecution is not a consent and I think that your Honor will benefit if he will take two minutes to read this Wolrich case where the Court reversed itself, reversed its former position.

I think it will be very enlightening to you. This is a clipping from the tax service because it is not yet reported in the advance sheets.

Mr. Russo: If your Honor please, the statement that Weber was masquerading as anything is completely untrue. He has a right to make an investigation to determine
income tax fraud under any circumstances with
1711 or without a revenue agent.

However, in answer to Mr. Batter, I refer your Honor to Hanson *vs.* United States, 186 F. 2d 61, an Eighth Circuit case, in which the defendant made admissions to the Government auditors and also made available to them documents consisting of canceled checks, bank statements, and other memoranda, which the defendant delivered to them before the indictment was returned.

It was contended that the defendant should have been warned, and that is Mr. Batter's contention.

Mr. Batter: Not at all.

Mr. Russo: It was contended that the defendant should have been warned of his constitutional rights, that the documents might be used as evidence against him. Chief Judge Gardner, speaking for a unanimous court, pointed out at page 64 that "At the time defendant produced his canceled checks and bank statements and made certain admissions to the revenue agent, he was not under arrest, neither had he been charged with any offense,
nor was he threatened with prosecution or other-
1712 wise coerced."

That point is precisely the situation here. They were making an investigation to determine his tax status. There was no threat or intimidation that a prosecution was under way and the Court, in ruling adversely to defendant's contention in that case said: "But it is said that he should have been warned that the documents might be used as evidence against him. At the time in question there is no evidence that a criminal prosecution was in contemplation." That is precisely the situation here. "The Government agent, in the performance of duty, went to defendant, advising him that he wished to check his income tax returns for the years in question. There is nothing to indicate that there was even any suspicion at that time that the defendant was guilty of a criminal offense." That, your Honor, is also precisely the situation here. "In those circumstances we think there was no occasion nor necessity for warning the defendant that any statements he might make or documents he might pro-
duce would be used against him in a criminal prose-
1713 cution."

There are cases cited, among them Wilson *vs.* United States, and the Court, citing Wilson, said, "InI Wilson *vs.* United States, supra, the Court, addressing itself to this contention, said: 'And it is laid down that it is not essential to the admissibility of a confession that it should appear that the person was warned that what he said would be used against him; but, on the contrary, if the confession was voluntary, it is sufficient, though it appear that he was not so warned.'"

Now, here we are not concerned with any confession. We are concerned with a turning-over to the Government agents of defendant's records, partnership records, and under the theory as I have stated it, as it was stated in Hanson and as it is stated by the Supreme Court in Wilson, there was no occasion or necessity at that time to warn the defendant of any constitutional rights.

The Court continues: "And in Powers *vs.* United
States, supra, the Court said inter alia: 'We are
1714 of the opinion that it was not essential to the ad-
missibility of his testimony that he should first have been warned that what he said might be used against him.'"

Now, in that case the defendant's statement made to the officer was introduced in evidence at the trial of Powers

and the Court held that it wasn't necessary to warn him of his constitutional rights and that the agent's testimony as to that conversation was admissible against him. And that is the situation here.

There has been no showing by a defense counsel that there was any intimidation of the defendant, that the production of those documents was not voluntary and willingly given, and they were not secured by threat, coercion, inducement, promises, or any other illegal fashion.

In so far as Wolrich is concerned, counsel has submitted there the opinion there, incorrectly, of Judge Clary, in which he overruled himself in a previous opinion that is cited in United States against Guerrina at 112 Fed.
Supp. 126. That is an Eastern Division of Pennsyl-
1715 vania case.

Judge Clary says in that opinion: "A reconsideration of the case has convinced the Court that on one aspect the earlier opinion was erroneous. In the light of the opinion in the Burdick case (214 F. 2d 768), the question as to whether the defendant consented to the examination of his check-stubs and other records which he himself made available to the agents, without first being warned of his constitutional rights, is one that cannot be determined preliminarily as a matter of law but is one which must be determined as a question of fact by the jury at the time of trial. The Burdick case, which cites with approval Montgomery *vs.* United States, Fifth Circuit, 1953, 203 F. 2d 887, 893, effectively disposes of this question. While it is true that the facts in each of the above two cited cases differ considerably from those in the instant case, the facts in each of those cases clearly demonstrate that criminal prosecution was contemplated
at the time the defendants were questioned by spe-
1716 cial agents of the Internal Revenue Bureau. The import of the decisions in the Burdick and Montgomery cases, supra, is that failure to warn the defendants of their constitutional rights before questioning them as to their potential tax liability does not per se and as a matter of law render their admissions involuntary. The circumstances of the investigation and the failure to warn the defendants of their constitutional rights were matters which went only to the weight and credibility of the evidence thus obtained and not to its admissibility. I do not feel that the facts in the instant case are so different

from either the Burdick or Montgomery cases as to warrant this Court reaching a different result. The order heretofore entered on May 5, 1953, will, therefore, be modified to the extent that the evidence procured by the agents of the Internal Revenue Bureau on their first visits and while the defendant was present will not be suppressed. The Government may introduce such evidence at trial, without prejudice, however, to the right of the
1717 defendant at that time to raise for jury determination the question as to whether the disclosures then made were in fact voluntary."

That, as I see it, is the situation here.

Mr. Batter: If your Honor please, one Wolrich case is on all fours with our case here. There was a mistrial for disagreement of a jury. During the course of that trial the special instructions to the agents, the manual of instructions which specifically define the powers of a special agent, came to the attention of the Court.

During the period between the first and second trials this situation arose and the Court granted the motion of the defendant for a hearing to ascertain the facts of exactly how they did gain access. Now, that is our case exactly. If Mr. Hall had gone to the Highland Motor Sales alone, conducted the ordinary routine investigation that the law authorized him to conduct, and during the course of that investigation the books and records had been made available to him, of course there would have been a consent and there would have been no prob-
1718 lem, but here is the distinguishing feature, as we have it in the Wolrich case, too. When he goes there with Special Agent Weber, whose sole purpose and object is to procure evidence for a prosecution, and that fact is not made known to the taxpayer, he cannot be given a consent. That is our situation exactly.

It was the situation in the Wolrich case and the Court then set the matter down for hearing to ascertain the facts as to whether or not the Treasury agent did or did not disclose his purpose when he first came to the taxpayer's office.

The manual of instructions is very clear, and I think it will do your Honor a great deal of help in deciding this matter if you will just read the Wolrich decision. It will only take a couple of minutes.

Mr. Russo: If your Honor please, any instructions issued by the Treasury Department to its agents is only a mandate and direction to those agents and it confers no right or benefit to any taxpayer. It is a book setting
1719 out a modus operandi for agents. There is nothing in there that protects any right of the defendant.

Now, as to the Wolrich case, Mr. Batter fails to point out first that Judge Dimock in that case rejected the opinion of Judge Clary in the first Guerrina opinion. As Mr. Batter correctly points out, the Wolrich case was tried and resulted in a disagreement of the jury. Then the defendant for the second time moved for reargument of a motion to suppress evidence alleged to have been obtained from him under a consent to a search of his records and papers alleged to have been obtained by fraud.

There is no such allegation here by defense counsel. There the defendant argued that the material was elicited on the trial which indicated—I mean, during the course of the first trial, there was certain information that came out—which indicated that the investigation, at the time of an alleged statement that it was only a routine audit, was of a character very different from a mere checkup to see whether checks which had been cashed were
1720 properly recorded in the defendant's books.

On the basis of the facts in the case the Court concluded to hear evidence on the question of whether the consent to the examination of the defendant's books and records was obtained by fraud.

There is no allegation here that these books and records were obtained by fraud.

Mr. Batter: There definitely is; if your Honor please, and that is why I requested a hearing on that motion before the trial.

Mr. Russo: On the basis of your own affidavit there is no allegation here that these books and records were obtained by fraud.

Mr. Batter: Yes, there is. It is all there.

Mr. Russo: It is significant that in the affidavit of the defendant, Sam Achilli, which is attached to his motion to reconsider, he nowhere avers or sets out any facts from which it can be inferred that access to the books and records of Highland Motor Sales, which were

made available to the investigating officers by Earl Gromer, the defendant's partner, was secured by fraud, deceit or misrepresentation.

1721 Mr. Batter: He testified so.

Mr. Russo: I submit that that affidavit supports me 100 percent.

Mr. Batter: He definitely states in his affidavit that Weber did not disclose his purpose when he called.

Mr. Russo: He doesn't have to, and the Nicola case is the authority for that, which I just read to your Honor.

Mr. Batter: I urge your Honor to read that Wolrich case.

The Court: Is that all, gentlemen?

Mr. Batter: Yes.

Mr. Russo: Yes.

The Court: Well, I will read this before I decide, gentlemen.

Mr. Russo: All right, sir. If your Honor will also read Nicola, I think you will find it quite illuminating. Here are some notes that I have on it. You might wish to read those in connection with the brief.

I don't have a copy of this, if the Court please, but it is an answer to the motion to suppress that was filed by Mr. Batter originally, which was overruled at the

1722 time he attempted to file it, at the outset of this trial.

The Court: Can you go ahead now and bypass this?

Mr. Russo: No, sir. We are right at the point where the decision must be made.

The Court: All right. I will go into it, gentlemen, and I will give you my decision as soon as I can.

Mr. Russo: Thank you.

Mr. Batter: Thank you.

1723 (Whereupon in open court and in the presence and hearing of the jury, the following further proceedings were had, to-wit:)

The Court: Ladies and gentlemen of the jury, we will now recess until Monday morning at ten o'clock, and you will return back here at that time, please.

The Court will see counsel in chambers, please.

The witness is also excused until Monday morning.

(Whereupon in chambers and out of the presence and hearing of the jury, the following proceedings were had to-wit:)

The Court: Gentlemen, this is getting close to the closing hour. I read all the cases that were submitted and I examined the affidavit, and I thought that both sides seemed to feel pretty strongly of their position. So I thought that I would, under the circumstances, give 1724 it the once over between now and Monday.

If you have anything additional you want to submit, then if you can do that by tomorrow—

Mr. Batter: I have prepared a full brief, your Honor, and it is in the file.

The Court: I have that. I was going to say that I have all of the briefs that were presented originally, that is, on the last motions.

Mr. Batter: Yes.

The Court: To suppress.

Mr. Russo: Your Honor doesn't have on file the memorandum that I gave you.

The Court: No, I have that now. If that is all you wish to offer, fine. We will give you our judgment on this Monday morning at ten o'clock, gentlemen.

Mr. Batter: Thank you.

Mr. Russo: Thank you, your Honor.

The Court: Have a pleasant week-end, gentlemen.

(Whereupon, the trial of the above-entitled cause was adjourned to Monday, May 2, 1955, at the hour of ten o'clock a.m.)

1725

Before Hon. Win G. Knoch,
and a Jury.

Monday, May 2, 1955,
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:

Mr. Russo,
appeared for the Government;

Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

(Whereupon the following proceedings were had in open Court outside the presence and hearing of the jury, to-wit:)

The Clerk: No. 53-CR-154, United States of America *v.* Achilli, the case on trial.

The Court: You may proceed.

1726 Mr. Russo: There is a ruling that your Honor has reserved in this matter.

The Court: There has been an objection interposed, and I am going to overrule the objection.

Mr. Russo: Very well.

(Thereupon the following further proceedings were had in open Court in the presence and hearing of the jury, to-wit:)

Mr. Russo: May I proceed, your Honor?

The Court: Yes. You may proceed.

EARL H. GROMER, called as a witness on behalf of the Government herein, having been previously duly sworn, resumed the witness stand and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Your name is Earl H. Gromer?

A. It is.

Q. Are you the same Earl H. Gromer who was on the witness stand and who was sworn and testified last Thursday?

1727 A. I am.

Q. Were you on the witness stand at the conclusion of last Thursday's session?

A. I was.

Q. Now, at the time you were on the stand, Mr. Gromer, you were asked to examine Government's Exhibit No. 264 for identification and state what it purported to be. Will you answer that question now, please.

A. A page from the general ledger of the Highland Motor Sales which was prepared at the commencement of the partnership, and being the partner's investment in that partnership, Sam Achilli's portion.

Q. Is that Sam Achilli's portion of his investment in Highland Motor Sales?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Q. Now, directing your attention to the first line on Government's Exhibit 264, Mr. Gromer, and specifically to January, 1945, will you explain that item, please?

A. It is indicated as the initial expense and purchases of moneys paid out by Sam Achilli at the time of the formation of the partnership for necessary items in the transaction of the business.

1728 Q. Now, directing your attention to the first figure under the Column headed "Credits", what is that figure and what does it represent?

A. The figure is $2,053.29. It represents expenditures made by him up to that time, through January.

Q. On behalf of the partnership business?

A. Yes, sir.

Q. Directing your attention to the next line in January, 1945, what is that item and what does it purport to reflect?

A. It is a 1934 Nash which Mr. Achilli put into the business at the value of $335.00.

Q. Directing your attention to the third item, what does that reflect?

A. A Buick put into the business by Mr. Achilli in the amount of $1,060.

Q. Now, directing your attention to the date of March 5th, what if anything do they purport to represent?

A. It is a journal entry of $35 where his account was credited for $35.

Q. Directing your attention now to the date December 31, 1945, the first item under that date, what does that purport to represent?

A. It is a $800 check that was paid to Mr.
1729 Achilli and debited to his investment account.

Q. That purports to be a withdrawal from the partnership investment?

A. That is right.

Q. Is that right?

A. Yes, sir.

Q. Now, directing your attention to December 31, 1945, the item there (indicating), what does that purport to represent?

A. It is a year-end posting to profit and loss of the share of profits made by the partnership in the first year of operation.

Q. Now, referring to the column under the heading of "Credits", what was Mr. Achilli's credits or investment in the partnership of Highland Motor Sales as of December 31st, 1945?

A. $7,275.92.

1730 Q. You testified, I believe, that he withdrew $800 from his partnership investment, is that correct?

A. Yes, sir.

Q. Now under the column headed, "Credits," will you state, please, the total amount of the items that are posted to Mr. Achilli's credit as of December 31, 1945?

A. $8,075.92.

Q. $8,075.92?

A. Yes.

Q. So that the figure that you testified as his balance at December 31, 1945, $7,275.91, is the remainder of $8,075.92 less the $8,000.00 that he withdrew, is that correct?

A. Less the $800.00 he withdrew.

Q. I am sorry, less the $800.00 he withdrew.

A. That is correct.

Q. Now directing your attention to Government Exhibit No. 264 once more, is that figure $7,275.92 the same figure that appears on Government Exhibit 4, which purports to be the partnership return of income of Highland Motor Sales for the calendar year 1946?

A. Yes, sir.

Q. Is that the same figure that is reflected there as Mr. Achilli's capital account at December 31, 1945?

1731 A. It is.

Q. And does that represent the total of Mr. Achilli's investment in Highland Motor Sales at December 31, 1945?

A. It does.

Mr. Russo: I will ask that this be marked Government Exhibit No. 265 for identification.

(The document was thereupon marked Government Exhibit 265 for identification.)

By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government Exhibit No. 265 for identification, purporting to be ledger sheets —there are three of them stapled together—of Sam

Achilli's account with Earl Gromer, and I ask you if you have ever seen that before.

A. I have.

Q. What were the circumstances, Mr. Gromer, under which you first saw that?

A. Well, it is a page out of our accounts receivable ledger in the office. I saw it at the time it was made.

Q. Was that record kept by you in the regular
1732 course of business?

A. By myself and the secretary.

Q. Was it the regular course of business for you to keep such a record?

A. It was.

Q. And was that record kept under your supervision and control?

A. It was.

Q. Now directing your attention, Mr. Gromer, to the columns headed Debits, Credits and Balance, please tell the Court and Jury what those three columns represent.

A. Well, the debit column represents either cash paid out by our office or a journal entry debiting the account of Mr. Achilli.

The credit column represents cash received on the account, either from Mr. Achilli or for his account or a credit from the journal.

The balance represents the status of the account after each posting, either a credit or debit balance.

Q. Now, I will ask you to refer to Government Exhibit No. 265 for identification, and direct your attention to August 10, 1944.

A. Yes, sir.

1733 Q. I ask you to tell the Court and Jury the state of the account, Mr. Achilli's account with Earl Gromer on that date.

A. It was in balance.

Q. Now directing your attention to September 12, will you please explain that item?

A. The year 1944?

Q. September 12, 1944, yes, sir.

A. Well, it is a check that was drawn by our office to the Postmaster for revenue stamps in the amount of $14.30.

Q. For what transaction?

A. I wouldn't know.

Q. Was it a transaction of Mr. Achilli's?

A. Yes.

Q. And did it relate to the acquisition by him of some real property?

A. Yes.

Q. Now directing your attention to the second item, please explain that.

A. It is an item of $125 which was credited to the Recorder's account, Recorder of Kane County, and debited to Mr. Achilli's account for recording a document.

Q. Now directing your attention to October 10, 1734 1944, please explain that item.

A. There is a check to the Union National Bank and Trust Company in the amount of $500.00.

Q. For whom was that issued and by whom was that issued?

A. The check was issued by my office and it was payable to the Union National Bank and Trust Company.

Q. On whose behalf?

A. Mr. Achilli's.

Q. Directing your attention to the next item, November 1, 1944, explain that item.

A. Well, it is cash received from Mr. Achilli in the amount of $40.55 in payment of the first two items, revenue stamps to the Postmaster and the Recorder's charges, and $25.00 which I charged him for services rendered.

Q. And what was the state of the balance of his account, as of that date?

A. Debit $500.00.

Q. He owed Gromer $500.00, is that right?

A. Yes, sir.

Q. Is that what you are saying?

A. Yes, sir.

Q. Now please explain the next item under November 1.

1735 A. That is a check to the Iron Fireman Manufacturing Company for $100.00.

Q. And what is the next item under December 30, 1944?

A. It is a check by our office to G. R. Beverely, attorney for Mr. Hopp, for the balance due of $2,703.05.

Q. And what was the state of Mr. Achilli's account with Earl Gromer as of December 30, 1944?

A. $3,303.05.
Q. Did you owe him or did he owe you?
A. He owed the office, myself.
Q. He owed you that amount?
A. Yes, sir.
Q. He was in the red?
A. Yes, sir.
Q. Now directing your attention to January 3, 1945, will you explain that item, please?
A. Mr. Achilli gave me $3500, which left a credit balance on his account of $196.95.
Q. I show you Government Exhibit No. 100 for identification, which purports to be a cashier's check payable to the order of Earl Gromer, bearing number 154,777, in the amount of $3500.
I will ask you if you have ever seen that check before.
1736 A. Yes, sir.
Q. Directing your attention to the endorsement on the back thereof, whose endorsement is that?
A. It is mine.
Q. I will ask you if that is the $3500 that Mr. Achilli gave you that you have posted here under the item cash as of January 2, 1945.
A. It is.
Q. I didn't understand you.
A. It is.
Mr. Batter: What exhibit number is that, counsel?
Mr. Russo: 100.
By Mr. Russo:
Q. Now directing your attention to the third page of Government Exhibit No. 265 for identification, Mr. Gromer, and to the item under February 20, 1948, will you explain that item, please?
A. Well, it is cash that came to the office in the amount of $4300, and had relationship to a loan to a Mr. Silagy.
Q. And to whose account was that credited?
A. Sam Achilli.
Q. Did you state the amount?
1737 A. $4300.
Q. Directing your attention to the fourth item under the date February 29, 1948, will you explain that item, please?
A. That is a check to Sam Achilli from my office for

$2115, representing a portion of the $4300 received from Mr. Silagy.

Q. Directing your attention to the date April 22, 1948, will you explain that item, please?

A. That is a balance of the cash received from Mr. Silagy in the amount of $4339.56.

1738 Q. So what was the total received on Mr. Achilli's account from Silagy?

A. $8,639.56.

Q. Now, I direct your attention to the next item immediately below under the date of April 22, 1948.

A. Yes.

Q. Will you explain that item, please?

A. It is a check to Mr. Achilli for $2,156.21, which is the balance of the Achilli-Silagy matter.

Q. Now, Mr. Gromer, will you refer to Government Exhibit 265 and tell the Court and Jury, please, the status of Mr. Achilli's account to Earl Gromer as of December 31st, 1944.

A. It was owing $3,303.05.

Q. Owing by whom to whom?

A. Mr. Achilli to Earl Gromer.

Q. Now, will you please state Mr. Achilli's account to Earl Gromer as of December 31st, 1945?

A. There was due Earl Gromer $5,426.87.

Q. Due to Earl Gromer from whom?

A. Mr. Achilli.

Q. Now, will you please state the account as of December 31st, 1946?

A. It was in balance.

1739 Q. Will you state it now as of December 31st, 1947?

A. In balance.

Q. State it now as of December 31st, 1948?

A. It was in balance.

Mr. Russo: Will you mark this as Government's Exhibit 266 for identification, please.

(The document was thereupon marked Government's Exhibit 266 for identification.)

By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government's Exhibit 266 for identification which purports to be a ledger sheet account consisting of two pages, stapled together, of Sam Achilli's account with Gromer & Brady.

A. Yes.

Q. I ask you if you have ever seen Government Exhibit 266 for identification before?

A. I have.

Q. What were the circumstances under which you saw it?

A. Mr. Brady and myself were partners in the law practice and this is a page from our accounts receivable ledger.

Q. Was that record kept in the regular course of
1740 business?

A. It was.

Q. And was it the regular course of business for you to keep such records?

A. It was.

Q. Was it made and kept under your supervision and control?

A. It was.

Q. Now, directing your attention to the three columns on Government Exhibit 266 headed "Debits", "Credits", and "Balance", will you tell us, please, what those three accounts represent?

A. Well, the debit column represents items that were paid out, paid out or charged to the account of Sam Achilli either in cash or check or journal entries.

"Credits" represents money received from Mr. Achilli or for his account or journal entries crediting his account.

The third column, "Balance" is the balance either due us or due him after the entry of the item, the respective item.

Q. Will you refer to Government Exhibit 266 for identification, please, Mr. Gromer, and tell us the balance after deducting the debits from the credits from
1741 Sam Achilli's account to Gromer & Brady as of December 31st, 1946?

A. Well, on December 31st, 1946, our office was indebted to Mr. Achilli for $2,692.00.

Q. Now, would you state again as of December 31st, 19— what was the date you just testified about?

A. December 31st, 1946.

Q. December 31st, 1946. That, I believe you said, was $2,692.00.

A. Yes, sir.

Q. Now, what is his balance as of December 31st, 1947?

A. It is in balance.

Q. In balance?

A. Yes.

Q. And as of December 31st, 1948?

A. In balance.

Q. Now, I direct your attention to Government Exhibit No. 266 for identification, and to the date of November 18th, 1946.

A. Yes.

Q. Will you explain that item, please?

A. It is a credit to the account of cash received on account of the purchase price of real estate by Mr. Achilli.

1742 Q. From whom did he purchase it?

A. A Mr. Wagner.

Q. Now, directing your attention to November 30th, 1946, and to the item posted there, will you explain that item, please?

A. An additional $135 on the same transaction.

Q. Was received by whom from whom for whom?

A. Received by Gromer & Brady for the account of Sam Achilli.

Q. Now, I direct your attention to January 2, 1947.

A. Yes.

Q. Will you explain that item, please.

A. It is an additional $2,702.97 received on account of the purchase of the Wagner property.

Q. Now, directing your attention to January 9th, 1947, will you kindly explain that item?

A. It is an additional $8,032 received in winding up that purchase.

Q. What purchase?

A. The purchase price of the Wagner property—I should say, the sale of it—no. It's the purchase. It is his account.

Q. Will you speak up, please, so the jury can hear you.

1743 A. That is money received from the—

Q. Just a minute, please.

(There was a short interruption, after which the following proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

By Mr. Russo:

Q. Now, with respect to that Wagner transaction, was that not the sale made by Mr. Achilli of that property to the Wagners?

A. That is what I was correcting, that this is money coming in from the sale of it.

Q. Now, let's correct your testimony wherever it needs correcting. What was the first money that Gromer & Brady received from Mrs. Wagner or from someone on her behalf at the outset of that transaction? Will you kindly explain the entire transaction with reference to Government Exhibit 266?

A. Well, Mr. Achilli sold this property to a Mr. Wagner and these items or payments that were received were credited to his account on account of that purchase price.

Q. When was the first item of payment received?

A. November 18th.

1744 Q. What year?

A. In the amount of $1,350.00.

Q. $1,350?

A. Yes.

Q. What year?

A. 1946.

Q. Now, did you receive any further money on Mr. Achilli's account thereafter?

A. Yes. Twelve days later we received an additional $1,350.

Q. And what was that date?

A. November 30th.

Q. Now, did you receive any further moneys from Mrs. Wagner or someone acting on her behalf in connection with Mr. Achilli's sale of that property?

A. On January 2, 1947, $2,702.97.

Q. Did you thereafter receive any further money on Mr. Achilli's behalf from anyone acting or purporting to act for Mrs. Wagner in connection with Mr. Achilli's sale of that property?

A. On January 9th, 1947, $8,032.

Q. Was received from whom?

A. We received it from Mr. Kimmler representing the Wagners, on account of Mr. Achilli.

1745 Q. Now, I direct your attention to May 20th, 1948, and to the first item posted—just a minute.

Directing your attention to the five items beginning with

May 20th and ending with May 26th, will you explain those items, please, one by one.

A. Well, Mr. Achilli purchased a house in Elgin and procured a first mortgage from the First Federal Savings & Loan Association and on May 20th, 1948, we received from the First Federal Savings & Loan Association for the account of Mr. Achilli, $13,000.

The same day we paid $8,038.89 to William H. Abelmann, who was the real estate man in Elgin, on account of the purchase. We paid the Kane County Title Company for title search, $31.15, and we drew a check to the order of Sam Achilli for $4,893.96 and charged Mr. Achilli $35 for services and paid the Kane County Title Company an additional $1.00.

1746 Q. There is another item there, Mr. Gromer.

A. I am sorry. I read them all. I got this one first.

Q. Oh.

Now directing your attention to Government Exhibit No. 198, purporting to be a check drawn on the First National Bank, bearing number 12856, dated May 20, 1948, payable to the order of Earl Gromer, Attorney, for Sam Achilli, in the amount of $13,000, I will ask you if you have ever seen that check before.

A. Yes, sir.

Q. Directing your attention to the reverse side thereof, will you state whether or not it bears any endorsements.

A. It bears my endorsement.

Q. Does it bear any other endorsement?

A. No, sir.

Q. That is the only one?

A. Yes.

Q. Now will you refer to Government Exhibit No. 266 for identification, and state, please, what relationship Government Exhibit No. 198 has to that transaction under date of May 20, 1948?

1747 A. Exhibit 198 is the check that is entered in the amount of $13,000 on May 20, 1948, in Exhibit 266.

Q. Now, Mr. Gromer, I will ask you if you are familiar with the corporation that was originally organized as Avenue Motor Sales Incorporated about November, sometime in November, 1946.

A. Yes, sir.

Q. Who were the incorporators?

A. I just don't know offhand.

Q. Who supplied the capital for that corporation?

A. The reason I don't know, we had several corporations and one of them was changed in name, and I don't know whether that is one of them that was changed. I just don't recall the circumstances of the formation.

Q. I will ask you then if Avenue Motor Sales, Incorporated was a corporation that later became the Midwest Tucker Sales Corporation.

A. Yes.

Q. Who supplied the capital for Avenue Motor Sales at the time that it was incorporated?

A. Mr. Achilli and myself in the way of a loan for the operation thereof.

Q. Directing your attention to January 29, 1947, I will ask you whether or not that was the date or the
1748 approximate date on which the name of the corporation known as Avenue Motor Sales was changed to Midwest Tucker.

A. I wouldn't remember the date, sir.

Q. Is that approximately correct?

A. I have no way of fixing it in my mind.

Q. All right. Do you recall what the authorized capital stock of Avenue Motor Sales, Incorporated was?

A. No, sir.

Q. What was the total investment in Midwest Tucker Sales?

A. You are asking items that I am not that familiar with to remember. I have documents in the file.

Q. Will you refer to any documents that you may have that will refresh your recollection?

A. (Witness produced documents.) I have the cash received account of the books of Midwest Tucker which indicates the amount of money that was paid in.

Mr. Russo: I will ask that this be marked Government's Exhibit No. 267 for identification.

(The document was thereupon marked Government Exhibit 267 for identification.)

1749 By Mr. Russo:

Q. Now I show you Government Exhibit No. 267 for identification, purporting to be a ledger sheet of the cash account received and ask you if you have ever seen that before?

A. I have.

Q. Was that record kept in the regular course of business?

A. It was.

Q. Was it the regular course of business for you to keep such records?

A. It was.

Q. And were the transactions that it purports to represent made at or about the time that they are reflected thereon?

A. They were.

Q. Was it kept under your supervision and control?

A. Yes, sir.

Q. Now will you refer to Government Exhibit No. 267 for identification, and state what the total amount invested in Midwest Tucker Sales was?

A. Well, sir, as I said, this is a record of the items that were received and used by the Midwest Tucker but it isn't the payout sheet that would indicate that to me.

1750

Q. Well, find the record that will indicate it to you.

A. I have the cash paid out items which indicate—

Mr. Russo: I will ask that this be marked Government's Exhibit No. 268 for identification.

(The document was thereupon marked Government Exhibit 268 for identification.)

By Mr. Russo:

Q. Now Mr. Gromer, I show you Government Exhibit No. 268 for identification, and I will ask you to refer to it and to the dates December 21, 1946, and December 26, 1946, and ask you if those two postings reflect the amount of Sam Achilli's and Earl Gromer's investment in Midwest Tucker Sales.

A. Yes.

Q. What is that amount?

A. $16,000.

Q. What was Mr. Achilli's share in the investment in Midwest Tucker Sales?

A. Well, he was contributing half of the item and I was contributing the other half.

Q. So his investment would be what?

1751 A. Eight thousand.

Q. $8,000?

A. Yes, sir.

Q. Now did that investment continue into the years 1947 and 1948?

A. Yes, it is still continuing.

Q. Was a portion—Now pay attention to the question, Mr. Gromer, and I will ask the question again.

Did that investment in Midwest Tucker Sales continue in 1946 into 1947 and 1948?

A. Yes.

Q. Was there a portion of that investment returned to you and to Mr. Achilli?

A. Yes.

Q. What was the total amount returned?

A. We received $4,000 franchise refund, which was put into a Melrose Park franchise.

Q. Yes. Now what was Mr. Achilli's share of that $4,000?

A. $2,000.

Q. Are you familiar with the corporation known as Speedway Tucker Sales?

A. Yes, sir.

Q. When was that organized?

1752 A. Shortly after this Avenue Motors.

Q. Was that organized approximately April 17, 1947?

A. Yes, sir.

Q. Who supplied the capital for that corporation?

A. Well, Mr. Achilli and I. It was represented by this refund item.

Q. If I understand your testimony, then the $4,000 that came back to you from Midwest Tucker Sales was reinvested by you and Mr. Achilli in Speedway Tucker, is that right?

A. Ultimately, yes. The timing was a little different. We put it in and then this was—

Q. Well, just tell us the story, Mr. Gromer.

A. Well, we received the refund from Tucker Corporation in June, and I think we commenced the other business a little earlier, opened up. Of course, we didn't need any capital at the time.

Q. But you did put the $4,000, you and Mr. Achilli did put that $4,000 into Speedway Tucker?

A. Yes, sir.

Q. What was Mr. Achilli's share of that $4,000 investment?

A. One-half.

Q. And what is the amount?

1753 A. $2,000.

Q. Now did that investment continue in the years 1947 and 1948?

A. Yes.

Mr. Russo: Mark this Government Exhibit 269 for identification.

(The document was thereupon marked Government Exhibit 269 for identification.)

The Witness: Just a moment. Do you want these out?

Mr. Russo: Just the ones concerning which you have testified.

By Mr. Russo:

Q. Now Mr. Gromer, I show you Government Exhibit No. 269 for identification, purporting to be a certified photostatic copy of a judgment note in the amount of $9,000, dated November 15, 1946, and purporting to be signed by Sam Achilli.

A. Yes, sir.

Q. I will ask you if you know where the original of the photostatic copy, Government Exhibit No. 269 for identification, is now.

Let me ask you first, did you ever see the original?

1754 A. Yes.

Q. Do you know where the original is now?

A. Well, the last time I saw it, it was in the Clerk's office of the Circuit Court of Kane County, Illinois.

Q. What transaction, if any, does Government Exhibit 269 for identification purport to reflect?

A. It is a note for $9,000 given by Sam Achilli to me, November 15, 1946 which is payable six months after date or on sale of the Red Lion.

Q. Was a loan made on or about the date the document bears November 15, 1946?

A. Yes, sir.

Q. Now I show you Government Exhibits Nos. 167 and 168 in evidence. Government No. 167 purports to be a cashier's check on the First National Bank of Elgin, dated October 31, 1946, bearing number 122961, payable to the order of Earl Gromer in the amount of $4,000.

A. Yes, sir.

Q. Government Exhibit No. 168 purports to be a cashier's check of the First National Bank of Elgin, dated October 31, 1946, bearing number 122962, payable to the order of Earl Gromer.

I will ask you if you have seen those two docu-
1755 ments before.

A. I have.

Q. I will ask you if they represent the form in which the loan that you have just testified about was made to Mr. Achilli?

A. It is the $9,000 that was loaned to him at the time he gave this note.

Q. Directing your attention to the reverse side of Government Exhibit No. 168, I will ask you to examine it, please, and state what if any endorsement it bears.

A. It bears my endorsement, "Pay to the order of Sam Achilli, Earl H. Gromer," and then is endorsed by him.

Q. Directing your attention to Government Exhibit No. 167 and to the reverse side thereof, will you state, please, what if any endorsement it bears?

A. "Pay to the order of Sam Achilli" with my siggnature and then his.

Q. Now, after those endorsements were placed on Government Exhibits Nos. 167 and 168, what if anything was done with the $9,000?

A. I delivered the drafts to Mr. Achilli.

Q. Was that $9,000 loan ever repaid?

A. Well, it was included in the final settlement at
1756 the time of the dissolution. It was never paid as such.

Q. It was never paid as such.

A. Right.

Q. Did there come a time when you had to bring action on that note?

A. That was the reason it was put in judgment March 9, 1951.

Q. You got a judgment against Mr. Achilli?

A. Yes, sir.

Q. For default in payment of the note?

A. Yes, sir.

Q. And what was the date on which that default judgment was taken?

A. March 9, 1951.

Q. Was that loan of $9,000 by you to Mr. Achilli outstanding as of December 31, 1946?

A. Yes.

Q. Was it outstanding as of December 31, 1947?

A. Yes.

Q. Was it outstanding as of December 31, 1948?

A. Yes.

Q. Now directing your attention to Government Exhibit No. 79 in evidence, which purports to be an agreement of Sam Achilli and Ruth Achilli to purchase for
1757 $1,000 certain property that is described as a portion of the Red Lion property, I will ask you if you have ever seen that before.

A. Yes, sir.

1758 Q. What were the circumstances under which you first saw it?

A. Mr. Achilli was negotiating with the Material Service Corporation for the purchase of this tract. I examined the title for him and we viewed the agreement before he signed it.

Q. I direct your attention to the third page of Government Exhibit 79—or rather, to the fifth page and to the signatures on the right-hand side of the page, about half way down the page.

A. Yes.

Q. Whose signatures are those, if you know?

A. Sam Achilli and Ruth Achilli.

Q. Did you receive Government Exhibit 79 on behalf of Sam Achilli and Ruth Achilli?

A. Yes, sir.

Q. Following the execution of the agreement evidenced by Government Exhibit 79, was there a deed delivered to you by Material Service Corporation for Mr. and Mrs. Achilli?

A. Yes. The deed was delivered. I don't know to whom it ran.

Q. I show you Government Exhibit 80-A purporting to be the deed conveying the property described in
1759 Government Exhibit 79, purporting to be a certified photostatic copy of that deed.

A. Yes.

Q. I will ask you if you ever saw the original?

A. I did, and we recorded it.

Q. Did you receive it from Material Service Corporation for Mr. and Mrs. Achilli?

A. Yes.

Q. I believe you said you recorded it for them?

A. Yes.

Q. Now, I show you Government Exhibit No. 169 purporting to be a cashier's check of the First National Bank of Elgin dated February 9th, 1948, bearing No. 128425 payable to the order of George Fritzel dated February 9th, 1948.

A. Yes.

Q. I will ask you to examine Government Exhibit 169 and state whether or not you have ever seen it before?

A. Yes, sir.

Q. Will you describe the circumstances under which you saw it and the transaction, if any, to which it relates?

A. Mr. Fritzel was buying a one-half interest in the Red Lion Restaurant.

Q. By that do you mean the corporation or the 1760 property?

A. The corporation and the personal property, not the real estate.

Q. The corporation and the personal property, not the real estate?

A. Yes.

Q. Very well, sir. Go ahead.

A. This is a portion of the purchase price that passed in the office.

Q. From Mr. Fritzel to Mr. Achilli?

A. Yes, sir.

Q. On or about the date that document bears?

A. Yes.

Mr. Russo: Will you mark this as Government Exhibit 270 for identification.

(The document was thereupon marked Government Exhibit 270 for identification.)

Mr. Russo: 270-A.

(The document was thereupon marked Government Exhibit 270-A for identification.)

Mr. Russo: 270-B.

(The document was thereupon marked Govern-
1761 ment Exhibit 270-B for identification.)

By Mr. Russo:

Q. Now, Mr. Gromer, I show you Government Exhibit

Exhibits 270 and 270-A, 270 purporting to be a bill of sale.

A. Yes.

Q. I ask you to examine those documents and state, please, whether or not you have ever seen them before.

A. I have.

Q. What were the circumstances under which you first saw them?

A. Well, I prepared them at the time that Mr. Fritzel was acquiring an interest in the Red Lion.

Q. What does Government Exhibit 270 purport to be?

A. It is a bill of sale of an undivided one-half interest by Mr. Achilli to George E. Fritzel.

Q. An undivided half interest in what?

A. All the goods and chattels in the premises known as the Red Lion, Route 25, St. Charles Township, Kane County, Illinois.

Q. What is personal property, not real property, is that correct?

A. Right.

1762 Q. What does Government Exhibit 270-A purport to be?

A. That's a statement of the transaction, the merchandise that was on inventory on the date of the sale, half of which is included in the sale price, and half the value of the chattel and equipment, half the prepaid insurance and half of the prepaid liquor and dance license.

Q. What does that total?

A. $16,894.85.

Q. What was the date of the transaction?

A. On or about February 9th, 1948.

The Court: We will take a short recess, ladies and gentlemen.

(Whereupon a short recess was taken, after which the following further proceedings were had herein in open Court in the hearing and presence of the jury, to-wit:)

1763 The Court: Proceed, please.

By Mr. Russo:

Q. Mr. Gromer, are you familiar with an estate known as the Walbaum estate?

A. I don't believe so.

Q. Are you familiar with an estate known as the Bohlin estate?

A. Yes.

Q. Did you have any connection in any representative capacity with respect to the administration of that estate or the distribution of the proceeds from it?

A. I was the attorney representing the administrator of the estate.

Q. Who was the administrator?

A. Mrs. Achilli.

Q. Now directing your attention to Government Exhibit No. 265 for identification, the first sheet; the second page, and to the date July 26, 1944.

A. Yes, sir.

Q. I draw your attention to the item posted there and ask you to explain it for the Court and Jury.

A. It is a journal entry of a transfer of $9,785.76 from the Emma Walbaum account to Sam Achilli's account.

Q. On what date?

1764 A. On July 26, 1944.

Q. Was there any other entry on that same date?

A. Yes. A check was drawn to the Elgin Loan and Home to retire a mortgage in the amount of $2,089.34. $11.00 was paid to the Postmaster for revenue stamps. A $420 check was issued for commission on the sale of the property, and $7224.42 paid to Ruth Achilli and $25 charged for the services.

Q. Did that check that you issued to Ruth Achilli in the amount of $7224.42 come back to you?

A. We entered it on the 28th of July, 1944, journaled it, debited the bank account, and issued a new check to her for $7,134.42.

Q. Now does the check that you issued in that amount represent Ruth Achilli's and Howard Bohlin's interest in the Walbaum estate?

A. I don't believe Mr. Achilli had an interest—

Q. Ruth Achilli. Let me rephrase the question. Whose interest did the $7,224.42 represent?

A. If I may correct you, this was the first check, which was written and was debited back on the bank account and canceled because it was in the wrong amount.

The commission payable was $520 instead of $420,
1765 and so we had to redraw the check and the check was for $7,134.42, and represented the interest of Ruth Achilli in the property.

Q. And what was the conduit through which she shared in the Walbaum property? Was it her mother, Edith Bohlin, or do you know?

A. Well, sir, I don't think the Walbaums were related to the Achillis, and I don't think she shared in that estate. She shared in the Bohlin estate.

Q. Do you have any records reflecting any inheritances by Mrs. Sam Achilli in the Bohlin estate?

A. Yes.

Q. Will you refer to those, please?

A. (Witness produces document.)

Mr. Russo: I will ask that this be marked Government's Exhibit No. 271 for identification.

(The document was thereupon marked Government Exhibit 271 for identification.)

By Mr. Russo:

Q. Do you have an inventory of the Bohlin estate, Mr. Gromer?

A. I have a copy of the inventory that was filed in
1766 the Bohlin estate.

Q. When we speak of the Bohlin estate, are we speaking of the estate of Edith Bohlin?

A. Yes.

Q. Who was Edith Bohlin?

A. Mother of Ruth Achilli.

Q. When did she die?

A. March 7, 1943.

Q. Did you open the estate in the Probate Court of Kane County?

A. I did.

Q. When?

A. Late March or early April of 1943.

Q. Did you make an inventory of the assets of that estate?

A. I did.

Q. May I have it, please?

A. (Witness produces document.)

Mr. Russo: I will ask that this be marked Government's Exhibit No. 272 for identification.

(The document was thereupon marked Government Exhibit 272 for identification.)

1767 By Mr. Russo:

Q. I show you Government Exhibit 272 for identi-

fication, and ask you if that is the inventory of the Bohlin estate to which you have referred.

A. It is.

Q. Will you please tell us what that estate consisted of?

A. It consisted of an undivided one-third interest in and to real estate located Lot 5 South 10 feet Lot 9 of the Assessor's Subdivision of part of farm Lot 5, Lots 6, 7 and 8, Northeast Quarter, Section 23, in Elgin, being a residence on the west side of town.

Also a tract, part of Outlot 1 of James T. Gifford's Addition to Elgin, which was a residence, an apartment building, on the east side of town.

Q. Was there anything else?

A. No, sir.

Q. What was the amount of the total inventory?

A. That was the inventory, and in the final report there were some receipts that weren't inventory.

Q. What were those receipts?

A. Well, there was a bonus check from the Elgin National Watch Company of $52.66; a small bank account of $214.00; and a Social Security contribution check of
1768 $76.50.

Q. Did you sell the house concerning which you have testified there at the southeast corner of Griffith and Division? Was that sold?

A. Not as a proceeding in the estate, no. The undivided one-third interest was sold in the west side house.

Q. What were the net proceeds from the sale of that one-third interest?

A. I don't know without reference—

Q. I ask you to examine Government Exhibit No. 271 for identification, and ask you if that transaction is reflected there.

A. It is.

Q. Directing your attention to Government Exhibit No. 271 for identification and to the item beginning March 14, 1944, will you relate the circumstances of the distribution of that estate?

A. Well, on March 2, 1944, we paid the Kane County Title Company $32.00 for continuing the title covering this property.

On March 14, 1944, we received from the Elgin Loan and

Home $3,583.86, being the net distribution from the sale.

1769 Q. On April 4 we paid to Jennie McDonald, one of the heirs, $153.21. We paid to Ruth Achilli $284.91. We paid to Jennie McDonald $1,029.58; to Elsie Scherbarth, $1029.58; to Ruth Achilli $435.19; to Howard Bohlin $435.19.

We charged fees of $25 handling the real estate transaction. We charged $150 for representing the estate.

1770 Q. Who is Howard Bohlin, if you know?

A. The brother of Ruth Achilli.

Q. I direct your attention to Government Exhibit 272, the inventory.

A. Yes.

Q. I will ask you if that is the same property that was sold in connection with the administration of the Bohlin Estate?

A. Well, Tract 1 was sold in connection with the administration of the Bohlin Estate.

Q. Tract 1 was sold in connection with the administration of the Bohlin Estate?

A. Yes

Q. Is that identified as part of the Walbaum Estate?

A. No.

Q. It is not?

A. No, sir.

Mr. Russo: Will you mark this as Government Exhibit 273 for identification, please.

(The document was thereupon marked Government Exhibit 273 for identification.)

By Mr. Russo:

1771 Q. Now, Mr. Gromer, I show you Government Exhibit 273 for identification purporting to be the corporate records of the Red Lion, Incorporated.

A. Yes.

Q. I will ask you if you have ever seen that volume before?

A. Yes, sir.

Q. Now, I call your attention to the call and waiver of notice of special meeting of the Board of Directors of Red Lion, Incorporated dated February 9, 1948, and to the minutes of the meeting held on that date pursuant to the call and waiver of notice.

A. Yes.

Q. I will ask you to state whether those are the original minutes of the Red Lion, Incorporated?

A. They are.

Q. I call your attention to what purport to be the minutes of a special meeting held on February 9th, 1948, to page 2 thereof and to the signatures.

A. Yes.

Q. I will ask you to state, if you know, whose signatures they are?

A. Margaret Fritzel's signature appears as Secretary. The minutes are approved by George E. Fritzel, Sam
1772 Achilli and George McCaffrey, Directors.

Q. In what capacity do their signatures appear?

A. As Directors.

Q. And were they the three Directors at that time?

A. Yes.

Q. And the only Directors?

A. Yes.

Q. You have testified that there appears on there the signature of Margaret L. Fritzel.

A. Yes.

Q. Is that her signature?

A. Yes.

Q. Now, to the left of the signature of Margaret Fritzel appear three signatures under the typed word "Approved".

A. Yes.

Q. Are they the signatures of the three Directors, George E. Fritzel, Sam Achilli and George McCaffrey?

A. Yes.

Mr. Russo: At this time, if your Honor please, I would like to offer in evidence Government Exhibit 293, and particularly the three pages concerning which this witness has testified.

1773 Mr. Batter: 293?

Mr. Russo: 273. I beg your pardon.

Mr. Batter: No objection.

The Court: It may be received.

(The document previously marked Government's Exhibit 273 for identification was thereupon received in evidence as Government's Exhibit 273.)

Mr. Russo: At this time, may it please the Court, I ask the Court's permission to read a portion of the minutes to the jury.

The Court: Very well.

Mr. Russo: (Reading):

"The Officers of the corporation were directed and authorized to enter into a lease with Sam Achilli of the premises known as the Red Lion, State Route 25, St. Charles Township, Kane County, Illinois, for a term of three years at a monthly rental of $500.00 and to employ George E. McCaffrey as Manager.

"There being nothing further to come before the meeting the same adjourned."

1774 Mr. Batter, if you will have no objection, we would like to take those pages and remove them from the corporate minutes and have them photostated under your and my supervision and the original volume returned to Mr. Gromer, who is attorney for the corporation, inasmuch as they are in need of it, I understand.

The only Exhibit I am interested in offering is the call and waiver and the minutes. Do you have any objection?

Mr. Batter: No objection after I have had an opportunity to go through the book.

Mr. Russo: Thank you. Now, Mr. Reporter, will you mark this as Government's Exhibit 274 for identification, please.

(The document was thereupon marked Government Exhibit 274 for identification.)

By Mr. Russo:

Q. Mr. Gromer, I show you Government Exhibit 274 for identification purporting to be a ledger sheet of a floor plan account of Avenue Motor Sales, 5304 Highland Avenue, Elgin, Illinois, containing to the left thereon 1775 the names Duane W. Mull and Robert J. Knaack.

A. Yes.

Q. I will ask you to examine it, please, and state whether or not you ever have seen that before?

A. I have.

Q. What were the circumstances under which you first saw it?

A. It is a page out of the accounts of the Elgin Acceptance Company and represents the account of Duane W. Mull and Robert J. Knaack, Co-Partners, who did business as Avenue Motor Sales in Elgin.

Q. Now, are there posted on three various and sundry checks that were issued by the Elgin Acceptance Company

to Avenue Motor Sales in connection with the financing done by Avenue Motor Sales with Elgin Acceptance Company?

A. Yes.

Q. I direct your attention, Mr. Gromer, to April, 1948, and show you Government Exhibit 42 in evidence.

A. Yes.

Q. I ask you to examine Government Exhibit 42 which purports to be a check of the Elgin Acceptance Company, No. 877, dated April 28th, 1948, payable to the order of Avenue Motor Sales in the amount of $600.00.

1776 A. Yes.

Q. I will ask you whether you have ever seen that check before?

A. Yes, sir.

Q. I direct your attention to the signature in the lower right-hand corner.

A. Yes.

Q. Whose signature is that?

A. Mine.

Q. Was it placed on there at or about the date the document bears?

A. The date it bears, yes.

Q. Now, will you refer to Government Exhibit 274 and state whether or not the transaction reflected by Government Exhibit 42 is on there?

A. It is.

Q. Will you explain that transaction, please?

A. It is a check for $600.00 which was given for a floor planning of a 1939 Oldsmobile.

Q. Is that the same automobile that is described in the left-hand portion of Government Exhibit No. 42?

A. That describes a 1949 Oldsmobile, yes, sir.

Q. I direct your attention to the endorsements on the back of Government Exhibit 42.

1777 A. Yes.

Q. Whose endorsements if any appear on there?

A. Avenue Motor Sales by Duane W. Mall and "For Deposit only, Highland Motor Sales."

1778 Q. Now will you refer to Government Exhibit No. 274 for identification, and state whether or not Government Exhibit No. 43, which purports to be a check of the Elgin Acceptance Company, bearing No. 878, dated

April 28th, 1948, payable to the order of Avenue Motor Sales in the amount of $700 and purporting to be signed by Earl H. Gromer is reflected on Government Exhibit No. 274.

A. It is. It is entry No. 2.

Q. Directing your attention to Government Exhibit No. 43 and to the signature appearing in the lower right-hand corner, whose signature is that?

A. Mine.

Q. And was it affixed thereon on or about the date the check bears?

A. Yes.

Q. Directing your attention to the endorsements on the back of Government Exhibit No. 43, will you state please whose endorsements appear thereon, if any?

A. Avenue Motor Sales, Duane W. Mull. I haven't the slightest idea whose the next one is.

Q. Will you state please whether or not any endorsement appears thereon of Highland Motor Sales or of Sam Achilli?

1779 A. No.

Q. It does not?

A. No, it doesn't look like it. No.

Q. Now, will you again refer to Government Exhibit No. 274 for identification, and I direct your attention now to Government Exhibit No. 45, which purports to be a check of the Elgin Acceptance Company, bearing No. 879, dated May 8th, 1948, payable to the order of Avenue Motor Sales in the amount of $600.00.

A. Yes.

Q. Directing your attention to the signature in the lower right-hand corner, I will ask you whose signature that is.

A. Mine.

Q. Was it placed on there on or about the date the check bears?

A. Yes.

Q. Directing your attention to the reverse side of Government Exhibit No. 45, will you state, please what endorsements if any appear there?

A. Avenue Motor Sales, Robert J. Knaack. Then D. E. —that is the same one.

Q. Would that be Williams?

A. It could be.

1780 Q. Very well, sir, go ahead.

A. Percy Boetticher.

Q. Will you state whether or not, please, there appears thereon any endorsement of Highland Motor Sales or of Sam Achilli?

A. No.

Q. Is that reflected on Government Exhibit No. 274 for identification?

A. Yes, it is entry No. 3.

Q. And what does that reflect?

A. It reflects a floor plan of a vehicle purchased by Avenue Motor Sales, a 1939 Plymouth.

Q. That was financed by Elgin Motor Sales, was it?

A. Yes, sir—Elgin Acceptance Company.

Q. Directing your attention to Government Exhibit No. 44, which purports to be a check of Elgin Acceptance Company, bearing No. 881, dated May 18, 1948, payable to the order of Avenue Motor Sales, in the sum of $850.

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. Mine.

Q. Was your signature placed on there on or about 1781 the date the check bears?

A. Yes.

Q. Calling your attention to the reverse side thereof, will you state please what endorsements if any it bears?

A. Avenue Motor Sales by Robert J. Knaack and Sam Achilli, and Sid Luckman Motors, Incorporated.

Q. And is Government Exhibit 44 reflected on Government Exhibit No. 274 for identification?

A. It is.

Q. What does that reflect?

A. It reflects the floor plan by the Elgin Acceptance Company of a 1941 Oldsmobile automobile bought by Avenue Motor Sales.

Q. Now, I direct your attention to Government Exhibit No. 46, purporting to be a check of the Elgin Acceptance Company, No. 893, dated May 22, 1948, payable to the order of Avenue Motor Sales in the amount of $800.

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner, will you state please whose signature that is, if you know?

A. That is my secretary's, Nan Jean Baumann.

Q. Directing your attention to the reverse side of Government's Exhibit No. 46, I will ask you to examine it
1782 and state what if any signatures it bears.

A. Avenue Motor Sales, Duane W. Mull and Sam Achilli.

Q. Is there an endorsement following that of Sam Achilli of Highland Motor Sales?

A. No.

Q. And is Government Exhibit No. 46 reflected on Government Exhibit No. 274 for identification?

A. It is.

Q. What does it reflect?

A. Floor plan of a 1942 De Soto by Avenue Motor Sales.

Q. Directing your attention to Government Exhibit No. 48, which purports to be a check of the Elgin Acceptance Company, bearing No. 894, dated May 22, 1948, payable to the order of Avenue Motor Sales in the amount of $1500.

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner, will you state please, whose signature that is, if you know?

A. Nan Jean Baumann.

Q. Directing your attention to the reverse side of Government Exhibit No. 48, will you state please what endorsements if any it bears?

A. Avenue Motor Sales, Duane W. Mull, Sam
1783 Achilli and George Musso, Ketzner Motor Sales Company, Edwardsville, Illinois.

Q. Does it bear any endorsement of the Highland Motor Sales?

A. No.

Q. Is Government Exhibit No. 48 reflected on Government Exhibit No. 274 for identification?

A. Yes, it is.

Q. What does it reflect?

A. It is a floor plan of a 1947 Plymouth by the Avenue Motor Sales.

Q. Now, I show you Government Exhibit No. 47, which purports to be a check of the Elgin Acceptance Company, bearing No. 895, dated May 22, 1948, payable to the order of Avenue Motor Sales in the amount of $700:

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner, will you state please, whose signature that is?

A. Nan Jean Baumann.

Q. Directing your attention to the reverse side of Government Exhibit No. 47, will you state please, whether or not it bears any endorsements?

A. It does.

1784 Q. What endorsements?

A. Avenue Motor Sales, Duane W. Mull, Sam Achilli.

Q. Is there any endorsement following that of Sam Achilli by Highland Motor Sales?

A. No.

Q. Is Government Exhibit No. 47 reflected on Government Exhibit No. 274 for identification?

A. Yes.

Q. What does it reflect?

A. It is a floor plan of a 1941 Plymouth by the Avenue Motor Sales.

1785 Q. Directing your attention to Government Exhibit No. 49, which purports to be a check of the Elgin Acceptance Company, No. 904, dated May 1, 1948, payable to the order of Avenue Motor Sales in the amount of $700.

A. Yes, sir.

Q. Directing your attention to the signature in the lower right-hand corner, will you state, please, whose signature that is, if you know?

A. Nan Jean Baumann.

Q. Directing your attention to the reverse side of Government Exhibit No. 49, will you examine it, please, and state whether or not it bears any endorsements?

A. Avenue Motor Sales, Duane W. Mull, Sam Achilli.

Q. Will you state, please, whether or not following the endorsement of Sam Achilli there appears any endorsement of Highland Motor Sales?

A. No, sir.

Q. Is Government Exhibit No. 49 reflected on Government Exhibit No. 274 for identification?

A. It is. It is floor plan of a 1940 Chevrolet club coupe to the Avenue Motor Sales, $700.

Q. Now I show you Government Exhibit No 52, purporting to be the check of Elgin Acceptance Company,

1786 No. 916, dated June 10, 1948, payable to the order of Avenue Motor Sales in the amount of $1090.

Directing your attention to the signature in the lower right-hand corner, will you state, please, whose signature that is?

A. Nan Jean Baumann.

Q. And who is Nan Jean Baumann?

A. My secretary.

Q. Directing your attention to the reverse side of Government Exhibit No. 52, will you state, please, whether or not it bears any endorsement?

A. Avenue Motor Sales, Duane W. Mull, Sam Achilli.

Q. Will you state whether or not following the endorsement of Sam Achilli, there appears an endorsement of Highland Motor Sales?

A. No.

Q. Is Government Exhibit No. 52 reflected on Government Exhibit No. 274 for identification?

A. Yes, sir.

Q. How?

A. It is a floor plan of a 1941 Buick convertible in the amount of $1090, Avenue Motor Sales account.

Q. Directing your attention to Government Exhibit No. 50, purporting to be a check of the Elgin Acceptance
1787 Company, No. 954, dated July 20, 1948, payable to the order of Avenue Motor Sales in the sum of $475.

Directing your attention to the signature in the lower right-hand corner, will you state, please, whose signature that is?

A. Nan Jean Baumann.

Q. Directing your attention to the reverse side of Government Exhibit No. 50, will you state, please, whether or not it bears any endorsements?

A. Avenue Motor Sales, Duane W. Mull, for deposit only, Highland Motor Sales.

Q. Is Government Exhibit No. 50 reflected on Government Exhibit No. 274 for identification?

A. It is.

Q. What does it reflect?

A. Floor plan of a 1938 Ford in the amount of $475, by Avenue Motor Sales.

Mr. Russo: For the purpose merely of correcting the record, if your Honor please, I have identified in my direct

examination Government Exhibit No. 52, purporting to be a check bearing number 916, in the amount of $1090.

The correct number is Government Exhibit No. 51.

1788 Will you make that correction, please, Miss Reporter?

I will ask that this be marked Government's Exhibit No. 275 for identification.

(The document was thereupon marked Government Exhibit 275 for identification.)

By Mr. Russo:

Q. I now show you Government Exhibit No. 275 for identification, purporting to be a check of the Elgin Acceptance Company, No. 332, dated September 11, 1946, payable to the order of Sam Achilli, in the amount of $673.88, on the Kamholz contract.

Directing your attention to the signature in the lower right-hand corner, whose signature is that?

A. Nan Jean Baumann.

Q. Directing your attention to the reverse side thereof, will you state, please, whether or not it bears any endorsements?

A. The endorsement of Sam Achilli and John W. Gostele, Jr.

Q. Following the endorsement of Mr. Achilli, will you state, please, whether or not it bears the endorse-

1789 ment anywhere of Highland Motor Sales?

A. It does not.

Q. Now I ask you to refer to Government Exhibit No. 275 for identification, and then locate Elgin Acceptance records reflecting that transaction.

A. The check is entered in the check issued account.

Mr. Batter: Just a moment. May the record show what records the witness is testifying from?

Mr. Russo: We are going to mark that right now, Mr. Batter.

A Juror: Your Honor, may I ask a question pertaining to this testimony?

The Court: No, there will be no questions asked from there.

Mr. Russo: I will ask that this be marked Government Exhibit 276 for identification.

(The said book was thereupon marked Government Exhibit 276 for identification.)

By Mr. Russo:

Q. Now will you refer to Government Exhibit No. 276

for identification and to pages marked C113 and account number NR, September 11, 1946, and describe that 1790 transaction?

Mr. Batter: Just a moment. Your Honor, we haven't identified the record yet as to whose record it is.

Mr. Russo: Oh, yes.

By Mr. Russo:

Q. Directing your attention to Government Exhibit No. 276 for identification, which purports to be a ledger account of Elgin Acceptance Company, I will ask you if you have ever seen that document before.

A. Yes, sir.

Q. Was that document kept in the regular course of business?

A. It was.

Q. Was it the regular course of business for you to keep such a record?

A. It was.

Q. Was it made at or about the time of the transaction it purports to reflect?

A. It was.

Q. Was that record kept under your supervision and direction?

A. It was.

Q. Now referring to Government Exhibit No. 276 1791 for identification, will you please relate that transaction as it is reflected in that book?

A. Referring to page identified as C113, which is a check ledger of the Elgin Acceptance Company, on September 11, 1946, Check No. 332 was drawn to the order of Sam Achilli in the amount of $673.88, and notes receivable account was debited on the same date in the notes receivable account for the amount of $673.88.

Q. Go ahead.

A. In the process of referring to the journal, the amount of the note is spread and the note receivable account is credited with the $673.88 and the balance of the note receivable is spread to income or insurance, what the account may be. Referring to J38, which is a page in the journal on September 11, 1946, the Highland Motor Sales note receivable account last referred to is debited and the Kamholz account is credited in the same amount.

There doesn't seem to be any profit in the transaction.

1792 Q. Is Government Exhibit 275 check No. 332 which you have referred to in your testimony?

A. Yes.

Mr. Russo: Will you mark this as Government Exhibit 277 for identification, please.

(The document was thereupon marked Government Exhibit 277, for identification.)

The Court: We will have to recess now, ladies and gentlemen, for the noonday lunch. We have a monthly meeting of all the Judges of this Court today, and I am ten minutes late now. We will see you at two o'clock, please.

(Whereupon the further hearing in the above-entitled trial was recessed until 2:00 o'clock p.m. of the same day, Monday, May 2nd, 1955.)

1793 * * (Caption—No. 53-CR-154) * *

Before Hon. Win G. Knoch,
and a Jury.

Monday, May 2, 1955,
2:00 o'clock p.m.

Court met pursuant to recess.

Present:

Mr. Russo,
appeared for the Government;

Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States *vs.* Achilli, the case on trial.

(Whereupon the following further proceedings were had in open Court in the hearing and presence of the jury, to-wit:)

Mr. Russo: May I proceed, your Honor?

The Court: Yes.

1794 EARL H. GROMER, called as a witness on behalf of the Government herein, having been previously duly sworn, returned to the witness stand and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Mr. Gromer, I show you now Government Exhibits 275, 277, 50, 52, 49, 47, 48, 46, 44, 45, 43 and 42.

A. Yes.

Q. I will ask you to examine them, please, and then state whether or not those transactions are typical of the transactions that were financed with Elgin Acceptance Company by purchasers of automobiles from Highland Motor Sales?

A. If by "typical" you mean of the usual procedure, yes. We purchased conditional sales contracts from Highland Motor Sales and issued checks for the amount of the unpaid balance of the purchase price of the car.

Q. Now, I will ask you to refer to Government Exhibits 4, 5 and 6 and ask you to state whether or not there was any difference between the amount of your earnings from Highland Motor Sales and those of Sam Achilli?

A. Yes.

1795 Q. Will you explain that difference, please, for each of the years represented by Exhibits 4, 5 and 6?

A. Well, Mr. Achilli being the active manager of the garage received a drawing account in the nature of a salary. The tax returns reflect the ultimate take by the respective partners including the drawing that he received.

Q. Was that salary withdrawn from Highland Motor Sales prior to the determination of profits for distribution to the partners?

A. Yes.

Mr. Russo: Now, may it please the Court, the Government at this time offers in evidence Government Exhibits 234, 235, 236, 237, 238, 97, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 100, 266, 198 and with respect to 198, also as related thereto, Government's Exhibits 197, 199 and 200, those being Exhibits, 197, 199 and 200, which your Honor reserved his ruling on during the testimony of Erven Jurs, and I think we have connected

them up now; and we also offer 269, 270, 270-A,
1796 271, 272, 274 and 275.

Mr. Batter: It is going to take a little time to examine these Exhibits. Would your Honor wish to declare a recess?

The Court: I think we had better do that so everybody can be at ease.

(Whereupon a short recess was taken after which the following further proceedings were had in open Court, in the hearing and presence of the jury, to-wit:)

1797 The Court: Proceed.

Mr. Batter: No objection to Exhibit No. 234, your Honor. No objection to Exhibit 235, 236, 237, 238, 97, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255.

No objection to Exhibits 257, 258, 259, 260, 261, 262, 263.

No objection to Exhibits 265, 100, 266, 198, 197, 199, 200, 269, 270, 271, 272, 274, 275.

With respect to Exhibit 264, I object, your Honor, on the same grounds that I objected to the testimony, and you overruled that objection.

The Court: Then that may be received subject to the objection and for the same reason.

(The document previously marked Government Exhibit 264 was thereupon received in evidence as Government Exhibit 264.)

Mr. Batter: Exhibit 256, there is no objection to this exhibit, your Honor, if the exhibit number is marked on the receipt itself, instead of the piece of paper to which it is attached.

The Court: All right. That may be changed.

Mr. Batter: I have been unable to find in here, counsel, an exhibit marked 270-A.

1798 Mr. Russo: I don't believe it was offered.

Mr. Batter: It was included in your list.

Oh, here is Exhibit 270-A.

Mr. Russo: Did you interpose any objection, Mr. Batter, to Exhibit 270-A?

Mr. Batter: No.

The Court: They may all be received into evidence, that is, all of those that are offered where there is no objection.

I think the one you objected to is Exhibit 264, is that right?

Mr. Russo: That is right, your Honor.

The Court: All right. That has been received and the objection overruled on that one.

All the others may be received.

(The documents so offered were thereupon received in evidence as Government Exhibits 97, 100, 198, 197, 200, 234 to 266 inclusive, 269, 270, 270-A, 271, 272, 274 and 275.)

1799 Mr. Russo: Your witness, Mr. Batter.

Cross Examination by Mr. Batter.

Q. Mr. Gromer, I believe you testified that you installed the bookkeeping system at Highland Motor Sales.

A. Yes, sir.

Q. And that you had very close supervision of it for a period of four or five months.

A. Yes, sir.

Q. Can you pin that time down a little bit more definitely?

A. Well, it would be from January 1, 1945, to May or June.

Q. Until when?

A. May or June.

Q. What is the occasion that you are able to fix that date?

A. I had a young lady who was an alleged bookkeeper come from the Flexonics, and she was learning the process of keeping books.

Q. And that was about May or June that she became a member of the employees organization?

A. That is my recollection, yes.

1800 Q. I believe you testified that subsequent to this young lady taking over the books—By the way, what was her name?

A. I think her name was Rosemary Simpson, if I recall correctly.

Q. Rosemary Simpson? After Miss Simpson took over the books, I believe that you testified that you still supervised the books for a period of time but with less attention than before.

A. That is correct.

Q. How late a period would you fix that to be?
A. It was later in the year.
Q. Later than a year?
A. Within the year.
Q. Within the year?
A. Yes.
Q. In other words, before the close of 1945?
A. That is correct.
Q. What was the occasion for your less active control of the books at that time?
A. Well, the young lady became more familiar with the books.
Q. As she became more familiar, you became less concerned?
1801 A. Yes, sir.
Q. How long did Miss Simpson remain an employee of the Highland Motor Sales as bookkeeper?
A. I don't recall, sir.
Q. Was it very long after that date?
A. I could refer, if I had the records—
Q. You do have the record?
A. No. I said if I had the record, it would be revealed.
Q. Do you recall an occasion when Mr. Carlson was retained as bookkeeper?
A. Yes.
Q. Did you hire Mr. Carlson?
A. I had a hand in his coming, yes.
Q. And did you instruct him in how to keep the books at Highland Motor Sales?
A. We worked together in the early period, yes.
Q. Now, Mr. Gromer, on these year end occasions when the books were brought down to your office, what was the scope and purpose of bringing them to your office?
Mr. Russo: The question assumes a fact not in evidence, if your Honor please.
Mr. Batter: The witness has testified the books
1802 were brought to his office for closing at the end of each year, your Honor.
The Court: He may answer.
The Witness: Mr. Brady was an accountant, a C.P.A., and he closed the books, drew off the year end statement, completed the tax returns.
By Mr. Batter:
Q. Mr. Brady was your partner, was he not?

A. Yes, sir.

Q. What kind of an examination was made of the books at the time they were brought to your office at the close of each year? Was a detailed audit made?

A. I don't believe so. Mr. Brady did it. I don't think he spent that much time on them.

Q. Was he under your instructions?

A. No.

Q. Who hired him to do that?

A. Well, it was part of the office function.

Q. What was that?

A. Part of the office function. He took care of all tax matters.

Q. It was part of your office function?

A. Yes.

1803 Q. That is the office of Gromer & Brady?

A. Yes.

Q. Did you tell him to prepare the returns for Highland Motor Sales?

A. I probably did.

Q. In telling him to prepare the returns of Highland Motor Sales, how extensively or with what lack of extensiveness did you direct him to go into the books?

A. I didn't direct him to go into the books at all.

Q. You did not?

A. He sat down with the bookkeeper each year, and they made the necessary journal entries in closing the books, setting up year end calculations.

Q. Then after Mr. Carlson became familiar with the books, you had very little to do with them, is that correct?

A. That is correct.

Q. You testified that after 1945 the custody and supervision of the books was under the control of Mr. Sam Achilli, is that correct?

A. Yes, sir.

Q. To your knowledge what knowledge did Sam Achilli have of bookkeeping?

A. If you ask my opinion, I don't think he has a 1804 comprehensive understanding.

Mr. Russo: I object to any opinion he may have, if your Honor please.

By Mr. Batter:

Q. When you entrusted the care and supervision of the

books of Highland Motor Sales to Mr. Sam Achilli, on what did you base that delegation of authority?

1805 A. The fact that we had a competent bookkeeper keeping the books.

Q. You relied upon the bookkeeper rather than Mr. Achilli?

A. Mr. Achilli was a partner and they were down in the office where he was managing the office.

Q. To your knowledge did he have any knowledge of bookkeeping?

A. I don't think he understands the rudiments of it.

Q. What is that?

A. I don't believe he understands the rudiments of bookkeeping.

Mr. Batter: May I have Exhibits 4, 5, and 6?

Mr. Russo: Yes.

(Documents were thereupon handed to Mr. Batter.)

By Mr. Batter:

Q. Mr. Gromer, I hand you Government Exhibits 4, 5 and 6, and ask you whether they are the partnership tax returns for the years 1946, 1947 and 1948?

A. Yes, sir.

Mr. Russo: Mr. Gromer, will you keep your voice

1806 up, please, so we can hear you down here?

The Witness: The answer is "Yes."

By Mr. Batter:

Q. Directing your attention to Government Exhibit 4, the partnership return for 1946, will you be good enough to examine that and tell me whether it bears Mr. Achilli's name as one of the signing partners?

Mr. Russo: I object to that, if your Honor please. It does not require the signature of but one partner under the law.

Mr. Batter: I do not believe that is—

Mr. Russo: It does not make any difference.

Mr. Batter: I do not believe that is a valid objection. I am simply asking, does it contain the signature. I am not asking whether—

Mr. Russo: It is immaterial, if your Honor please.

Mr. Batter: I am not asking whether it is necessary for the signature to be on there.

The Court: He may answer.

A. It does not bear the signature of Mr. Achilli.

1807 By Mr. Batter:

Q. Whose signature does it bear?

A. It bears mine.

Q. Now, directing your attention to Government Exhibit No. 5, the partnership return for the year 1947, does that bear the signature of Mr. Achilli?

A. It does not.

Q. Whose signature does it bear?

A. It bears the signature of Mr. Brady and myself.

Q. And Mr. Brady's signature is on there for what purpose?

A. He prepared the return.

Q. Now, directing your attention to Government No. 6, the partnership return for 1948, does that bear Mr. Achilli's signature?

A. It does not.

Q. Whose signature does it bear?

A. Mine.

Q. Again directing your attention to Government Exhibit No. 4, the partnership return for 1946, let me direct your attention to the affidavit on page 4 which reads:

"I swear or affirm that this return, including any accompanying schedules and statements has been examined by me and to the best of my knowledge and
1808 belief it is a true, correct and complete return."

When you signed that return, Mr. Gromer, did you believe it to be a true and correct return?

A. As reflected on the books of the company, yes.

Q. Did you believe it to be a true and correct return at that time in every respect?

A. Yes, definitely.

Q. Directing your attention to Government Exhibit No. 5, which is the partnership return for 1947 and bears an affidavit:

"I swear or affirm that this return, including any accompanying schedules and statements, has been examined by me and to the best of my knowledge and belief is a true, correct and complete return",

when you signed that return, did you believe that to be a true and correct return?

A. Yes, sir.

Q. Now, directing your attention to Government Exhibit No. 6, which is the partnership return for 1948, and the affidavit appearing on page 4 which reads:

"I swear or affirm that this return, including any accompanying schedules or statements, has been ex-

1809 amined by me and to the best of my knowledge and belief is a true, correct and complete return", when you signed that return did you believe it to be a true and correct and complete return?

A. I did.

Mr. Batter: Will you mark this as Defendant's Exhibit 4 for identification, please.

(The document was thereupon marked Defendant's Exhibit 4 for identification.)

Mr. Batter: 5.

(The document was thereupon marked Defendant's Exhibit 5 for identification.)

Mr. Batter: 6.

(The document was thereupon marked Defendant's Exhibit 6 for identification.)

By Mr. Batter:

Q. Now, Mr. Gromer, you testified several times about the dissolution of the partnership. Sometimes you spoke of it in 1950 and sometimes you spoke of it in 1951.

1810 Directing your attention to Defendant's Exhibit 5 for identification, let me ask you whether that document will refresh your recollection as to when the partnership dissolution began?

A. The suit to dissolve began in 1951, by the number of the proceedings.

Q. Will you look at the date of the complaint?

A. The affidavit affixed to the complaint is dated May 16th, 1951.

Q. Then on or about—May 16th, did you say?

A. Yes.

Q. Then on or about May 16th, 1951, you did institute proceedings to dissolve the partnership existing between yourself and Sam Achilli doing business under the name Highland Motor Sales Company, is that correct?

A. Yes, sir.

Q. I hand you Defendant's Exhibit No. 6 for identification and ask you whether that is the stipulation settling that suit?

Mr. Russo: Just a minute. I object to that, if your Honor please, because there has been no direct examination about any stipulations. It is a matter beyond the scope of the direct examination. If defense counsel wants

to examine this witness on that he should put it in 1811 in his case in chief.

Mr. Batter: If your Honor please, there have been several references to dissolution as the testimony was given. We are not in a position to judge the bias of the witness or his prejudice, but it is an important part of the cross examination to establish the credibility and the bias or prejudice of the witness, as represented by a lawsuit that he instituted and settled.

The Court: Objection sustained.

Mr. Batter: May I have Exhibit 266?

(There was a slight interruption, after which the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

By Mr. Batter:

Q. Mr. Gromer, I direct your attention to Government Exhibit 266, which I understand—correct me if I am not right—is a ledger sheet of the books of Gromer & Brady. I will ask you whether or not you have the 1812 check referred to under date of May 25th to Sam Achilli, May 25, 1948, in the amount of $4,893.96.

A. I do not have it with me.

Q. You do not have it with you?

A. No, sir.

Q. You did not bring all the vouchers and checks and items referred to in this Exhibit?

A. No, sir.

1813 Mr. Batter: Let me have Exhibit 268 for identification, please.

By Mr. Batter:

Q. Mr. Gromer, you testified this morning that the firm of Gromer & Brady in December, 1946, paid out $16,000 for franchise of the Tucker Corporation, an interest of half of which was Mr. Achilli's, did you not?

A. I don't think so.

Q. Just what did you testify?

A. The corporation of Midwest Tucker paid that out, charged on the books of the Tucker Corporation.

Q. The $16,000 was paid to the Midwest Tucker Corporation, is that correct?

A. That was paid by them for franchise to the Tucker Corporation in Chicago.

Q. I see, and the Midwest Tucker Corporation was a corporation in which you and Mr. Achilli each had a half interest?

A. We had made the investment loan to it.

Q. In what proportion had you made that loan?

A. Fifty percent.

Q. Fifty percent each?

A. Yes.

1814 Q. So that 50 percent of that $16,000 of Mr. Achilli's money went into the Midwest Tucker Corporation as a loan which in turn used that money to buy the franchise from the Tucker Corporation, is that correct?

A. That was the—

Mr. Russo: I object. Just a moment, Mr. Gromer. I am wondering whether Mr. Batter is testifying or whether he is asking a question, if your Honor please. I would like to have it put in the form of a question.

Mr. Batter: This is cross examination. I am asking him if that is what he testified.

The Court: Proceed.

By the Witness:

A. That was the substance of it, the way it was finally entered in the books, yes.

Mr. Batter: I apologize for not rising that time, your Honor.

By Mr. Batter:

Q. That was the substance of it?

A. It was garnered from other sources.

1815 Q. What was that?

A. It was garnered from other sources, and then the representative shares was 50 percent.

Q. Where was that money garnered from?

A. Well, some of it came from the Elgin Acceptance Company.

Q. Yes.

A. Some from the Highland Motor Sales.

Q. Yes? Between the Elgin Acceptance Corporation and Highland Motor Sales, is that the source of the entire $16,000?

A. Well, there were personal loans.

Q. What?

A. There was some personal contributions made that

made up the $16,000. I would have to look at the book You have it there. I can't see it.

Q. Will this record, Government Exhibits 268 and 267, show you the financing of that deal?

A. Exhibit 267 shows the source of the funds that were used to pay it, yes.

Q. And what was the source of the funds to pay that $16,000?

A. $4400 came from the Elgin Acceptance Company, and an additional $4100. Then I contributed $1500.

1816 Sam Achilli contributed $2500 from the Highland Motor Sales, and I contributed $2500 from the Highland Motor Sales. Then I contributed $1,000.

Q. Does that make up $16,000?

A. $16,000, yes.

Q. Then you also testified, I believe, to an item of $4,000, Tucker Corporation franchise refund.

Will you give me the date and tell me the circumstances of that refund?

A. Originally the Tucker Corporation had sold a dealership to the Midwest Tucker Company in Elgin, and that was based on a price per unit car that was to be purchased. That aggregated $16,000.

Then they revamped that procedure and made the Midwest Tucker Company in Elgin a distributor, and the basis for the distributor's deposit was $12,000. They gave us $4,000 back.

Q. You were asked on direct examination, and you were cautioned to be very careful of your answer, as to whether that investment in the Tucker Corporation was a good investment at the end of 1946, 1947 and 1948, and you responded that it was.

A. I didn't—

Mr. Russo: I will object. Just a moment. I object,

1817 if your Honor please, that that wasn't the question I put to him.

There was no question asked of this witness whether it was a good investment. The question put was whether it was a continuing investment as of those dates.

The Court: The objection is well taken.

By Mr. Batter:

Q. When you testified that this was a continuing investment at the end of 1947 and 1948, what did you mean?

A. I mean we haven't got our money back yet.

Q. Mr. Gromer, did you testify about an investment in April of 1947 of $4,000 in some situation referred to as Speedway Tucker.

A. That was a retail—

Q. Did you testify about that?

A. Yes.

Q. Can you find it for me on those exhibits?

A. No, that was in the Speedway Tucker account.

Q. That is another account?

A. Yes.

Q. You don't have that with you here?

A. No, sir.

1818 Q. Mr. Gromer, directing your attention to Government Exhibit No. 269, which is a judgment note for $9,000 to Earl H. Gromer, signed by Sam Achilli. Tell me, what was the consideration for that note?

A. $9,000 loaned to Mr. Achilli.

Q. $9,000 loaned to Mr. Achilli?

A. Yes.

Q. Do you have the check representing that loan with you?

A. They are in the exhibits. There are two drafts from the bank.

Mr. Russo: They are here.

Mr. Weber: They are in evidence.

By Mr. Batter:

Q. Directing your attention to Government Exhibits Nos. 167 and 168, are those the two checks that were issued as consideration for that note?

A. Yes, sir.

Mr. Batter: Was Exhibit 273 offered in evidence?

Mr. Weber: Yes, offered and received.

By Mr. Batter:

Q. Directing your attention to Government Exhibit No. 273, will you tell me the date of that directors'

1819 meeting?

A. February 9, 1948.

Q. What business was conducted at that meeting?

A. The resignation of Ruth Achilli was accepted as vice president, secretary and treasurer. Mr. Achilli resigned as president.

George Fritzel was elected president. George L. McCaffrey, secretary. Margaret L. Fritzel, treasurer—or

correction—the president was George E. Fritzel. Vice president was George McCaffrey. Secretary, Margaret L. Fritzel, and the treasurer George L. McCaffrey.

Q. And from that date on did Mr. and Mrs.—

Mr. Russo: There is more, Mr. Batter. Let him finish the answer.

Mr. Batter: You read part of it. I thought we had covered the rest.

Mr. Russo: We might as well cover it again.

The Witness: The officers of the corporation were authorized and directed to enter into a lease with Mr. Achilli on the premises known as the Red Lion for a term of three years, monthly rental $500, and to employ George McCaffrey as manager.

1820 By Mr. Batter:

Q. From that date on, did Mr. and Mrs. Achilli cease to be directors and officers of Red Lion, Inc.?

A. If my memory sustains me, Mr. Achilli is still a director.

Q. But not an officer?

A. No—he might be vice president. I don't know. You can look in the tail end of the book.

Q. Was he during any part of 1948, after that meeting, an officer of the corporation?

A. I can tell by reference to the minutes.

In October 8, 1949, he was a director.

Q. 1948 I am speaking of.

A. April 15, 1948, he was a director.

Q. But not an officer?

A. Apparently not.

Q. Mr. Gromer, in testifying respecting Government Exhibit No. 274, which I show you, you testified that that was typical financing for the Elgin Acceptance Corporation, is that correct?

A. This is a ledger of the account of the Avenue Motor Sales and is the method by which we posted the checks to the account that was being financed.

1821 Q. I notice that sheet is headed "Floor Plan." That is the mode of financing employed on floor plan financing, is that correct?

A. Yes, sir.

Q. Mr. Gromer, directing your attention again to Government Exhibit No. 274, can you tell from that Ex-

hibit whether or not each and every one of those cars was purchased by the Avenue Motor Sales from the Highland Motor Sales Company?

A. No, sir.

Q. Did Elgin Acceptance Corporation do business with companies other than Highland Motor Sales and Avenue Motor Sales?

A. One correction. The company was a partnership, it was not a corporation, Elgin Acceptance Company.

Q. It was a partnership?

A. It was a partnership, and it purchased notes receivable from other than Highland Motor Sales on occasion.

Q. And from others than Avenue Motor Sales?

A. Most of our business was Highland Motors, but they purchased from other sales dealers.

Mr. Batter: That is all.

Mr. Russo; No further questions.

The Court: That will be all, sir.

(Witness excused.)

1822 Mr. Russo: At this time, may it please the Court, we reoffer Government Exhibits 8 and 9 in evidence. Government Exhibit 8 purports to be the certificate of assessments and payments of Ruth Bohlin for the period 1930 to 1945, which your Honor took under advisement at the time the offer was made originally, and Government Exhibit No. 9 for identification purports to be the certificate of assessments and payments of Ruth Achilli for the period 1930 to 1942 which your Honor at that time also took under advisement. I think we have connected them up now and we reoffer them at this time.

Mr. Batter: I make the same objection, your Honor. Ruth Achilli is not a party to this case. These records are nothing that connect her with it, and in no way or detail pertain to the issues in this case.

Mr. Russo: It goes to the Government's burden—

(There ensued a discussion between Mr. Russo and
1823 Mr. Batter which was not audible to the Reporter.)

Mr. Batter: Mr. Gromer is still sitting in the Court Room, your Honor. I think he should be excluded.

Mr. Russo: If your Honor please, he has been excused as a witness. The Government has no further need for him.

Mr. Batter: I intend to call him, your Honor.

Mr. Russo: That is something else.

The Court: Well, if that is the case, then he can leave the Court Room. Mr. Gromer, please leave the court room.

(Mr. Gromer left the court room.)

Mr. Russo: With respect to both of those Exhibits, in answer to Mr. Batter's argument they go to the Government's burden of proof in that the Government is required to negative every possible source that it can of prior accumulated funds, and those two documents go towards that negative proof.

Mr. Batter: They offer no such proof, your Honor.

1824 Mr. Russo: That is a question for the jury.

Mr. Batter: I do not think it is.

The Court: They may be received subject to the objection.

(The documents previously marked Government's Exhibits 8 and 9, were thereupon received in evidence as Government's Exhibits 8 and 9.)

Mr. Russo: I offer in evidence now, may it please the Court, a certified photostatic copy of the marriage record of Sam Achilli and Ruth Bohlin at Elgin, Illinois on September 26, 1942, certified by the Recorder of Deeds for Kane County, Illinois.

Mr. Batter: No objection.

Mr. Russo: Will you mark this as Government Exhibit 278 for identification, please.

(The document was thereupon marked Government's Exhibit 278 for identification.)

The Court: It may be received.

1825 RALPH A. WEBER, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Your name is Ralph A. Weber?

A. Yes.

1826 Q. That is spelled W-e-b-e-r?

A. Yes, sir.

Q. Where do you live, Mr. Weber?

A. 423 South Avenue, Aurora, Illinois.

Q. What is your business or occupation?

A. I am a Special Agent for the Treasury Department, Intelligence Unit, Internal Revenue Service.

Q. Where is your office located?

A. 17 North Dearborn, Chicago.

Q. How long have you been so employed?

A. Since November 15th, 1948.

Q. Now, Mr. Weber, what was your business or occupation prior to November 15th, 1948?

A. I was a senior accountant in public accounting

Q. How long were you engaged in that business or profession?

A. From August of 1945 until November, 1948.

Q. Prior to August, 1945, what was your business or occupation?

A. From March, 1942, until August, 1945, I was a First Lieutenant in the Army Air Forces. I served in Italy, and was shot down on November 1st, 1944.

Q. What was the nature of your business as a senior public accountant and the nature of your duties?

1827 A. To conduct audits, make examinations, prepare financial statements, prepare income tax returns for certified public accountant signatures.

Q. And what is the nature of your duties as a Special Agent of the Intelligence Division of the Bureau of Internal Revenue?

A. To conduct examinations of income tax returns of individuals, corporations, partnerships and such other returns that may be assigned wherein there may be any indication that fraud might be involved in the filing of that return.

I also supervise other agents of lesser grade. I work in cooperation with revenue agents and deputy collectors or other agents of the Internal Revenue Service.

Q. Mr. Weber, have you had any specialized training in accounting?

A. I have had approximately 44 hours of accounting at the College level. I served a year as a junior accountant with a certified public accounting firm. I have had various correspondence courses.

Q. Did you attend college in connection with those courses?

A. I did. I attended the University of Illinois
1828 and Northwestern University.

Q. How long were you at the University of Illinois?

A. I was there for two and a half years.

Q. How long were you at the Northwestern University?

A. I was at Northwestern University about eight years of night school and I am still attending.

Q. I believe you testified you took some courses in accounting schools. What studies did you take and what correspondence courses did you take?

A. I took a course in advanced accounting. I have taken a course in cost accounting. I have also taken a course in commercial law.

Q. Over what period of time did you take courses in cost accounting and advanced accounting? Over how many years did you take those courses?

A. Well, as a correspondence course I took those over a two or two and a half year period.

Q. Did you have any courses in the theory of accounting, corporate accounting and analytical accounting?

A. Yes.

Q. Consolidated accounting?

A. Yes.

Q. Municipal accounting?

A. Yes.

1829 Q. Did you ever take any courses in preparation for a certified public accountant examination?

A. No.

Q. Are you a certified public accountant?

A. Yes.

Q. Are you licensed to practice as a certified public accountant?

A. Yes.

Q. Where?

A. In the State of Illinois.

Q. Have you had any other specialized education?

A. I have had various courses in income tax law in the Internal Revenue Service Schools and correspondence courses.

I have had approximately eight hours at the College level of income tax law, individuals, corporations and

partnerships. I have had approximately ten hours of education in economics, statistics and marketing.

Q. Have you had any courses in evidence and procedure?

A. I have had a course in evidence and procedure in the Internal Revenue Service Schools.

Q. Now, Mr. Weber, do you have any knowledge of the net worth plus non-deductible expenditures
1830 method of determining taxable net income?

A. I do.

Q. Will you tell the Court and jury, please, what that method involves?

A. It involves the determination of all of an individual's assets at a starting point period, all of his liabilities, subtracting those liabilities from the assets to determine the net worth and then continuing on for the subsequent year-end periods, determining all of the assets and liabilities and subtracting those liabilities from the assets and determining the net worth at the end of the period, subtracting the starting-point period from the ending-point period, adding the non-deductible expenditures and then applying the reportable income for that period as disclosed by the individual's income tax returns.

1831 Q. Now, have you been in the court room throughout the course of the trial in the case of United States *v.* Sam Achilli, which is the case now on trial?

A. I have.

Q. During the course of your employment as Special Agent of the Internal Revenue Service Intelligence Division, did there come a time when you undertook an examination of the partnership returns of income of Sam Achilli and Earl H. Gromer, doing business as Highland Motor Sales, for the years 1946, 1947 and 1948, and the separate individual returns of Sam Achilli for the years 1946 and 1947, and the joint income tax returns of Sam Achilli and Ruth Achilli for the year 1948?

A. There did.

Q. When?

A. Approximately March of 1949 or possibly prior to that date, I reviewed the partnership income tax returns of the Highland Motor Sales or of Sam Achilli and Earl Gromer, doing business as Highland Motor Sales, and from that made a contact with Mr. Achilli at the Highland Motor Sales offices.

Q. What was the first step you took in making that investigation?

1832 A. After I had reviewed the tax returns as they had been filed, I went to the offices of Highland Motor Sales where I met Mr. Achilli. With me at that time was Mr. Auld.

I introduced myself to Mr. Achilli, presented my credentials, and stated I was a Special Agent of the Internal Revenue Service; that Mr. Auld was a Revenue Agent, and was a local agent in that area; that we had come to make an investigation or an examination of the partnership tax returns for the years 1946, 1947 and 1948.

Q. Did you request the books and records of Highland Motor Sales?

A. At that time we told Mr. Achilli that we would like to start the examination immediately. We asked if we could be supplied with a place to work, and if we could have such records as we deemed necessary.

I asked for the general ledger and the financial statements that were filed by Highland Motor Sales with the Chrysler Corporation periodically, normally every month and at the end of each year.

Q. Pursuant to your request, what if anything did Mr. Achilli do?

A. Mr. Achilli brought to us these records. He

1833 brought in his—

Mr. Batter: I object, your Honor. May I ask the witness a few questions preparatory to an objection?

Mr. Russo: I don't think he has a right to interfere at this time, if your Honor please, with the direct examination.

Mr. Batter: Respecting his qualifications, your Honor.

The Court: Well, you may ask the questions and I will pass on them.

By Mr. Batter:

Q. Mr. Weber, when you called upon Mr. Achilli at the Highland Motor Sales office, and told him you were a Special Agent, did you tell him what the duties and obligations of a Special Agent were?

Mr. Russo: Just a moment, Mr. Weber.

Mr. Batter stated that he wanted to test his qualifications. That is not a question directed to the witness' qualifications.

The Court: The objection is sustained.

By Mr. Batter:

Q. What are the qualifications of a Special Agent,
1834 Mr. Weber?

Mr. Russo: I object, if your Honor please. The qualifications of a Special Agent are not in issue here at this time.

The Court: The objection is sustained.

By Mr. Batter:

Q. Mr. Weber, does the manual instructing Special Agents in their duties provide that the duties of a Special Agent shall be those of accumulating evidence for the purpose of ascertaining whether or not there shall be criminal prosecution or civil prosecution?

Mr. Russo: I object, if your Honor please, on the same ground.

The Court: Objection sustained.

By Mr. Batter:

Q. Did you tell Mr. Achilli on your call there that your investigation might result in a criminal prosecution?

Mr. Russo: I object, if your Honor please. The interrogation of this witness, as Mr. Batter stated originally to the Court, is directed to his qualifications as an expert.

Mr. Batter: I didn't add the word expert.

1835 Mr. Russo: Qualifications as a—you were talking about qualifications, and of course you were talking about experts.

Mr. Batter: I was talking about Special Agents.

Mr. Russo: His qualifications as a Special Agent is not in issue at this time, if your Honor please.

The Court: The objection is sustained.

Mr. Russo: Miss Reporter, will you please read my last question?

(The question was read as follows:

"Q. Pursuant to your request, what if anything did Mr. Achilli do?")

The Witness: Will you also read my answer?

(Answer read as follows:

"A. Mr. Achilli brought to us these records. He brought in his—")

By the Witness:

A. (Continuing) He brought in his bookkeeper, a Miss Baumann; introduced us to her, and said that any-

thing we wanted she should afford us, and asked her
1836 to bring in the general ledger which, as I recall,
was in the vault.

Mr. Achilli personally obtained the financial statements and brought them in to us.

By Mr. Russo:

Q. What was the date of that visit, Mr. Weber?

A. If I recall, it was April 20, 1949.

Q. What if anything did you then do next in the investigation of the case?

A. After that we were at the offices of Highland Motor Sales on several occasions, at which times we examined the various books and records of Highland Motor Sales.

We examined the general ledger, the general journal, the cash disbursements register, the cash receipts register, the sales register, the invoice register, the accounts receivable ledger, the inventory cards of new and used cars, the canceled checks, the bank statements, the sales slips, the invoices—that is all I can recall at the moment.

Q. All right, sir. Then what if anything did you do to determine the correctness of the partnership returns for the years 1946, 1947 and 1948?

A. That was a process that took some time. We
1837 started out the first day by comparing the financial
statements as they were brought to us with the partnership income tax returns as they had been filed, which were in our possession.

After verifying the correctness of those two, we traced the items reported or recorded on the financial statements to the general ledger.

We then test checked the footings in the general ledger. We traced the postings from the cash receipts, the cash disbursements, the general journal, the sales invoice or the sales register, the invoice register to the general ledger.

We test footed all of the journals. We checked the canceled checks back to the cash disbursements. We traced the cash receipts into the bank. We checked the sales slips to the cash receipts register. We checked the invoices to the sales register. After we had thoroughly satisfied ourselves that the books and records were in agreement with the income tax returns, we started abstracting the sales register.

Q. After you made the determination that the partnership returns correctly reflected the returns of Highland Motor Sales for the years 1946, '47 and '48,
1838 what did you do, if anything?

A. After we had abstracted the sales register, we prepared, we checked that abstract to the used car and new car inventory cards.

We checked the invoices to the abstract, and after we had obtained the addresses of the purchasers, we prepared for typing letters to be mailed to the purchasers of automobiles from Highland Motor Sales.

Q. Did you make any test check of invoices and purchases to verify the accuracy of those invoices?

A. After we had abstracted them, after we had abstracted the sales record, we took approximately ten invoices, or the names of ten purchasers, and went and called on them personally. This was prior to the time of preparing for mailing all of the names of those who had purchased cars there.

Q. And as a result what did you find?

A. The test check of the ten disclosed that five of the purchasers' records indicating the purchase of an automobile indicated that they had paid more for the automobile than what the records of Highland Motor Sales had disclosed.

With that information in hand, we then returned to the offices of Highland Motor Sales and rechecked
1839 those items to the books and records, and could not find them.

At that time we requested Mr. Achilli to come in to our office—or into his office, I should say, the office that we were using—and asked him or advised him of the differences and asked him if he could explain them.

Mr. Achilli stated at that time that there were no differences, that we could check as long as we wanted to, and that everything that he had received had been on the records of Highland Motor Sales.

We explained further that these five people had indicated that they had paid more for their automobiles than what he said, and we would like to have him show us where it was on the records.

He said, "I will bet you that you won't find anything missing from my records."

And I said, "We are not here to bet. All we want to do is find out the facts."

So he had in his hands a set of keys, which he said were to a Chrysler convertible which Mr. Truman had ridden down Michigan Avenue in, in the Shriners parade that year, and he said, "I will bet you these against
1840 nothing that I can show you where they are."

And I said, "We don't want to bet, but you just go ahead and show us."

So at that time he called for the sales register. He called for the new car and used car inventory cards. He called for the sales slips. He called for the invoices of those cars. He called for the cash receipts journal.

Then he traced those sales with their miscellaneous records through the books and records, and to me gave an indication of his knowledge of the recording of those transactions.

After a diligent search he said, "No, I guess you are right, we can't find them." And he said, "Here, you win."

He threw the keys on the desk in front of me.

I said, "No, just keep the keys, forget it." I said, "I am sorry, but we will have to go into this thing further, and we will have to make a detailed examination to determine all of the transactions to find out how much was omitted from the returns.

Q. What was the date of that occurrence, Mr. Weber?

A. That was on July 26, 1949.

By Mr. Russo:

1841 Q. Now after that conversation with Mr. Achilli, what did you do next in the investigation of the case?

A. Then the letters were prepared from the abstract of the sales register, and they were mailed to the purchasers of automobiles, and they were asked to give such testimony or evidence regarding their transaction with Highland Motor Sales.

We then contacted personally all of the used car dealers that had done any business with Mr. Achilli. We checked their records and compared them with our abstract. We photostated such records as were pertinent, and the original records were returned to them.

Q. Did you compare the partnership returns with the individual returns of Sam Achilli?

A. After we had interviewed all of the purchasers that

we could locate, we then made a determination of the amount of income that was not reflected in the partnership income tax returns, and at that time we called for the individual income tax returns and compared them—no, I take that back.

We already had the individual income tax returns, but at that time we compared those individual income tax returns with the partnership tax returns, and found that the individual returns agreed with the distributive
1842 share of income on the original partnership returns, which had already been determined as being in agreement with the books and records.

Q. After you made that determination, what other determination did you make, if any?

A. It was at that time that we determined the net worth procedure of determining income should be explored to determine whether or not Mr. Achilli had received and retained this money that these purchasers had testified to.

Q. Following that determination, what if anything did you do?

A. We canvassed all of the banks. We canvassed the Recorder's Office of Kane County.

We interviewed real estate agents. We interviewed attorneys representing purchasers or sellers of property. We interviewed or canvassed the insurance companies.

We attempted to determine all of Mr. Achilli's assets and liabilities for the years 1945, 1946, 1947 and 1948, and also to determine all of his expenditures that were not deductible on his returns for those same years.

Q. Now, Mr. Weber, did you ask Mr. Achilli to
1843 supply you with a statement of his net worth?

A. I did.

Q. What did he say to you about that?

A. He said upon advice of his counsel, he was refusing to submit such a statement.

Q. You made some mention, if my memory serves me correctly, of some photostats.

During the course of your investigation, did you examine the original books and records and the various documents of the various dealers and individuals who have testified in this case and who had purchased cars from Highland Motor Sales?

A. I did.

Q. Did you have all such books and records and documents photostated?

A. I did.

Q. Were they photostated under your supervision and direction?

A. They were.

Q. Did you compare the originals with the photostats?

A. I did.

Q. Are the photostats true and correct representations of the originals?

A. They are.

1844 Q. Are they the same photostats that have been offered and received in evidence in this case?

A. They are.

Q. Now, during the course of your investigation, Mr. Weber, did you make any inquiry concerning gifts, inheritances or devises to Sam Achilli?

A. I did.

Q. What did your investigation disclose?

A. It disclosed that Sam Achilli as an individual received no gifts, bequests, inheritances or devises, but that his wife did participate in the estate of her mother, Edith Bohlin.

Q. Directing your attention now to July 11th, 1951, did you have a conversation with Mr. Achilli?

A. I did.

Q. Who was present?

A. Mr. Achilli and myself.

Q. Where was the conversation held?

A. It was at the offices of Highland Motor Sales.

Q. And what was that conversation?

A. At that time I asked Mr. Achilli for the books and records of the pool hall, Barney's Snooker Hall. Mr. Achilli stated at that time that for the year 1946 when he ran it the books and records were lost.

1845 Q. Did you ask Mr. Achilli who the owner of the pool hall, Barney's Snooker Hall, was in 1946?

A. I did.

Q. What did he say?

A. He said he was.

Q. Directing your attention to August 14th, 1951, did you have a conversation with Mr. Achilli at or about that time?

A. I did.
Q. Where was that conversation held?
A. That was held in the offices of the Intelligence Unit at 105 West Monroe Street, Room 900, in Chicago.
Q. Who was present?
A. Present were Mr. Parrillo, Mr. Achilli's attorney at that time, Mr. Hauptman, his certified public accountant at that time, Mr. Auld, the Revenue Agent, myself and a stenographer.
Q. What was that conversation?
A. At that time I asked Mr. Achilli various routine questions regarding his history. I then administered the oath and I advised him of his constitutional rights and then put to him the question that the investigation thus far had disclosed that he had failed to report certain income on his income tax returns for the years 1946, 1846 1947 and 1948, and I asked him if he cared to give any explanation or if he had any explanation to give.

He did not answer, but his attorney did in his stead and stated that upon advice of him, Mr. Parrillo, his counsel, that he refused to give any statement or to make any further—have any further contact with me, and that they were immediately leaving the premises.

They did not at that time, or at that moment. I dismissed the stenographer and we were bidding adieu when I asked Mr. Parrillo if he had reconsidered the signing of the consent extending the statute for the civil tax purposes, known as a waiver, and he said no, they weren't going to waive anything, not even the flag.

Q. Now, during the course of your investigation, Mr. Weber, did you have occasion to make any inquiry concerning the individual books and records of Mr. Achilli?
A. I did.
Q. Did you ask of him?
A. I did.
Q. What did he say?
A. He said he had none, that the only books and 1847 records he had were what might be in his safe deposit box at the Union National Bank. At that time we accompanied him, Mr. Auld and myself, to his safety deposit box when he opened it up for examination.

We examined it, inventoried it, and it included only various insurance policies, deeds to pieces of property and sundry personal papers, but no cash.

Q. You found no money?
A. No money whatsoever.
The Court: Ladies and gentlemen of the jury, we will now recess until ten o'clock tomorrow morning. You will return back here at that time, please.

(Whereupon the further hearing in the trial of the above-entitled cause was adjourned to Tuesday, May 3rd, 1955, at the hour of ten o'clock a.m.)

1848

* * (Caption—No. 53 CR 154) * *

Before Hon. Wm. G. Knoch,
and a Jury.

Tuesday, May 3, 1955,
10:00 o'clock a.m.

Court met pursuant to adjournment.

Present:
Mr. Russo,
appeared for the Government;
Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53 CR 154, United States *vs.* Achilli, the case on trial.

(Whereupon the following further proceedings were had herein in open Court in the presence and hearing of the jury, to-wit:)

The Court: You may proceed.

1849 Mr. Russo: Before we proceed with the witness, if your Honor please, the witness Gromer was testifying from a portion of the record of an Exhibit that was identified as Government's Exhibit No. 273.

Upon Mr. Batter's indication that there would be no objection to the substitution of photostatic copies of the call and waiver of notice and the minutes of the Special Meeting we have had those photostated. Mr. Batter has examined them and found them to be correct.

At this time it is my understanding that the United States of America, Plaintiff, and the Defendant, Sam

Achilli, by and between their respective counsel, stipulate that the photostatic copies of the documents referred to may be numbered 273-A and substituted for Defendant's Exhibit No. 273.

Mr. Batter: It is so stipulated.

The Court: All right. That may be done.

Mr. Batter: Your Honor, with these preliminaries over and before the witness takes the stand I now offer
1850 in evidence a certified copy of the complaint and the stipulation in the case of Earl H. Gromer against Sam Achilli, which were identified by the Witness Gromer yesterday as Defendant's Exhibits for identification 5 and 6.

Mr. Russo: I object, if your Honor please. The indictment here covers the years 1946, 1947 and 1948. What if anything occurred between the Defendant Achilli and the Witness Gromer in the year 1951 has no bearing on the issue of the Defendant's guilt or innocence under the charges of the indictment.

Mr. Batter: The witness testified several times with respect to the dissolution of the partnership on direct examination and these documents are the documents that refer to that dissolution.

Mr. Russo: The dissolution of the partnership in 1951, if your Honor please, has no bearing on the issues on trial.

The Court: Well, I see no objection to the admission bearing on the question as to the point of dissolution,
1851 and I am going to admit them in evidence.

Mr. Russo: Solely on the point of dissolution as it occurred in 1951?

The Court: That is the only purpose, yes.

Mr. Russo: Your Honor, the stipulation or the agreement, if your Honor please, that resulted in an action for accounting—

The Court: I don't think the second one is material. I am going to—

Mr. Russo: I object to that one.

The Court: I am going to admit the first one, that is, Defendant's 5, and deny the admission of Defendant's Exhibit 6.

(The document previously marked for identification Defendant's Exhibit 5, was received in evidence as Defendant's Exhibit 5.)

RALPH A. WEBER, called as a witness herein on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Your name is Ralph A. Weber?

A. Yes, sir.

1852 Q. You are the same Ralph A. Weber who was sworn and testified yesterday?

A. Yes, sir.

Q. Were you on the stand at the conclusion of yesterday's session?

A. Yes, sir.

Q. Mr. Weber, I have handed you Government's Exhibit No. 7, a certificate of assessments and payments with respect to the Defendant Sam Achilli and ask if it reflects the payment of any income tax by Mr. Achilli from the years 1930 to 1939 inclusive?

A. It does not.

Q. I ask you now whether it reflects any payments of any income—

Mr. Batter: I object to that. That document is not in evidence.

Mr. Russo: It certainly is in evidence.

Mr. Batter: When was it put in evidence?

Mr. Russo: That was admitted in evidence at the outset of the testimony of Witness Mines, when Witness Mines testified, if your Honor please.

Mr. Batter: I have the record here. Here is the official transcript, your Honor. No. 7 is not admitted into

1853 evidence.

Mr. Russo: Then, if your Honor please, I offer it in evidence at this time.

Mr. Batter: May I see it?

Mr. Russo: Sure.

(Mr. Russo hands document to Mr. Batter.)

Mr. Batter: I object to it, your Honor, on the grounds that it precedes the period here involved and lacks probative value because it shows nothing but assessments and collections rather than income.

Mr. Russo: If my memory serves me correctly, your Honor, the Witness Mines testified that that was a summary of the records that were kept and maintained in the

Office of the Collector of Internal Revenue. There were no objections to the Exhibit on the grounds of failure to lay a foundation. The witness testified concerning it and it is offered for the purpose of negativing any defense of prior accumulated funds that may have been available to the Defendant during the years involved in the indictment.

1854 The Court: It may be received subject to the objection.

(The document previously marked for identification Government's Exhibit 7, was thereupon received in evidence as Government's Exhibit 7.)

1855 By Mr. Russo:

Q. Now will you refer to Government Exhibit No. 7, and state whether or not it reflects the payment of any income taxes by the defendant Sam Achilli for the years 1940 to 1945, inclusive?

A. It does.

Q. What is the total amount of income taxes reflected in Government Exhibit No. 7 as paid by Sam Achilli for the years 1940 to 1945, inclusive?

Mr. Batter: I object, your Honor. The document speaks for itself.

Mr. Russo: It doesn't, your Honor. The document is one that needs for the purpose of informing the jury an explanation. Some of those things are not immediately apparent to a layman, and they do need explanation.

The Court: He may answer.

Mr. Batter: This witness has not been qualified to testify what has been done in the Collector's office, your Honor.

Mr. Russo: He certainly has been qualified. He qualified as an expert yesterday.

The Court: Proceed.

1856 By the Witness:

A. $2,699.77.

By Mr. Russo:

Q. Is that $2,699.77?

A. Yes, sir.

Q. On the basis that Sam Achilli made no payment of income taxes for the years 1930 to 1939, inclusive, and that he did make payments of income taxes for the years 1940 to 1945, inclusive, totaling, I believe you testified, $2,699.77, have you computed the maximum possible tax-

able income of Sam Achilli for the years 1930 to 1945, inclusive?

A. I have.

Q. What did you determine Mr. Achilli's maximum possible taxable income for the years 1930 to 1945, inclusive, to be?

Mr. Batter: Object to that, your Honor. That is pure speculation and the highest realm of speculation when you consider exemptions, when you consider taxable income, capital gains and losses. Any such computation is pure speculation and not proper testimony.

Mr. Russo: It isn't speculation at all, if your
1857 Honor please. It is a mathematical computation, and the computation is subject to cross examination by Mr. Batter and he can ascertain whether there is anything wrong with the computation.

The Court: He may answer.

By the Witness:

A. $16,958.99.

By Mr. Russo:

Q. Now, Mr. Weber, will you explain how that computation was made?

A. With the information taken from the certificate of assessment and payments, the amounts of money paid during the years 1940 to 1945, and by applying the applicable tax rates for those individual years, we arrive at the taxable income after exemptions, and that figure is $16,958.99.

Q. In making that computation, Mr. Weber, did you take any other factors into consideration?

A. The exemptions that were known to be available to Mr. Achilli for those years were added to the taxable income to arrive at a net income for those years.

Q. Did you take any other factors into consideration?

1858 A. The fact that, as has been testified here to, that Mr. Achilli's wife, Mrs. Achilli, participated in the Edith Bohlin estate, which would be a non-taxable income, and the sale of the property that was signified as Emma Walbaum sale, of which we have no definite knowledge, assuming it to be from an estate, those two items were taken into consideration.

Q. Now as a result of taking those factors into consideration, what did you determine Mr. Achilli's maxi-

mum possible net income to be for the years 1930 to 1945, inclusive?

A. $38,653.72.

Q. Does that figure, $38,653.72, include the income taxes that were paid by Mr. Achilli for the years 1930 to 1945, inclusive?

A. They do.

Q. What is the amount of the taxes Mr. Achilli paid for the years 1930 to 1945, inclusive?

A. $2,699.79.

Q. Then what did you determine the maximum possible income available to Mr. Achilli for the acquisition of assets as of December 31, 1945, to be?

A. $35,954.93. That figure does not take into consideration any possible living expenses which might
1859 have been incurred by Mr. Achilli during that period.

Q. Living expenses such as what, Mr. Weber?

A. Food, clothing, medicine, insurance, and so on.

Q. Now did you make a comparative summary of the sales of new and used cars by Highland Motor Sales for the years 1946 to 1948, inclusive?

A. I did.

Q. On what is that summary based?

A. On all the evidence and documents presented in this trial.

Q. Do you have that summary?

A. I do.

Q. May I have it, please?

A. (Witness produced document.)

Mr. Russo: I will ask that this be marked Government Exhibit 279 for identification.

(The document was thereupon marked Government Exhibit 279 for identification.)

Mr. Batter: Do you have an extra copy of that so I may follow it as you go along?

Mr. Russo: Just give me a little time, Mr. Batter.
1860 At this time we offer in evidence, if the Court please, Government Exhibit No. 279.

The Court: Do you have an extra copy of that?

Mr. Russo: Yes, your Honor. I should like to distribute a copy not only to the Court, but to every member of the jury and to defense counsel.

Mr. Batter: I object to this, your Honor, because this computation in the first place construes the testimony

of the witnesses, which is the province of the jury and not of the witness.

Secondly, it contains figures that are not in evidence, that is, what the books of Highland Motor Sales purport to show.

Mr. Russo: The witness has testified, if your Honor please, that the summary is based upon all the evidence and documents in this case.

Mr. Batter: The books of Highland Motor Sales are not in evidence, your Honor.

Mr. Russo: They will be in just a moment. The
1861 books themselves don't purport to be in evidence, if your Honor please. The witness has testified that he examined those books, that he made extracts and abstracts and summaries of them, and those summaries are reflected in this exhibit.

The Court: It may be received subject to the objection.

(The document previously marked Government Exhibit 279 for identification was thereupon received in evidence as Government Exhibit 279.)

Mr. Batter: I make a further objection, your Honor, with respect to the records of the Highland Motor Sales and renew my motion that all records procured from them be subject to my motion to suppress.

Mr. Russo: The motion has no merit, if your Honor please.

The Court: The motion has heretofore been ruled on by the Court, and the same ruling will maintain, and an objection may be noted.

1862 Mr. Batter: I can have a running objection to that?

The Court: Yes, that is true.

Mr. Russo: Now, may it please the Court, may I distribute copies of Government Exhibit No. 279 to the jury?

The Court: Yes.

(Mr. Russo thereupon handed copies of the exhibit to the jury.)

By Mr. Russo:

Q. Mr. Weber, I have just handed you Government Exhibit No. 279 in evidence.

I will ask you to refer to it and explain it for the Court and Jury.

A. This is a schedule that I prepared from the testimony of the witnesses and from the evidence that has been presented here at this trial.

The schedule is entitled, "Sam Achilli," and carries the case number, and is "Comparative Schedule of Testimony to the Records of Highland Motor Sales."

The titles of the columns, "Exhibit Number" re-
1863 fers to the exhibit as it is classified here in this trial.

Then the name of the witness, the type of automobile that was purchased and the date on which the transaction occurred, according to the testimony.

The columns have been broken down into the years 1946, 1947 and 1948. The amount paid per the testimony is as was testified here. The amount received per the Highland Motor Sales records are as they were abstracted by me or under my supervision from those books.

The "To Whom Paid" is as was testified here, and the same holds true for 1947 and 1948.

In the last three columns under, "Income Unrecorded and Unreported on the Books of Highland Motor Sales," for the years 1946, 1947 and 1948, is represented the difference between the amount paid per the testimony and the amount received per the Highland Motor Sales.

In the first instance, Harold Hubbe, testified that he bought a 1948 Plymouth on March 9, 1948, and paid $2050 for that car. He further stated that the money was paid to either Mr. Achilli or Mr. Cons.

The books of Highland Motor Sales disclose that that transaction was recorded as $1524.18, the difference
1864 being $525.82.

Austin A. Mitchell testified that he purchased a 1948 Plymouth on April 9, 1948, and paid the money to Mr. Cons. He testified he paid $2200.

The amount received per Highland Motor Sales records, $1524.18. The difference is $675.82.

Leonard Studt testified he purchased a 1940 Chrysler on May 3, 1947. He testified he paid Mr. Cons $1050. Highland Motor Sales records indicate the sale as $510, the difference being $500—it should be $540.

Grace Studt testified, and Exhibit No. 29 was offered at that time, that she purchased a 1946 Plymouth on November 23, 1946. She paid $1977.05. The records of Highland Motor Sales disclose the sale as $1477.05.

I am sorry, I am off here a line.

Leonard Studt does disclose in 1947 the $540. Grace Studt, the difference between the $1977.05 that she testi-

fied to and the $1477.05 as recorded on the books was $500.

Again she purchased a car, a 1946 Plymouth on November 29, 1946, for $2054.07. Highland Motor Sales disclosed $1554.07. She testified the money was paid to Mr.
1865 Achilli. The difference is $500.

Again she testified she purchased a 1947 Plymouth on January 28, 1947, for $2007.20. Highland Motor Sales disclosed $1507.20, the difference being $500.

Again she testified she purchased a 1947 Plymouth on May 21, 1947, and paid $2030. Highland Motor Sales disclosed $1500, the difference being $530.

1866 Again she testified she purchased a 1946 Plymouth in September of 1946. She paid $1,300, she said she paid an additional $500.00 for it. The amount of the purchase price is not disclosed. Highland Motor Sales records disclose $1,337.33. The statement of an additional $500.00 bonus as disclosed under the Column for 1946 is unrecorded.

William Scalise testified he purchased a 1946 Plymouth on December 24th, 1946 and paid $1,900 for it. The Highland Motor Sales records disclosed that $1,555.30 which he said he paid to Mr. Achilli. The difference is $394.70.

Homer Catt disclosed he purchased a 1948 Plymouth on June 14, 1948, and paid the money to Mr. Cons. He paid $2,430. The Highland Motor Sales records report $1,632 sales price, the difference being $798.

Q. Will you also identify the Exhibits as you go along, Mr. Weber?

A. Hans Moeller presented Exhibits Nos. 25 and 26, and testified he purchased a 1948 Plymouth on July 29th, 1948, and paid the money to Mr. Achilli and Mr. Cons. He paid $2,400. Highland Motor Sales records disclosed $1,836 or a difference of $564.

1867 Arvid Sundquist presented Exhibit No. 27. He disclosed he purchased a 1948 Plymouth on November 30th, 1948, from Mr. Achilli and paid $2,155. The Highland Motor Sales records disclosed a payment of $1,938, a difference of $217.

John B. Jones disclosed purchase of a 1948 Plymouth on April 17th, 1948, and paid Mr. Achilli $2,200. Highland Motor Sales records disclose $1,534.38, a difference of $690.62.

Sam Mortellaro purchased a 1947 Plymouth on November 27th, 1947, from Mr. Achilli and Mr. Cons and paid $2,537. Highland Motor Sales records the sale of $1,570.30, a difference of $966.70.

Herbert Christianson purchased a 1948 Plymouth on March 9th, 1948, and paid Mr. Achilli $2,050. Highland Motor Sales records disclosed $1,615.26, a difference of $434.74.

Leonard J. Cardella presented Exhibit No. 10 and stated he purchased a car in the name of Michael Nemeth, Jr., a 1947 Plymouth on June 23, 1947, and paid Mr. Achilli or Mr. Cons $2,000. The Highland Motor Sales records disclose that sale in the name of Michael Nemeth, Jr. of $1,323.55, a difference of $676.45.

Again Mr. Cardella testified and presented Ex-
1868 hibit No. 11 and said that he purchased a 1947 Plymouth in the name of Vincent Giovenco on July 5, 1947. He dealt with Mr. Achilli or Mr. Cons and paid $1,900. The records of Highland Motor Sales disclose the sale in the name of Vincent Giovenco to be $1,249.80, a difference of $650.20.

This evidence was also testified to by Albert Papandrea. They presented Exhibit No. 12 stating they purchased a 1947 Plymouth on August 11th, 1947, in the name of Edward Priebe, and dealt with Mr. Achilli or Mr. Cons and paid $2,075. Highland Motor Sales records disclose the sale in the name of Edward Priebe of $1,427.50, a difference of $647.50.

They again testified that they purchased a 1947 Plymouth on August 30th, 1947, and presented Exhibit No. 13. They dealt with Mr. Achilli or Mr. Cons and purchased the automobile in the name of William Nebraske, and paid $2,125. The records of Highland Motor Sales disclose the sale in the name of William Nebraske in the amount of $1,383.30, a difference of $741.70.

They presented Exhibit No. 14, stating they purchased an automobile, a 1947 Plymouth, on September 5th, 1947,
in the name of D. Giannarrusco. They dealt with
1869 Mr. Achilli or Mr. Cons.

Q. Just a moment, Mr. Weber. Is that Exhibit 14 or Exhibit 15?

A. 14.

Q. All right, sir. I am wrong.

A. (Continuing) They stated they dealt with Mr. Achilli or Mr. Cons and paid $2,125.

Highland Motor Sales records disclose the sale in the name of D. Giannarrusco on that date in the amount of $1,393.75, a difference of $731.25.

They presented Exhibit No. 15 stating they purchased a 1947 Plymouth on September 13th, 1947. They purchased their car in the name of Patrick McInerney and dealt with Mr. Achilli or Mr. Cons, and paid $2,125. Highland Motor Sales records disclose the sale on that date to Patrick McInerney in the amount of $1,451.76, a difference of $673.24.

They presented Exhibit No. 16 and stated they purchased a 1947 Plymouth on October 7th, 1947, in the name of Louis Amedi. They dealt with Mr. Achilli or Mr. Cons and paid $2,100. Highland Motor Sales records disclose a sale on that date to a Louis Amedi in the amount of $1,451.77, a difference of $643.23.

1870 They further stated and presented Exhibit No. 17, that they purchased a 1947 Plymouth on October 16th, 1947, that they purchased that automobile in the name of Fred Sifferman and dealt with Mr. Achilli or Mr. Cons, and paid $2,100. Highland Motor Sales records disclose the sale on that date to Fred Sifferman in the amount of $1,451.76, a difference of $648.24.

They presented Exhibit No. 18, and testified that they purchased a 1947 Plymouth on October 28th, 1947, in the name of Henry Huberty. They dealt with Mr. Achilli or Mr. Cons and paid $2,110. Highland Motor Sales records disclose on that date a sale to Henry Huberty in the amount of $1,453, a difference of $657.

They presented Exhibit No. 19 and stated they purchased a 1947 Plymouth on November 3rd, 1947, in the name of Frank Pugliese. They dealt with Mr. Achilli or Mr. Cons and paid $2,025 for the car. Highland Motor Sales records disclose a sale on that date to a Frank Pugliese in the amount of $1,380.62 a difference of $644.38.

They presented Exhibit No. 20 and testified they purchased a 1947 Plymouth on December 1, 1947, in the name of Leonard Cardella and dealt with Mr. Achilli or

1871 Mr. Cons and paid $2,035 for the car. The books and records of Highland Motor Sales disclose a sale on that date to a Leonard Cardella in the amount of $1,421.42, a difference of $613.58.

They presented Exhibit No. 21 and testified they purchased a 1947 Plymouth on December 2, 1947, in the name

of Joe Pryzbyla and dealt with Mr. Achilli or Mr. Cons and paid $2,010. The records of Highland Motor Sales disclose a sale on that date to Joe Pryzbyla in the amount of $1,448.19, a difference of $561.81.

They presented Exhibit No. 22 and testified they purchased an automobile, a 1947 Plymouth, on December 19, 1947, in the name of Albert Kroll. They dealt with Mr. Achilli or Mr. Cons and paid $2,015. Highland Motor Sales records disclose a sale on that date to Albert Kroll in the amount of $1,462.22, a difference of $552.78.

They presented Exhibit No. 23 and stated they purchased a 1947 Plymouth on December 19, 1947, in the name of Herbert Carlson. They dealt with Mr. Achilli or Mr. Cons and paid $2,015 for the car. Highland Motor Sales records disclose a sale on that date to Herbert Carlson in the amount of $1,462.22, a difference of
1872 $552.78.

They presented Exhibit No. 23, and testified they purchased a 1947 Plymouth on December 22, 1947, in the name of R. Hindsley. They dealt with Mr. Achilli or Mr. Cons and paid $2,015. Highland Motor Sales records disclose the sale on that date to R. Hindsley of $1,488.99, a difference of $526.01.

Hal Plumb testified he purchased a 1946 Plymouth in November of 1946. He paid $1,525 for the car. Highland Motor Sales records disclose a sale on that date to Mr. Plumb of $1,525.

Mr. Plumb further testified that he traded a 1936 Plymouth for which he received no allowance. Highland Motor Sales records did not disclose a trade of that automobile.

John Bernhard testified he purchased that 1936 Ford in August of 1946 and paid $450 for it. Highland Motor Sales records disclose no sale of that car and he dealt with Mr. Cons, and the difference is $450.

He also traded a 1936 Chevrolet at that time for which we have no value, which does not appear on the books and records of Highland Motor Sales.

Irving Troyke testified he purchased a 1946 Ply-
1873 mouth in 1946 and paid $1,027 for the automobile.

He dealt with Mr. Cons. Highland Motor Sales records disclose that they received $1,027 on that car, but did not disclose a trade.

He testified that he traded an automobile at $100 for a 1947 Plymouth. The trade was not shown on the books and records of Highland Motor Sales and the sale of that automobile, of the 1947 Plymouth, was shown as $1,332.70. He stated further that he traded an automobile for an 1948 and gave $100. The Highland Motor Sales records disclose the sale of the automobile to Irving Troyke in the amount of $1,424.10.

Mr. Roth, Exhibit 60, testified that he purchased the car, a 1947 Plymouth, on June 10th, 1947, for $1,800. Mr. Troyke stated he didn't receive the money for that car that was used as a trade-in, so we have credited to the account here of Mr. Achilli the trade-in value as testified to by Mr. Troyke, $1,232.70, the difference between the $100 Mr. Troyke testified he paid and the sales price as reflected in the books and records of Highland Motor Sales.

Mr. Roth testified he dealt with Mr. Achilli or Mr. Cons. There is a difference there of $667.30.

1874 Frank M. Warner presented Exhibits 39 and 40 and testified he purchased an automobile in February, February 4th, 1948 from Mr. Achilli and paid $1,100 for the car.

Highland Motor Sales records disclose a sale to Mr. Warner on that date of $767.

Mr. Warner further states that he traded a 1947 Chevrolet for which he received $700. The books and records of Highland Motor Sales disclose a trade allowance of $733.30, a difference of—with respect to those four figures—of $3330.

Florence Wildhagen testified she purchased the 1941 Chevrolet that was traded by Mr. Warner on February 12th, 1948. She testified she dealt with Highland Motor Sales, she paid $1,000 for that car. Highland Motor Sales records disclose the sale as $900, a difference of $100.

Handley Clark testified and presented Exhibits 34 and 35 that he purchased a 1946 Buick on January 21, 1947, and dealt with Mr. Achilli and Mr. Cons, and paid $2,825. The books of the Highland Motor Sales disclose a sale to Mr. Clark on that date of $2 00, a difference of $825.

He further testified that he purchased two 1941

1875 Fords on January 23, 1947, and dealt with Mr. Achilli and Mr. Cons. He paid $2,000 for the two cars.

Highland Motor Sales records disclose the sale of those two cars, the first for $800 and the second for $900, a difference between the totals of $300.

He testified he purchased a 1940 Lincoln on January 27th, 1947. He dealt with Mr. Achilli and Mr. Cons and paid $850. Highland Motor Sales records disclose the sale in the amount of $600.00, a difference of $250.

He testified he purchased a 1942 Oldsmobile on February 2, 1947. He dealt with Mr. Achilli and Mr. Cons and paid $2,050 for that car. Highland Motor Sales records disclose the sale in the amount of $550, a difference of $1,500.

He testified he purchased a 1941 Chevrolet on February 15, 1947, for $950. That sale was not recorded on the books of Highland Motor Sales, and the difference is $950.

He testified he purchased a 1941 Oldsmobile on February 22, 1947. He dealt with Mr. Achilli and Mr. Cons and paid $1,150. That sale was not recorded on the books of Highland Motor Sales, a difference of $1,150.

1876 He testified he purchased a 1942 Chrysler on February 27, 1947. He dealt with Mr. Achilli and Mr. Cons and paid $1,450. That sale was recorded on the books and records of Highland Motor Sales as $1,000, a difference of $450. He testified he purchased a 1940

1877 DeSoto on March 7, 1947. He paid $950.00. Highland Motor Sales' records did not disclose the sale of any automobile of that type to Mr. Clark, a difference of $950.00.

He testified he purchased a 1941 Lincoln on March 17, 1947, and paid $1,045.00, and dealt with Mr. Achilli and Mr. Cons. That sale was not disclosed on the records of Highland Motor Sales, a difference of $1,045.00.

He testified he purchased a 1937 Ford on March 25, 1947, and dealt with Mr. Achilli and Mr. Cons. He paid $475.00 for that car. That sale was not recorded on the books of Highland Motor Sales, a difference of $475.00.

He purchased a 1941 Ford on March 28, 1947. He dealt with Mr. Achilli and Mr. Cons. He paid $875.00 for that car. The books and records of Highland Motor Sales do not disclose the sale of that car, a difference of $875.00.

He purchased a 1942 Oldsmobile on April 3, 1947. He dealt with Mr. Achilli and Mr. Cons. He paid $1,300.00.

That sale was not recorded on the books of Highland Motor Sales. That is keyed to No. 8. If you will turn the page to the No. 8, there, the second page, looking
1878 down about half way on the page, you will find Dorothy Stevens purchased a 1947 Chrysler on April 3, 1947. He dealt with Mr. Achilli. She testified she paid $1,986.50 and traded a 1942 Oldsmobile, for which she was allowed $800.00.

1879 The Highland Motor Sales disclosed a sale on that date to Mrs. Stevens of $2,105.00, but it does not disclose a trade-in. There was a difference there of $681.50.

Now turning back to the first page, we have applied that $800.00 trade-in allowance that Mrs. Stevens testified to, and show a difference of $500.00 that is not recorded, that should have been recorded and reported on the books of Highland Motor Sales.

Back to Mr. Clark, he testified he purchased a 1941 DeSoto in April of 1947. He dealt with Mr. Achilli or Mr. Cons.

He purchased a 1942 Packard in April of 1947 and he purchased another 1942 Packard.

For those three automobiles he paid $1550.00. Highland Motor Sales books disclose the sale of those three automobiles, the 1941 DeSoto as being $1,000.00, the 1942 Packard as $1100.00, the 1942 Packard as $900.00, making an over-reported amount, according to the testimony, of $1450.00. That amount is shown as a credit under the year 1947.

Mr. Clark further testified he purchased a 1942 Pontiac on April 12, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1300.00. That sale was not recorded on
1880 the books of Highland Motor Sales, a difference of $1300.00.

He testified further he purchased a 1941 Plymouth on April 16, 1947. He dealt with Mr. Achilli or Mr. Cons and paid $900.00. That sale was not recorded on the books of Highland Motor Sales, a difference of $900.00.

He testified he purchased a 1939 Ford on April 25, 1947, paying $400.00. The books of Highland Motor Sales disclose a sale of $400.

He testified he purchased a 1938 Ford on April 19, 1947, for $750.00, and he dealt with Mr. Achilli or Mr.

Cons. Highland Motor Sales disclose the sale of that car in the amount of $600.00, a difference of $150.00.

He testified he purchased a 1941 Plymouth on May 23, 1947. He dealt with Mr. Achilli or Mr. Cons and paid $1250.00. Highland Motor Sales disclose the sale of that automobile in the amount of $200.00, a difference of $1050.00.

He testified he purchased a 1941 Plymouth on May 31, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1250.00. Highland Motor Sales' records do not disclose the sale of that automobile, a difference of
1881 $1250.00.

He testified he purchased a 1942 Oldsmobile on June 7, 1947. He paid $1450.00 and dealt with Mr. Achilli or Mr. Cons. That sale is not recorded on the books of Highland Motor Sales, a difference of $1450.00.

He further testified, and presented Exhibits 34 and 37, that he purchased a 1942 Buick on June 3, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1750.00 for that automobile.

The books and records of Highland Motor Sales do not disclose any record of that sale, a difference of $1750.00.

He testified, and presented Exhibits 34 and 38, that he purchased a 1941 Chevrolet on July 3, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1100.00 for that automobile.

The books and records of Highland Motor Sales disclose the sale of that car as $850.00, a difference of $250.00.

He testified he purchased a 1942 Cadillac on November 8, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1500.00. The books and records of Highland Motor
1882 Sales do not disclose that sale, a difference of $1500.00.

He testified he purchased a 1936 Chevrolet on December 9, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $200.00 for that automobile. The books and records of Highland Motor Sales do disclose the sale of $200.00 of that automobile.

He testified he purchased a 1941 Buick on May 5, 1948, and paid $950.00. The books and records of Highland Motor Sales disclose that sale as being $750.00, a difference of $200.00.

He testified he purchased a 1940 Pontiac on June 22, 1948, and paid $775.00. The books and records of Highland Motor Sales disclose that sale as $775.00, no difference.

He testified he purchased a 1942 Plymouth on July 12, 1948. He dealt with Mr. Achilli or Mr. Cons and paid $800.00 for the automobile. The books and records of Highland Motor Sales disclose that sale as $500.00, a difference of $300.00.

He testified he purchased a 1947 Ford on August 18, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1800.00 for that automobile. The books and records of Highland Motor Sales disclose that sale as $1400.00, a difference of $400.00.

1883 He testified he purchased a 1939 Plymouth in November of 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $400.00. The books and records of Highland Motor Sales disclose that sale as being $300.00, a difference of $100.00.

He testified he purchased a 1941 Ford on November 4, 1948. He dealt with Mr. Achilli or Mr. Cons and paid $750.00 for that car. The records of Highland Motor Sales disclose that sale as $735.00, a difference of $15.00.

At the same time he purchased another 1941 Ford and paid $750.00 for that car. The books and records of Highland Motor Sales disclose that sale as $765.00, an overreport of $15.00. Those last two figures offset one another.

C. Bernard Magnuson presented Exhibit 33, and testified that he purchased a 1941 Buick on January 2, 1947, and dealt with Mr. Achilli or Mr. Cons. He paid $1200.00 for that automobile.

The books and records of Highland Motor Sales disclose the sale of that car as $1,075.00, a difference of $125.00.

He testified he purchased a 1942 Plymouth in January of 1947. He dealt with Mr. Achilli or Mr. Cons and
1884 paid $1100.00 for that car. The books and records of Highland Motor Sales do not disclose that sale, a difference of $1100.00.

He testified a 1941 Buick was purchased in January of 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1200.00. The books and records of Highland Motor Sales do not disclose that sale, a difference of $1200.00.

He testified a 1946 Ford was purchased on May 5, 1946—1947. I believe the testimony is 1946, and I believe it is in error. Exhibit 33 discloses that the purchase was made in 1947.

He paid $1750.00 for that automobile, and Highland Motor Sales records disclose the sale of that automobile as $1,000.00, a difference of $750.00.

He testified he purchased a 1942 Oldsmobile, May 27, 1946, according to the record—according to the evidence 1947. He paid $1500.00.

The records of Highland Motor Sales disclose that sale as $900.00. Again, he dealt with Mr. Achilli or Mr. Cons. There is a difference there of $600.00.

He testified he purchased a 1940 Plymouth in May, according to the testimony. According to the evidence, it was in 1947. He dealt with Mr. Achilli or Mr.
1885 Cons, and he paid $700.00.

The records of Highland Motor Sales do not disclose that sale, a difference of $700.00.

He testified he purchased a 1941 Oldsmobile, June 1, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1,300.00. The books of Highland Motor Sales disclose that sale as $1300.00.

He testified he purchased a 1941 Cadillac on March 1, 1948, for which he paid $1450.00. The books and records of Highland Motor Sales disclose that sale as $1300.00, a difference of $150.00.

He testified he purchased a 1939 Chevrolet in March of 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $650.00 for that car. The books and records of Highland Motor Sales do not disclose that sale, a difference of $650.00.

He testified a 1940 Oldsmobile was purchased on April 1, 1948. He dealt with Mr. Achilli or Mr. Cons and paid $1050.00. The books and records of Highland Motor Sales disclose the sale on that date of $750.00, a difference of $300.00.

He testified that he purchased a 1941 Plymouth on July 16, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1,000.00 for that automobile. The books
1886 and records of Highland Motor Sales disclose that sale as being $900.00, a difference of $100.00.

Dale Boose presented Exhibit 65, and testified that he purchased a 1946 Plymouth on October 9, 1946. He stated he paid $1,117.10, and was allowed $228.00 on a 1937 Chevrolet pickup. The records of Highland Motor Sales disclose that sale as being $1345.10, but they do not show a trade-in.

Truman Winters testified that he purchased that 1937 Chevrolet pickup in October of 1946 and paid $700.00 for it. The allowance, as testified by Mr. Boose, was given credit here and was deducted from the $700.00 to make a total difference of $472.00 that was not recorded or reported.

Howard V. Seyller testified he purchased a 1946 Chrysler on December 21, 1946. He paid $2232.00 for the automobile. The Highland Motor Sales records disclose the sale as being $2,178.30, a difference of $54.70.

Mr. Seyller further stated that he traded a 1936 Plymouth, for which he was given no allowance, and which was not recorded on the books of Highland Motor Sales.

Norbert Koschnick testified that he purchased that
1887 1936 Plymouth in December of 1946, and paid $400.00 for it. That sale was not recorded on the books of Highland Motor Sales. Both of these individuals testified that they dealt with Mr. Achilli. The difference there was $400.00 on the total transaction.

Wilton Doerge testified, and presented Exhibits 70 and 71, that he purchased a 1946 Plymouth June 1, 1946, for which he paid $700.00, and was allowed $600.00 on a 1939 LaSalle.

The Highland Motor Sales records disclose the sale to Wilton Doerge on that date of $1,167.49, the difference there being $132.51.

Henry Seims testified that he purchased the 1939 LaSalle on April 20, 1946, and traded for that car a 1937 Dodge tow truck. There was no money transaction involved.

Joseph Ingrassia testified, and presented Exhibit 72, that he purchased that 1937 Dodge tow truck on December 13, 1947, and paid $1,000.00 for it. The original allowance, as testified to by Wilton Doerge, was applied here but was not recorded on the books of Highland Motor Sales, a difference of $400.00 on the total transaction.

1888 In all cases the witnesses testified that they dealt with Mr. Achilli.

Joseph Ingrassia further testified, and presented Exhibit 73, that he purchased a 1941 Cadillac on July 15, 1948. He dealt with Mr. Achilli, and paid $1,750.00. The books and records of Highland Motor Sales do not disclose that sale, a difference of $1,750.00.

Sidney E. Read testified that he purchased a 1947 Plymouth on August 9, 1947. He dealt with Mr. Achilli or Mr. Cons, and paid $1430.00, and traded a 1939 Chevrolet.

The books and records of Highland Motor Sales disclose the sale on that date to Sidney Read in the amount of $1020.00 cash received and a trade allowance of $513.50, an over-report of $103.50.

Frank Rippberger testified he purchased a 1946 Chrysler on October 8, 1946, and paid $2,000.00, and traded a 1936 or 1937 Dodge. Highland Motor Sales' records disclose the sale on that date of $2312.93, but no allowance for any trade-in. A credit was given for $312.93.

Walter Schwab testified that he purchased that 1937 Dodge on October 8, 1946 and paid $600.00 for that 1889 car. He dealt with Mr. Cons. That sale was not recorded on the books of Highland Motor Sales, so there is a difference there of $600.00.

Harry Bendes testified that he purchased a 1948 Chrysler from Mr. Achilli on January 15, 1948. He paid $1,022.00 and was given $1,397.90 as an allowance on his 1946 DeSoto.

Highland Motor Sales' records disclose that sale as being $622.00 received in cash, and $1397.90 allowance. That allowance was taken as a credit on the sale of that car; therefore, $400.00 in cash was extracted from this transaction, a difference there of $400.00.

Joseph J. Katz presented Exhibits 74, 75, and 76. He testified that he purchased a 1941 Cadillac on November 19, 1946, for which he paid $2050.00. The records of Highland Motor Sales do not disclose that sale, a difference of $2050.00.

He further testified, and presented Exhibits 77 and 78, that he purchased a 1946 Chrysler on December 24, 1946, and paid $3300.00. Highland Motor Sales' records disclose the sale on that date in the amount of $2,420.80, a difference of $879.20. Both transactions were had with Mr. Achilli.

1890 Henry A. Gorder testified he purchased a 1946 Plymouth on October 24, 1946, for which he paid

$885.00, and was given a $500.00 allowance on a 1942 Ford that he traded. Highland Motor Sales' records disclose the sale of that automobile in the amount of $537.13 cash received, and allowance of $847.83. In that case I slipped and didn't charge them with anything.

Dr. A. Ludwig testified he purchased a 1947 Plymouth on July 26, 1947. He dealt with Mr. Achilli, and paid $1250.00 in cash and was given allowance for his 1941 Plymouth of $697.50.

The Highland Motor Sales' records disclose the sale of that automobile and show they received $1020.00 in cash and gave an allowance of $697.55, a difference there of $230.00.

The Court: We will now take a recess for a few minutes, ladies and gentlemen.

(Recess taken.)

1891 (Whereupon the further proceedings were had in open Court in the presence and hearing of the jury, to-wit:)

Mr. Russo: May we proceed, your Honor?

The Court: Yes.

Mr. Russo: Thank you.

By Mr. Russo:

Q. Mr. Weber, will you resume your explanation of Government's Exhibit No. 279 from the point that you left off?

A. The next item is that of Dorothy Stevens, which we have already explained in connection with the purchase of the Oldsmobile by Hanley Clark. The difference there was $681.50.

Walter Brawner testified, and presented Exhibit 64, that he purchased a 1946 Plymouth on March 30th, 1946. He paid $437.51, and was given $674 allowance on his 1941 Buick.

The record of Highland Motor Sales disclosed the sale of $1,111.39. The cost on Highland Motor Sales books without showing a trade-in was $994.87. Their actual cost, according to the testimony, was $674. They showed the purchase of that automobile. Therefore we charge them with $320.87, the difference between the $674

1892 and the $994.87.

Adolph Bernstein presented Exhibit 58, and testified he purchased a 1946 Plymouth on July 30, 1946, for which he paid $851 cash and traded a 1941 Buick.

The records of Highland Motor Sales disclose that sale as $1,701, but there was no trade-in recorded at that time. They subsequently show the purchase of that automobile for $1343.97, and carried that cost on their books, the difference between the $850 allowed per the testimony and the $1343.97 is $493.97.

George N. Saun—I believe that is supposed to be instead of S-a-w-n, it should be S-a-u-n—presented Exhibits 66 and 67, and testified that he purchased a 1947 Chrysler on March 8th, 1947, for which he paid $1,765, and was given allowance on a 1941 Cadillac of $1,300.

Highland Motor Sales records disclose the sale of that automobile and the allowance on that Cadillac to be $1,530 cash received and $1,235.60 as the trade-in allowance. The difference between those two figures is $235.64 and $64.40.

1893 The transactions of Walter Brawner, Adolph Bernstein and George Saun were all held with Mr. Achilli.

James Jervey testified that he purchased a 1940 Ford in June of 1946. He dealt with Mr. Achilli, and paid $900 in cash and traded in a 1936 Nash. He was given an allowance of $125 on the Nash.

The books of Highland Motor Sales did not disclose a trade, but did disclose the sale of $801.18. The difference between the two is $223.82.

Warren Phillips testified he purchased a 1936 Chevrolet on July 24, 1946 from Highland Motor Sales of Mr. Achilli. He paid $700. The books of Highland Motor Sales did not disclose any sale to Mr. Phillips, a difference of $700.

Julia Vickrock testified that she purchased a 1941 Oldsmobile in September of 1946 and paid $1424. She dealt with Mr. Achilli. The books and records of Highland Motor Sales do not disclose any sale to Mrs. Vickrock, a difference of $1424.

John Meagher testified he purchased a 1946 Plymouth on October 11, 1948 from Highland Motor Sales. He paid $1065 in cash and traded a 1942 Plymouth, for which he was allowed $635. Neither was shown on the books and records of Highland Motor Sales, a difference of $1065 and $635.

1894 Dale Hauptly testified that he purchased a 1936 Pontiac on January 4, 1946. He paid $425 and dealt with Mr. Achilli.

The books and records of Highland Motor Sales do not disclose any sale to Mr. Hauptly, a difference of $425.

Jack M. Gehringer testified he purchased a 1942 Chrysler on August 15, 1946. He traded his 1938 Dodge. He paid $1300 in cash and was given an allowance of $285.

The books and records of Highland Motor Sales disclose a sale of $1528.85 on that day to Mr. Gehringer but do not disclose any trade-in allowance. The difference there is $56.15.

Frank Carlson testified he purchased a 1947 Dodge on April 5, 1948. He dealt with Highland Motor Sales. He paid $2,340.

The books and records of Highland Motor Sales disclose a sale on that date to Mr. Carlson in the amount of $1,836, a difference of $504.

Harvey Kappen testified that he purchased an automobile on June 8th, 1946 and paid $280. He dealt with Mr. Cons. The books and records of Highland Motor Sales do not disclose a sale to Mr. Kappen on that date, 1895 a difference of $280.

Duane W. Mull testified, and presented Exhibits 41 and 43, that he purchased a 1941 Hudson on April 24, 1948. He dealt with Mr. Achilli or Mr. Cons. He paid $850. The books and records of Highland Motor Sales do not disclose any sale of that automobile at that time, a difference of $850.

He further testified, and presented Exhibits 41 and 42, that he purchased a 1939 Olds on April 24, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $650.

The records of Highland Motor Sales disclose that sale as being $600, a difference of $50.

He testified, and presented Exhibits 41 and 44, that he purchased a 1941 Oldsmobile on May 15, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1,175. Records of Highland Motor Sales do not disclose that sale, a difference of $1,175.

He presented Exhibits 41 and 45, and testified that he purchased a 1939 Plymouth on May 8th, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $50.

The books and records of Highland Motor Sales do not disclose any sale at that time, a difference 1896 of $50.

He testified and presented Exhibits 41 and 46,

that he purchased a 1942 De Soto June 1st, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1,100 for the car.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $1,100.

He presented Exhibits 41 and 47, and testified he purchased a 1941 Plymouth on June 1st, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1050.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $1050.

He presented Exhibits 41 and 48, and testified that he purchased a 1947 Plymouth on June 1, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1850.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $1850.

He presented Exhibits 41 and 49, and testified that he purchased a 1940 Chevrolet on June 3, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $950.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $50.

He presented Exhibits 41 and 50, and testified that he purchased a 1938 Ford on July 12, 1948. He 1897 dealt with Mr. Achilli or Mr. Cons, and paid $600.

The books and records of Highland Motor Sales disclose that sale, but as being $475, a difference of $125.

He presented Exhibits 41, 51 and 52, and testified he purchased a 1941 Buick on August 3, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $1500.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $1500.

He presented Exhibit 41 and testified he purchased a 1936 Ford on August 12, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $300.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $300.

Barney Rubinsky presented Exhibits 57 and 53, and testified he purchased a 1940 Dodge on April 6th, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $675.

The books and records of Highland Motor Sales disclose that sale as being $675.

Mr. Rubinsky presented Exhibits 57 and 54 and testified that he purchased a 1936 Pontiac on April 13, 1948. He dealt with Mr. Achilli or Mr. Cons, and paid $325.

The books and records of Highland Motor Sales 1898 disclose that sale as $200, a difference of $125.

He presented Exhibits 57, 55 and 56, and testified he purchased a 1940 Buick. He dealt with Mr. Achilli or Mr. Cons, and paid $900.

The books and records of Highland Motor Sales disclose that sale as being $750, a difference of $150.

Clarence H. Johnson presented Exhibit 59, and testified that he bought a 1940 Chevrolet on August 19, 1946 and paid $737. The books and records of Highland Motor Sales disclose the sale of that automobile as $737.

Mr. Johnson testified he dealt with Highland Motor Sales on all transactions.

He further testified he purchased a 1941 Chevrolet on August 19, 1946. He dealt with Highland Motor Sales and paid $799.33.

The books and records of Highland Motor Sales do not disclose that sale, a difference of $799.33.

Mr. Johnson further testified that he purchased a 1941 Buick on August 19, 1946, for which he paid $1108.33. The books and records of Highland Motor Sales disclose that sale—do not disclose that sale, a difference of $1108.33.

He further testified that he bought a 1938 Dodge 1899 on August 19, 1946. That 1938 Dodge is the same Dodge that Mr. Gehringer traded above, which is keyed with No. 12. Mr. Johnson testified he paid $503.33 for that car.

Highland Motor Sales records do not disclose that sale. We have given the allowance that was testified to by Mr. Gehringer of $285, making a net difference of $218.33.

William C. Hoppe testified he purchased a 1946 Plymouth on July 25, 1946. He paid $713.75, and was given an allowance on a 1942 Dodge of $693.25.

Highland Motor Sales records disclose that sale as being $1,407.60.

He further testified that he purchased a 1947 Chrysler on October 16, 1947. In both instances he dealt with Mr. Achilli. He paid $663 for that automobile, and traded a Packard. He did not state what allowance was given.

The books and records of Highland Motor Sales disclose that sale as being $2,191.85, and they gave an allowance of $1,528.85 on the Packard.

He further testified he purchased a 1947 Chrysler on

November 6th, 1947. He dealt with Mr. Achilli, and paid $601.50 and traded his 1947 Chrysler. He 1900 testified he paid $601.50.

The books and records of Highland Motor Sales disclose that sale as being $2,553.50 and a trade allowance was given on that Chrysler of $1,953.50.

Elmer Kamholz testified he purchased a 1941 Plymouth on September 4, 1946, for which he paid $900, and traded his 1936 Oldsmobile, for which he was given no allowance, or which he stated there was no allowance.

The books and records of Highland Motor Sales do not disclose that sale. But subsequently they disclose the purchase of that automobile for $388. Therefore the difference is $900 and $388.

Sylvester Plapp, Jr. testified that he purchased a 1942 Dodge on August 13, 1946 and paid $1,329.37. The records of Highland Motor Sales disclose that sale as being $1,329.37.

That Dodge is the same Dodge that was traded by Mr. Hoppe and is keyed with No. 11, just above, for which an allowance of $693.25 was given.

The books and records of Highland Motor Sales disclose that sale and a cost basis on that car of $1,342.50 was acquired by purchase. The difference between the $693.25 and the $1,342.50 is $649.25.

1901 Those figures total for the year 1946 of income unrecorded and unreported on the books of Highland Motor Sales to $14,955.10.

For the year 1947, $36,131.55.

For the year 1948, $21,068.00.

By Mr. Russo:

Q. Mr. Weber, did you make a determination of Mr. Achilli's balance in his capital account at Highland Motor Sales as of December 31, 1948?

A. I did.

Q. What did you determine that balance to be?

A. After analyzing his capital account on the partnership records, I found that at December 31, 1948 the balance of his account was $44,441.27.

Q. Did you also make a determination of Mr. Achilli's assets and liabilities as of December 31, 1945?

A. I did.

Q. Did you determine his net worth as of December 31, 1945?

A. I did.

Q. How did you make that determination?

A. From all of the evidence and testimony that has been given here at this trial. I amassed his assets and his liabilities, and subtracted the liabilities from
1902 the assets to determine his net worth at December 31, 1945.

Q. What did you determine that net worth to be as of that date?

A. At December 31, 1945 his net worth was $33,815.56.

Q. Did you make the same determination for the years 1946, 1947 and 1948?

A. I did.

Q. What if anything else did you do?

A. I took into consideration all of the non-deductible expenditures and all of the non-taxable income or capital gains, portions of capital gains.

I subtracted the starting point net worth from the net worth at December 31, 1946, and the net worth at December 31, 1946 from the net worth at December 31, 1947, and the net worth at December 31, 1947 from the net worth at December 31, 1948, to arrive at an increase in net worth for each of the years 1946, 1947 and 1948.

Q. Have you prepared a summary reflecting the details of your net worth analysis?

A. I have.

Q. May I have it, please?

A. Yes, sir. (Witness produces document.)

By Mr. Russo:

1903 Q. Upon what is that summary based?

A. Upon all the evidence and testimony that has been given here at this time.

Mr. Russo: I will ask that this be marked Government Exhibit 280 for identification.

(The document was thereupon marked Government's Exhibit 280 for identification.)

Mr. Russo: May it please the Court, at this time we offer in evidence Government Exhibit No. 280.

Mr. Batter: I object to this, your Honor, on the grounds that it is a summation of the witness' interpretation of the testimony of the several witnesses, which is a matter purely within the province of the jury itself.

I object upon the further ground that there has been no foundation laid for the application of the net worth theory.

The Court: It may be received.

(The document was thereupon received in evidence as Government's Exhibit 280.)

1904 Mr. Russo: At this time, may it please the Court, may I distribute copies to the jury?

The Court: All right.

(Copies of the Exhibit were thereupon handed to the jury.)

Mr. Batter: Your Honor, may I have a running objection to all the evidence adduced from this Exhibit?

The Court: Yes, that is understood, Mr. Batter.

By Mr. Russo:

Q. Now, Mr. Weber, will you kindly refer to Government Exhibit No. 280 and explain for the Court and jury all the items appearing thereon?

A. This is the schedule that was prepared of the net worth and expenditures for the years indicated.

Q. What are those years?

A. The years indicated are December 31, 1945, December 31, 1946, December 31, 1947, December 31, 1948.

The left-hand column is headed "Asset", then follows the name of the witness who has testified here, then the Exhibit number which has been entered into evidence.

1905 Exhibit No. 171 and Exhibit No. 102 dated May 22, 1947 and January 12th, 1948 respectively have been interposed in the columns. They are financial statements signed by Mr. Achilli that have been received into evidence. They have been applied as nearly as possible to the assets which have been testified to by the witnesses.

Some assets on those Exhibits do not appear in our figures at the December 31 year end columns. There was no testimony given as to those assets.

Reading across: Union National Bank, Witness Mr. Roy Flora presented Exhibits 92, 93 and 94, which disclosed a balance in the checking account of Mr. Achilli at December 31, 1945 of $16.51; December 31, 1946, $3,579.54; December 31, 1947, $2,148.03; December 31, 1948, $6,934.55.

Exhibit 171 at May 22, 1947, discloses cash in the bank of $2,000. Exhibit 102 at December 31, 1948, discloses cash on hand in the bank of $3,100.

U. S. Treasury 2½ per cent bonds were testified to

by Mr. Flora, who presented Exhibits 86 and 87. They were purchased in 1947 and were on hand at December 31, 1947 in the amount of $8,000.

Exhibit 102 discloses them on hand at January 12, 1948 in the amount of $8,000.

1906 Cashier's Check No. 28824, Exhibit 95 presented by Mr. Flora, disclosed to be in the hands of Mr. Achilli at December 31, 1948 $35,000.

Trust No. 127, which is the garage building at 192 Wellington Street, testified to by Mr. Flora, Exhibits 89 and 90. The trust certificate showed Mr. Achilli's interest in that trust to be $7,800 at December 31, 1945; $9,600 at December 31, 1946; $11,400 at December 31, 1947; and $13,300 at December 31, 1948.

Exhibit 171 stated an interest of $10,500 at May 22, 1947, and $15,000 at January 12, 1948.

The Red Lion, which was the property purchased from Mr. Turpin, and was testified to by Mr. Turpin under Exhibit 84, in 1945, of $18,400. That was on hand December 31, 1946, $18,400; December 31, 1947, $18,400; on hand December 31, 1948, $18,400.

Red Lion—Material Service, Seymour Burton testified that he sold a piece of property adjacent to the Red Lion to Mr. Achilli, and presented Exhibits 79, 80 and 80-A. It was purchased in 1946 in the amount of $1,000. It was on hand at December 31, 1947 in the amount of $1,000, and on hand December 31, 1948, $1,000.

Red Lion, Schedule attached. Now if you will turn 1907 to the third page.

This schedule is a schedule of expenditures in the reconstruction of the Red Lion for the years 1946, 1947 and 1948.

The left-hand column denotes the witness that testified here, and then some association as to what he might have been associated with. Then the Exhibit Numbers, the amount received per testimony, less amount included in bank expenditure, which is a total amount, and then a distribution for the years 1946, 1947 and 1948, and a total column.

Mortimer Hawkins, the architect, testified that the total of architect's certificates, Exhibits 82 and 83, for the year 1946 were $2,417.22; for the year 1947 were $70,596.36; for the year 1948, $8,143.35. A total of $81,156.93.

Martin Seybold, the First National Bank of Elgin, tes-

tified that he made a loan, and presented Exhibits 121 through 160-E, and further testified that he made expenditures in connection with the reconstruction of the Red Lion in the year 1947 totalling $24,715.90.

Mortimer Hawkins testified that his architect's fees, and presented Exhibits 83, 128-A and 139-A were
1908 $7,726. The bank disclosed the payment of $1,453.03 of that amount.

Mr. Hawkins testified he received $1,625 in 1946; $1,647.97 in 1947, plus that amount that is disclosed in the bank expenditure account; and $3,000 in 1948. A total here charged of $6,272.97. The $1,453.03 is in the total figure of $24,715.90.

Mortimer Hawkins further testified that he made advances that he was reimbursed for, and presented Exhibit No. 83; that he was paid $141.67 in the year 1947, or a total of $141.67.

Lamar Kidwell of the Lamp Construction Company presented Exhibits 125, 125-A and 125-B, 126, 126-A, 126-B, 126-C, 145, 145-A, 145-B, 155, 155-A, 155-B, 155-C, 146, 146-A, 146-B, and 146-C.

He testified that he received a total amount of $39,179.03, of which the bank testified that $9,091.56 was paid by them in the prior amount.

He testified that he received in 1946, $792.22; 1947, $28,900.66; 1948, $394.59, for a total of $30,087.47. The $9,000 as previously stated is in the $24,000 above.

M. C. Lohbauer presented Exhibits 154, 154-A and 154-B, 132, 132-A, 132-B, and 132-C, and 123, 123-A,
1909 123-B and 123-C.

He stated he received $8,531.56. The bank disclosed payment of $2,932.98. He stated that he received in 1946 $2,798.78; in 1948, $2,799.80, for a total of $5,598.58 that he received other than from the bank.

Frank Marker of Elgin Wiring and Fixture Company presented Exhibits 124, 124-A, 124-B and 124-C. He testified that he received $4,391.42, that the bank expended $800 as shown above. He testified that he received this money in 1948. Therefore he received $3,591.42 in the year 1948, and the same in the total column.

Clifford N. Smith presented Exhibits 156 and 156A, and testified that he received $4,000 in 1947; $637.30 in 1948, for a total of $4,637.30.

Walter Magnuson of Midwest Hardware presented Exhibits 158 and 158-A. He testified he received $1,071.63 in 1947; $119.07 in 1948, for a total of $1190.70.

Jack Hintt of A. J. Ironside Company presented Exhibits 157 and 157-A, 220 and 221. He testified he received $4,069.89 in 1947; $627.20 in 1948, for a total of $4,697.09.

1910 Bernard Gershick of Elgin Glass & Mirror Company presented Exhibits 160, 160-A, 160-B, 160-C, 160-D and 160-E. He testified that he received $100 in 1947, a total of $100.

Other cancelled certificates that were retained by the bank, Exhibits 153, 153-A and 153-B, 159, 159-A and 159-B, were $26.46, a total of $26.46.

Certificate stubs not shown above, Exhibit 82, were $350.00, a total of $350.00.

That totals in 1946, $2,417.22; in 1947, $67,822.96; in 1948, $11,169.38, for a total of $81,409.56.

Now the assets acquired in 1946 by this purchase or this expenditure is added to the expenditure in 1947 to arrive at a total expenditure at the end of 1947 of $70,240.18. That expenditure for the years 1946 and 1947 is added to the total expenditure for the year 1948 to arrive at a total of $81,409.56, which was the total testified to here as being Mr. Achilli's investment in the Red Lion at that date.

Those figures are now on the first page under the title of Red Lion, Schedule Attached, $2,417.22 in 1946, $70,240.18 in 1947, and $81,409.56 in 1948.

1911 Exhibit 171, Mr. Achilli stated that his investment in the Red Lion was $30,000 at that date, Exhibit 102 at January 12, 1948, he stated his investment to be $75,000.

Robert E. Wales further testified regarding the Red Lion and presented Exhibits 113, 114, 115, 116, 117, that he received in 1947, $17,284.01. That, plus what he received in 1948, totals $17,598.48.

1912 Real Estate, witness Clarence Gubbins presented Exhibit No. 180 and testified that he sold to Sam Achilli 732 Brook Street, Elgin, Illinois, for $12,600.00. An additional $600.00 was for the carpeting. He had on hand at December 31, 1945, $12,600.00 and $600.00; on December 31, 1946, $12,600.00 and $600.00; December 31, 1947, $12,600.00 and the $600.00.

On Exhibit 171, Mr. Achilli valued this property at $18,000.00. On Exhibit 102, January 12, 1948, he valued this property at $20,000.00.

75 Grove Avenue was testified to by, first, H: Wheeler Britton, who presented Exhibits 181 and 182, and then William Abelmann, the real estate agent, and then Lamp Construction Company, Lamar Kidwell, who presented Exhibit 179.

They testified that Mr. Achilli purchased that property for $20,000.00 in 1947. He had it on hand December 31, 1947, in the amount of $20,000.00. He had it on hand December 31, 1948, in the amount of $20,000.00.

Mr. Kidwell testified that Lamp Construction Company made improvements on that property in the amount of $5,000.00 during the year 1948. $5,000.00 is shown 1913 in the year 1948 at December 31, 1948.

Mr. Achilli valued that property at January 12, 1948, at $25,000.00.

Dr. E. E. Glashagel presented Exhibit No. 105. He testified that he sold Mr. Achilli Lot 9, Oak Hills Subdivision, Elgin, Illinois, for $2,000.00, and at December 31, 1947, Mr. Achilli had that asset in the amount of $2,000.00; December 31, 1948, he had the asset in the amount of $2,000.00.

John Stewart presented Exhibits 174 and 175, and testified he sold Mr. Achilli Lot 10 in Oak Hills Subdivision, City of Elgin, the property there located, for $2100.00; that he received $210 in 1947 and received the balance in 1948.

At December 31, 1947, Mr. Achilli had invested $210, and at December 31, 1948, he had invested $2100. I believe the Exhibit 102, January 12, 1948, discloses the lot valued at $6500.

The property located at 18-20 Douglas Avenue was testified to by Joseph Wiedeman and Ranstead S. Lehmann, who presented Exhibit 112. They stated that Mr. Achilli purchased that property during the year 1948, and had it on hand at December 31, 1948. The amount paid was $55,000.

1914 William Abelmann, Wynyard S. Swainson and Henry Santurre testified as to the property at 819-821-823 Dundee Avenue, City of Elgin. They presented Exhibits 106, 110 and 111. They testified that Mr. Achilli's

interest in that property at December 31, 1945, was $6,750; that the property was sold during the year 1946.

167 Liberty Street, contract of sale, Josephine Wagner testified that she purchased the property during the year 1946, and Earl Gromer further testified as to the transaction. They presented Exhibit 207. They testified at December 31, 1946, Mrs. Wagner owed Mr. Achilli $10,800.

18 South Aldine Street, Elgin, Illinois, is listed on Exhibit 171 as valued at $7500, and Exhibit 102 valued at $9,000. We have had no testimony here concerning that property, and it does not appear in our net worth figures.

Part Lot 1 of P. J. Kimball's Addition to the City of Elgin, Illinois, Arthur H. Middleton testified to that property, presenting Exhibits 107 and 108. He testified he sold the property to Mr. Achilli during the year 1948, for which Mr. Achilli paid $12,000.

1915 Under Receivables, Robert C. Heckman presented Exhibits 118, 119 and 120, and testified that Mr. Achilli's share of the loan made to him and outstanding at December 31, 1947, was $2,000.

Mitchell A. Silagy, Jr., presented Exhibits 224 and 223 and 222. He testified that Mr. Achilli's interest in the loan to him at December 31, 1947, that was outstanding was $3500.

Marvin Affeld presented Exhibits 217, 218 and 219, and testified that he borrowed $7500 from Mr. Achilli, which was outstanding at December 31, 1947.

Theodore Gordon testified and identified the cashier's check presented by Martin Seybold, check No. 132,224, Exhibit 172. He stated that he received a loan from Mr. Achilli during the year 1948, outstanding at December 31, 1948, in the amount of $15,000.

McCummings Oil Company, James W. McCummings testified, and presented Exhibit 104. He testified that Mr. Achilli had an investment in an oil well, made the investment during the year 1946 in the amount of $2500 and that it was outstanding at December 31, 1946, December 31, 1947 and December 31, 1948.

1916 Marvin Affeld testified that Mr. Achilli made an investment in an oil well that he was promoting during the year 1948 in the amount of $1500, and that that was outstanding December 31, 1948.

Partnership Interests, which were testified to by Earl Gromer, all represent the one-half interest that is due

Mr. Achilli, and represent his equity in these properties and ventures.

Highland Motor Sales, Exhibits 4, 5 and 6, December 31, 1945, $7,275.92; December 31, 1946, $14,989.73; December 31, 1947, $27,528.60.

Exhibit 171, Mr. Achilli stated his investment in Highland Motor Sales at May 22, 1947, was $27,116.42, and Exhibit 102, at January 12, 1948, $35,000.

In his Exhibit 171, dated May 22, 1947, Mr. Achilli stated that his investment in Elgin Acceptance Company at that date was $9,823.73. This item of an asset does not appear in our net worth statement any place.

Property located at 203 Grove Avenue, Exhibits 239, 242, 164 and 165, testified to by Mr. Gromer, Mr. Achilli's interest in that property at December 31, 1946, was $5500; at December 31, 1947, was $5500; at Decem-
1917 ber 31, 1948, $5500.

In the financial statement Exhibit No. 171 presented by Mr. Achilli, he stated his interest in that property to be $12,500.

209 Lake Street, testified to by Mr. Gromer, who presented Exhibits 243, 247, 167-A, stated that Mr. Achilli's investment in that property at December 31, 1946, was $4,000; at December 31, 1947, was $4,000; at December 31, 1948, $4,000.

203 Wellington Street, testified to by Mr. Gromer, Exhibits 248, 252, 161-A, he stated that Mr. Achilli's interest in that property at December 31, 1947, was $8,000 and at December 31, 1948, $8,000.

The gas station property, Exhibits 253 and 254, testified that Mr. Achilli's interest in that property at December 31, 1948, was $3,450.

630 Raymond Street, Exhibits 201, 255, 257, testified to by Mr. Gromer that Mr. Achilli's interest in that property at December 31, 1948, was $1,400.

568 Fremont Street, Exhibits 258 and 263, Mr. Gromer testified that Mr. Achilli's interest in that property at December 31, 1948, was $1,844.48.

Midwest Tucker Sales, Mr. Gromer testified that Mr. Achilli's interest in that property at December 31,
1918 1946, was $6,000; December 31, 1947, was $6,000; December 31, 1948, was $6,000.

He testified that in 1947 they made an investment in Tucker Speedway and Mr. Achilli's interest in that De-

cember 31, 1947, was $2,000; at December 31, 1948, was $2,000.

Mr. Gromer testified that at December 31, 1946, on Exhibits 265 and 266, Mr. Achilli had a balance due from the Gromer-Brady account of $2,692.

The tax returns—well, I have just testified as to the balance of Mr. Achilli's capital account at December 31, 1948, to be $44,441.27. The tax returns of Mr. Achilli indicate that he had an investment in the pool hall of $5,500 at December 31, 1945.

He had a contract receivable on the sale of the pool hall at December 31, 1946, of $3,309.

There was additional value on the Red Lion equipment which he uses as a cost basis on his return, but has not been testified to here of $2,955.63, and the same value at December 31, 1948, of $2,955.63.

The total assets for December 31, 1945, $58,942.43; for December 31, 1946, $97,978.49; for December 31, 1919 1947, $226,866.45; December 31, 1948, $389,033.97.

Q. Mr. Weber, will you read the figure for December 31, 1947, please?

A. December 31, 1947, $227,866.45. The Exhibit No. 171, the financial statement presented by Mr. Achilli, showed a total of assets at May 22, 1947, of $117,440.15.

His Exhibit 102, December 12, 1948, showed a total of assets of $206,600.00.

The Court: We will now recess for the noon lunch hour, please.

(Whereupon the trial of the above-entitled cause was recessed until 2:00 o'clock p.m. of the same day, Tuesday, May 3, 1955.)

1920

Court met pursuant to recess.

Present:

Mr. Russo,
appeared for the Government;

Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States of America, vs. Achilli, the case on trial.

(Whereupon the following further proceedings were had in open Court in the hearing and presence of the jury, to-wit:)

1921 Mr. Russo: May I proceed, your Honor?

The Court: Yes.

RALPH A. WEBER, called as a witness herein on behalf of the Government, having been previously duly sworn, resumed the stand, and testified further as follows:

Direct Examination (Cont'd.) by Mr. Russo.

Q. Your name is Ralph Weber?

A. Yes, sir.

Q. Are you the same Ralph Weber who was previously sworn and testified in this case?

A. Yes, sir.

Q. Were you on the stand and testifying at the conclusion of this morning's session?

A. I was.

Q. Mr. Weber, will you refer to Government's Exhibit 280 and continue your explanation from the point that you left off?

A. As I recall, this morning we had just completed the assets and had given the total figures for the columns as they were added.

1922 Now, on the second page, which is entitled "Sam Achilli, Schedule of Net Worth and Expenditures For The Year Indicated", we have listed in the first column the liabilities, then the witness, the Exhibit Number, and the years ending December 31, 1945, December 31, 1946, December 31, 1947, and December 31, 1948, and again, the references to Exhibit 171 and 102 in evidence for the period of May 22, 1947 and January 12th, 1948, respectively.

The Union National Bank, which was Roy Flora, testified that at December 31, 1947, Mr. Achilli had a liability to that institution of $6,000; at December 31, 1948, he had a liability of $25,000.

Exhibit 102, at December 12, 1948, Mr. Achilli stated he had a liability to the Union National Bank of $6,000.

In connection with the Red Lion at Elgin, Illinois,

Mr. Turpin testified that at December 31, 1945, Mr. Achilli owed to him $16,000. At December 31, 1946, he owed to him $10,000.

Again with the Red Lion Martin Seybold, on Exhibit 121 testified that Mr. Achilli owed to the bank on the Red Lion property at December 31, 1947, $21,977.78. At December 31, 1948, he owed $15,681.30.

1923 On Exhibit 102 at December 12th, 1948, Mr. Achilli stated he owed the bank $15,000 on this property.

75 South Grove Avenue. Mr. Jurs presented Exhibits 197, 198, 199 and 200. At December 31, 1948, Mr. Achilli owed $11,666.58 on that property.

1924 On Exhibit 171 at May 22, 1947, Mr. Achilli stated he owed $4,500 on this property.

Mr. Abelmann testified that Mr. Achilli owed to him as a trustee at December 31, 1947, $8,500 on that property.

As to 18 South Aldine Street, which appears on Exhibit 171, May 22, 1947, there is a liability against that property of $5,500 and on Exhibit 102 December 12, 1948, of $5,000, not listed in our net worth figures.

18 to 20 Douglas Avenue mortgage, testified to by Ransteat Lehmann, Exhibit 112, stated that Mr. Achilli owed on that property $49,500 at December 31, 1948.

The property at 819-821-823 Dundee Avenue, Abelmann on Exhibit 216, testified that Mr. Achilli's share of the liability on that property at December 31, 1945, was $3,500.

Lot 1, Kimball's Addition, Elgin, Illinois, testified to by Arthur Middleton, Exhibit 107, stated that at December 31, 1948, Mr. Achilli owed $5,800 on that property.

213 South Grove Avenue, which was a partnership investment, Martin Seybold presented Exhibits 164 1925 and 165 and testified that Mr. Achilli's share of the liability at December 31, 1946, was $2,637.22. At December 31, 1947, it was $2,133.52. At December 31, 1948, it was $1,483.46.

As to 209 Lake Street, another joint venture, Mr. Seybold presented Exhibits 166, 167 and 167-A, and stated that Mr. Achilli's share of the liability at December 31, 1946, was $1,829.17. At December 31, 1947, it was $1,292.54, and there was no balance at December 31, 1948.

On Exhibit 102 at January 12, 1948, Mr. Achilli stated he had a liability on this property of $10,000.

As to 202 Wellington Avenue, another joint venture, testified to by Mr. Seybold who presented Exhibits 161, 161-A and 162, he stated that Mr. Achilli's share of the liability at December 31, 1947, was $4,584.44. At December 31, 1948, it was $4,034.24.

On Exhibit 102 at December 12, 1948, Mr. Achilli stated that his liability on that property was $3,600.

Lindo Achilli testified that in 1947 he lent Mr. Achilli $3,000 and that that amount was outstanding at December 31, 1947 and December 31, 1948. He further
1926 stated he gave him an additional $2,000 during the year 1948, so that the total liability at December 31, 1948, was $5,000.

Henry Santurro testified that during 1947 he lent to Mr. Achilli $12,000, which was outstanding at December 31, 1947, and December 31, 1948.

Earl Gromer testified that in 1948 he lent Mr. Achilli $9,000, and that at December 31, 1948, that liability of $9,000 was still outstanding. It was outstanding at December 31, 1947, and outstanding at December 31, 1948.

In Exhibits 265 and 266, the ledger accounts of Mr. Gromer, disclosed that Mr. Achilli had due to him—or, due to the Gromer account, $5,426.87 at December 31, 1945.

Reserve for depreciation was taken from Exhibits 1, 2 and 3, from the income tax returns as filed by Mr. Achilli. In 1945 he claimed a depreciation reserve of $200. That was on the pool hall equipment.

In 1947 he claimed the Red Lion night club $4316.67 and the equipment of $2,379.44, a total of $6,696.11.

In 1948 on the Red Lion night club he claimed
1927 $8,633.33. On the Red Lion equipment he claimed $2,229.21 and then on additional building claimed $1,050.70. Those, totaled, amount to in 1945 $200; and in 1947, $6,696.11; and 1948, $11,913.24.

The reserve transferred from the prior year—

Mr. Batter: What did you read for 1948?

The Witness: $11,913.24. The reserve—

Mr. Batter: Maybe I have got a wrong statement here. I don't have that figure on here. Will you look at this, counsel?

Mr. Russo: Yes.

The Witness: I am coming to that, to the $17,000

figure. I am making a computation here, now, Mr. Batter.

Mr. Batter: Excuse me.

The Witness: I am only part way through.

Mr. Batter: Excuse me.

A. (Continuing) The reserve transferred from the prior year, $6,696.11, as to the year 1948. That portion was transferred from 1947. It made a total of $18,609.35. The night club equipment sold in 1948, the reserve that applied thereto, was $1,189.72. That, subtracted 1928 from the $18,609.35, totaled a reserve for depreciation at December 31, 1948, of $17,419.63.

The Red Lion equipment, one-half of which was sold during the year 1948, as disclosed in Exhibit 3, was $10,119.82. This in essence reduced the cost of the assets as shown on the assets section of this statement. Therefore, the total liability for the years indicated, for December 31, 1945, was $25,126.87.

For the year December 31, 1946, $23,466.39. For the year ending December 31, 1947, $75,184.39. For the year ending December 31, 1948, $166,700.03.

When those liability figures are subtracted from the corresponding asset figures they result in a net worth at December 31, 1945, of $33,815.56. December 31, 1946, $74,512.10. December 31, 1947, $152,681.98. December 31, 1948, $222,330.94.

Q. Will you read that figure again?

A. $222,333.94. The Exhibit 171 at May 22, 1947, disclosed a net worth as per Mr. Achilli's statement of $107,440.15, and Exhibit 102, dated January 12, 1948, stated he had a net worth on that date of $177,000.

The accumulated income per the filing record that 1929 was testified to here before is $35,954.93. The prior year's net worth will come from the net worth as stated in the prior year. At December 31, 1945, it was $33,815.56. That subtracted from the net worth at December 31, 1946, of $74,512.10 gives us an increase in the net worth in 1946 of $40,696.54.

The net worth at December 31, 1947, of $152,681.98 subtracting the net worth at December 31, 1946, of $74,512.10 leaves an increase in net worth at December 31, 1947, of $78,169.88.

Net worth at December 31, 1947, of $152,681.98 subtracted from the net worth at December 31, 1948, of

$222,333.94 leaves an increase in net worth from the year 1948 of $69,651.96.

The non-deductible portion of capital loss as added for the year 1947 is $400. The taxes paid in accordance with the Collector's records for the year 1948 is $1,744.32. For the year 1947, $2,500.00. For the year 1948, $5,600.00.

Lincoln National Life Insurance Comapny, testified to by Charles Carrel, Exhibit 233-B, stated that Mr. Achilli paid insurance premiums of $746.80 in the year 1946, $746.80 in 1947, and $746.80 in the year 1948.

1930 Continental Assurance Company, Joseph J. O'Rourke, Exhibit 192, Exhibit 193, and Exhibit 194, stated that Mr. Achilli paid insurance premiums during the year 1947 of $872.10, during the year 1948, $1,982.10.

Bankers Life Insurance Company, Vivian Roe, presented Exhibits 225, 226, 227, 228, 229, 230, 231, and 232, stated that Mr. Achilli paid insurance premiums during the year 1946 of $376.19, in the year 1947 of $376.19, and during the year 1948, $565.07.

Mr. Achilli's living expenses during the year 1946 are shown as $5,662.28, during the year 1947, $4,744.95, and during the year 1948, $4,594.99.

Total additional expenditures for the year 1946 were $8,529.79, for the year 1947, $9,640.04, and for the year 1948, $13,488.96.

Those figures added together is the increase in net worth, for the year 1946 totals $49,226.33, for the year 1947, $87,809.92, for the year 1948, $83,140.92.

From that we deducted non-taxable portion of capital gains for the tax returns, Exhibits 1 and 3, for the year 1946, $190.72, for the year 1948, $1,930.62, and the

1931 fire loss to the Red Lion, which was listed in Exhibit 1, 1946, $16,000, in 1947, $16,000, and in 1948 $16,000.

1932 This in effect reduces the assets as shown in the asset section. The total of those figures for the years indicated were $16,190.72 in the year 1946, $16,000 in the year 1947, and $17,930.62 in the year 1948.

Those figures as substracted from the prior accumulated increase in net worth for the year 1946 leaves a corrected net income of $33,035.61, for the year 1947, $17,809.92 and for the year 1948, $65,210.30.

The net income reported, as disclosed by Exhibits 1, 2 and 3, the income tax returns, disclosed that in 1946 Mr. Achilli reported $11,753.96, in 1947, $16,785.52 and in 1948, $34,503.12.

When subtracted one from the other, it leaves an additional income for the year 1946 of $21,281.65, for the year 1947, $55,024.40 and for the year 1948, $31,157.48.

Then we give him credit for an account payable to E. Gromer, omitted partnership income, which is one-half of the specific items that were testified to here, for the year 1946, $7,047.71, for the year 1947, $18,065.77 and for the year 1948, $10,534.00.

The net additional income as reflected in this net worth statement of the increase unaccounted for on 1933 the income tax returns for these years is as follows:

For the year 1946, $13,803.94, for the year 1947, $36,958.63 and for the year 1948, $22,623.18.

By Mr. Russo:

Q. Mr. Weber, I observe that in Government Exhibit 280 you have not given Mr. Achilli any credit for cash on hand as of December 31, 1945. Will you explain why you did not do so?

A. In various conversations we had with Mr. Achilli he indicated that he had no cash on hand.

Q. Directing your attention to November 6th, 1950, did you have any conversation with Mr. Achilli on or about that date?

A. I did.

Q. Where did that conversation take place?

A. At the offices of Highland Motor Sales.

Q. Who was present?

A. Mr. Achilli and myself.

Q. Please state that conversation.

A. At that time I inquired of Mr. Achilli as to whether or not he bought used cars in the open market. His answer to that was no, that he wholesaled his cars, that he had more cars traded in than what was necessary and he didn't have to buy them.

1934 He also stated that at that time—or he was asked at that time if he made any pay-outs to any one to acquire automobiles, to Chrysler Officials or otherwise, and at that time he said no, that he had never paid out any money.

Mr. Russo: Your witness.

Mr. Batter: If the Court please, these two Exhibits, Nos. 279 and 280 involve a great mass of material. They practically involve everything that has been testified to at the trial, and probably a lot that has not been—

Mr. Russo: I object to that latter statement, if your Honor please.

Mr. Batter: If the Court will indulge me, I think I can save the time of the Court and the jury by postponing this cross examination until tomorrow morning. The need of checking these documents and records is going to be tremendous. I can accomplish an awful lot this afternoon by going through them and be prepared in the morning to proceed with the cross examination.

I am sure it will save an awful lot of time if we
1935 can do that. However, if the Court feels differently I will begin my cross examination now.

Mr. Russo: If he is willing to defer the cross examination of this witness I have no objection, if your Honor please, provided we can continue with the final witness that the Government expects to put on in this case.

We have one other witness.

Mr. Batter: Yes. That will be all right.

Mr. Russo: All right.

(Witness withdrawn.)

WILLIAM M. RUGGABER, called as a witness herein on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Russo.

Q. Mr. Ruggaber, will you state your full name, please, and spell your last name for the Reporter.

A. William M. Ruggaber, R-u-g-g-a-b-e-r.

1936 Q. Where do you live, sir?

A. Deerfield, Illinois.

Q. What is your business or occupation?

A. I am a technical adviser, sir.

Q. By whom are you employed?

A. I am employed by the Regional Counsel of the Internal Revenue Service, Chicago, Illinois.

Q. Is that part of the Treasury Department?

A. That is part of the Treasury Department, yes, sir.

Q. How long have you been a technical adviser?

A. Since January, 1946.

Q. Will you tell the Court and jury, Mr. Ruggaber, what the duties of a technical adviser are?

A. I assist and advise the Regional Counsel and his associate attorneys on all tax and accounting matters in cases before them.

Q. What was your occupation prior to January, 1946?

A. I was an Internal Revenue Agent in the Internal Revenue Service.

Q. How long were you so employed?

A. I was an Internal Revenue Agent from January—no—from July 1st, 1936, until January, 1946.

Q. Tell the Court and jury, please, Mr. Ruggaber, what the duties of an Internal Revenue Agent are.

1937 A. To audit and examine income tax returns and books and records of taxpayers.

Q. Prior to your employment as a Revenue Agent, what was your occupation?

A. I was a Deputy Collector, Internal Revenue Service.

Q. How long were you a Deputy Collector?

A. From September 8th, 1923, until July 1st, 1935.

Q. Now, sir, have you had any specialized training in accounting?

A. I took a special commerce course in the University of Wisconsin in 1919 to 1921. I had two and a half years.

Q. Were you graduated from that course?

A. Yes, sir.

Q. Have you had any other specialized training?

A. I have taken the various courses given by the Internal Revenue Service, correspondence study courses, income tax, accounting, and evidence and procedure.

Q. How many such courses have you had?

A. Well, I have finished one or more for—

Q. Over what period of time?

A. Over about a fifteen year period.

Q. Mr. Ruggaber, do you know the method of computing taxes on net taxable income?

A. Yes, sir.

1938 Q. Have you testified in Court before in connection with the computation of taxes on net taxable income?

A. I have, sir.

Q. How many times?

A. I don't know the exact number, but I would say in excess of 50.

Q. Mr. Ruggaber, I hand you Government Exhibits 1, 2 and 3, Government Exhibits 1 and 2 being the separate

income tax returns of Sam Achilli for the calendar year, 1946 and 1947, Exhibit 3 being a joint income tax return of Sam Achilli and Ruth Achilli for the calendar year 1948, and I ask you if you have ever seen those before.

A. Yes, sir, I have.

Q. Now, Mr. Ruggaber, assuming that a taxpayer who is a resident of the State of Illinois and who during the calendar year 1946 was a married man who filed a separate return on the cash basis claiming an exemption for his son in addition to himself, and who had a net income of $25,557.90 which included net long term capital gains of $190.72, can you determine his correct income tax liability for the calendar year 1946?

A. I can.

Q. Have you made such computation?

1939 A. I have.

Q. What would such a taxpayer's correct income tax liability for the calendar year 1946 be?

A. The correct tax would be $9,383.17.

Q. Now, sir, assuming further that such a taxpayer reported on his separate income tax return for the calendar year 1946 a net income of $11,753.96 upon which he disclosed an income tax liability of $2,780.17, would such a taxpayer owe any additional tax to the United States Government?

A. He would.

Q. How much?

A. He would owe $6,603.00 additional income tax.

Q. Now, Mr. Ruggaber, assuming that a taxpayer who is a resident of the State of Illinois and who during the calendar year 1947 was a married man who filed a separate return on the cash basis claiming two exemptions for his sons in addition to himself, and who had a net income of $53,744.15, can you determine his correct income tax liability for the calendar year 1947?

A. I can.

Q. Have you made such computation?

A. I have.

1940 Q. What would such a taxpayer's correct income tax liability for the calendar year 1947 be?

A. $27,077.95.

Q. Assume, Mr. Ruggaber, that such a taxpayer reported on his separate income tax return for the calendar

year 1947 a net income of $16,785.52 upon which he disclosed an income tax liability of $4,620.98, would such a taxpayer owe any additional tax to the United States Government?

A. He would.

Q. How much?

A. He would owe a balance of $22,456.97.

Q. Now, Mr. Ruggaber, assume that a taxpayer who is a resident of the State of Illinois and who during the calendar year 1948 was a married man who had filed a joint return with his wife on the cash basis claiming two exemptions for his sons in addition to his own and that of his wife, had a net income of $54,676.30 which included net long term capital gains of $1,930.26, can you determine his correct income tax liability for the calendar year 1948?

A. I can.

Q. Have you made such computation?

A. I have.

1941 Q. What would such a taxpayer's correct income tax liability for the calendar year 1948 be?

A. $18,968.79.

Q. Now, assuming further, Mr. Ruggaber, that such a taxpayer reported on his joint income tax return for the calendar year 1948 a net income of $34,053.12 upon which he disclosed an income tax liability of $8,968.52, would such a taxpayer owe any tax to the United States Government?

A. He would.

Q. How much?

A. $10,000.27.

Mr. Russo: Your witness.

Cross Examination by Mr. Batter.

Q. Mr. Ruggaber, these figures you have been testifying to are based entirely upon the assumptions made by counsel in the questions put to you, is that true?

A. Yes, sir.

Q. If those assumptions proved to be incorrect, then your results would be incorrect?

A. That is correct, sir.

Mr. Batter: That is all.

Mr. Russo: Thank you, Mr. Ruggaber.

1942-1943 * * *

1944 Mr. Russo: May it please the Court, on yesterday after the conclusion of yesterday's session the Defendant, Sam Achilli, served a subpoena duces tecum on Special Agent Ralph A. Weber for the production of a document particularly described in the subpoena duces tecum. At this time we respectively request leave of Court to file a motion to quash that subpoena duces tecum and we ask for immediate argument.

Mr. Batter: Your Honor, I subpoenaed this Manual of Instructions from the Witness Weber because that is the Manual that governs his conduct.

Regarding what counsel says here, it may be confidential in so far as it is not available for general public release, but it is not confidential in so far as the powers of this Court are concerned to ascertain the duties of the Government representative who made the investigation in this case, and there is just nothing confidential about it in so far as the security regulations are
1945 concerned and there is nothing confidential about it, certainly, as far as the powers of this Court to require its presence are concerned.

Mr. Russo: May it please the Court, the Court, of course, takes judicial knowledge of all the pleas, pleadings and motions that have heretofore been submitted and argued in this court. Your Honor will recall that the Defendant's prior counsel, Joseph D. Struett, who at that time was representing the Defendant, served a subpoena duces tecum on the Attorney General Herbert Brownell, Jr., on T. Coleman Andrews, the Commissioner of Internal Revenue, and on Ernest C. Wright, the Regional Commissioner of the Internal Revenue Service here in Chicago.

The Government argued at that time, I am informed, that under Title 5, Section 22, the heads of Departments were authorized by law to promulgate certain regulations.

Pursuant to that Statute the Commissioner of In-
1946 ternal Revenue promulgated Rule 13, Article 80, or Regulation 12 in which the Secretary of the Treasury authorized the Commissioner of Internal Revenue to issue certain regulations in connection with documents, files and so forth in the possession and custody of the Commissioner of Internal Revenue.

The Commissioner then issued Article 80 in which he retains the possession and control of all the documents to which that regulation applies.

The document called for here is a particularized document that was generally called for in the subpoena that was issued against Mr. Wright. The Court heard long and extensive arguments, I believe, on those motions and at the conclusion of those arguments the Court quashed the subpoena duces tecum.

The situation here is precisely the same as it was at that time. They are asking for a document that there is
no authority in the law for the Government to pro-
1947 duce and they are asking for a document that is
not evidentiary in nature and has no bearing on the issues on trial here, and they are asking for a document from a Respondent who does not have the possession and control of that document.

However, not in response to the subpoena duces tecum, which we are here firmly resisting, but so that the Court may be fully advised in the premises, we will submit to the Court for its examination the document called for so that the Court may determine whether or not it is evidentiary in character and whether or not it has any bearing on the issues, and also to refute Defense Counsel's statement, which has no basis in fact at all, that the Respondent Weber was not authorized to conduct the investigation; and I respectfully refer your Honor particularly to page 152, the second sentence of Section 192.

1948 The Court: Is that all?

Mr. Russo: And I may say at this time, if your Honor please, that at the time that the subpoena was served on Mr. Weber, he was tendered as a witness fee $10.00.

The witness is proscribed by law from accepting the tender of that ten-dollar fee, and I would like to have the record show that in the presence of the Court, Government counsel is tendering to chief counsel the ten dollars that was tendered to Mr. Weber.

Mr. Batter: The ten dollars is accepted without in any way invalidating the process of the subpoena.

Now, if your Honor please, it has never been our contention that the Special Agent Weber had no authority to conduct an investigation.

Our purpose in that document, as was set forth in the Wallrich case, was to demonstrate the authority and powers of that agent, and to demonstrate that when such agent, under the circumstances that Weber did here visit the taxpayer, that he visited there for an express
1949 purpose of procuring evidence to be used to determine a criminal prosecution;

That under those circumstances, in the absence of a disclosure to the taxpayer of his purpose, that any consent given is in fact no consent, and that under the circumstances any and all information that he procured or any leads that he elicited from those sources is an invasion of the taxpayer's constitutional rights, of the sacredness of his papers and documents.

We are not challenging at all the facts that Weber is a Revenue Agent. We are not challenging the fact that he is a Special Agent.

What we are doing from that Manual of Instructions, which is his bible, is demonstrating to the Court that Weber, upon his visit to the defendant here, was acting within his authority and his powers, which was to corral evidence for the purposes of determining a criminal prosecution.

However, the failure to disclose that fact to the taxpayer under those conditions involves a violation
1950 of the taxpayer's rights. The purpose of this subpoena is to bring that document before your Honor, so that your Honor may judge of the conduct of Revenue Agent Weber, and what his purpose and authority was when he launched himself upon the taxpayer.

Now let me say this: I don't know what page it was that counsel referred to in that book, but quoting from the Walrich case they cite there, paragraph 675, which prescribes the procedure to be followed, that procedure involves the calling-in of a Special Agent only after there is a suspicion of fraud.

Now this case did not develop that way. This case did not develop by Revenue Agent Auld calling upon the taxpayer or the defendant, and then upon certain discoveries referring the case to the Special Agent, and having Weber assigned to it.

Weber and Auld in the very first instance called upon the taxpayer, and in calling upon the taxpayer, Weber's only purpose within his authority, as set forth in that

document, was to procure information and evidence
1951 to lead to a prosecution.

Now then there are cases where the Courts have very firmly said that the evidence of any Government agent, Internal Revenue or otherwise, the procuring of data, evidence, that he could not procure in a court of law is to be frowned upon and not admitted.

The very thought of surreptitiously coming to a taxpayer, deceitfully procuring access to his records, and then to produce those records or excerpts from them is repugnant to the Constitution, just as much so as without any warning or any previous knowledge they attempted to require the defendant to take the witness stand in his own case, and the courts will not tolerate it.

Our purpose in bringing that document before your Honor is to demonstrate that position and to support our motion.

Mr. Russo: If your Honor please, the point raised by counsel has been agitated and reagitated before your Honor several times, and your Honor has heard the testimony in this case and has listened to the respondent
1952 Weber on that stand.

I respectfully submit that there is not one scintilla of evidence indicating that he perpetrated any fraud or misrepresented any thing or perpetrated any deceit upon the taxpayer.

Mr. Weber had a perfect right to go in there and make that examination, and he wasn't required—we have argued the cases of Nicola *v.* United States and Hanson *v.* United States, and under the law he is not required to warn him of anything. He is in there to make investigation.

When he approached Mr. Achilli he handed him his credentials, said, "My name is Ralph Weber, Special Agent of the Internal Revenue Service. This is Mr. Auld, Revenue Agent. We want to see your books."

Achilli said, "Come on in. You can have them." And he made them available.

There is nothing that indicates that any sharp practices were indulged in by Mr. Weber and by Mr. Auld, and everything indicates that those records were willingly made available to Mr. Weber by Mr. Achilli.

1953 Mr. Batter: Your Honor, I think counsel's very statement just now before this Court clearly sets

forth the position that Mr. Weber did not come in there innocently, but, as he testified yesterday, for the purpose of ascertaining fraud.

Mr. Russo: He went in there for the purpose of making a fraud investigation, and he has that right.

Mr. Batter: But he made no disclosure to the taxpayer for the protection of his constitutional rights, and the mere fact that he handed his identification and said, "I am a Special Agent," that is not knowledge to the public that a Special Agent is there for a particular purpose.

The Court: All right, gentlemen. The Government's motion to quash the subpoena duces tecum will be granted.

Mr. Russo: Thank you, your Honor.

The Court: I understand you want a conference in chambers.

Mr. Batter: This will do just as well, your Honor.

The Court: All right.

224a And afterwards on, to wit, the 4th day of May, 1955 came the United States of America by its attorneys and filed in the Clerk's office of said Court its certain Motion to Quash Subpoena Duces Tecum Served On Special Agent Ralph A. Weber in words and figures following, to wit:

IN THE UNITED STATES DISTRICT COURT

225a

• • (Caption—No. 53 CR 154) • •

GOVERNMENT'S MOTION TO QUASH SUBPOENA DUCES TECUM SERVED ON SPECIAL AGENT RALPH A. WEBER

Comes Now The United States of America by its counsel, Vincent P. Russo, Special Assistant to the Attorney General, and respectfully moves that the court quash the subpoena duces tecum heretofore issued to and served upon Ralph A. Weber, Special Agent, Bureau of Internal Revenue, requiring him to produce "a certain Bureau of Internal Revenue, Official Manual of Instructions," on the following grounds:

1. The subpoena duces tecum calls for the production of a confidential document of the Internal Revenue Service, the production of which is contrary to public policy, statutory mandate and Treasury Regulations.

2. The document called for in the subpoena duces tecum is not evidentiary of and does relate to the innocence or guilt of the defendant.

3. The subpoena duces tecum calls for the production by respondent of a confidential document not within his possession and control.

/s/ Vincent P. Russo,
Vincent P. Russo,
Special Assistant to the
Attorney General.

226a And on the same day to wit, on the 4th of day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge appears the following entry, to wit:

227a

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 53 CR 154) * * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and being fully advised it is

Ordered that the Government's motion to quash subpoena duces tecum served upon Ralph A. Weber be and the same is hereby granted comes now the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause and the trial proceeds and during the further hearing of evidence on behalf of the Government the hour of adjournment having arrived it is

Further Ordered that the Jury and Alternate Jurors be permitted to separate and that this cause be and the same is hereby adjourned until May 5, 1955 at 9 A. M.

1954 Mr. Batter: Your Honor, what I wanted to bring before the Court was that Exhibits 279 and 280, which were introduced through the Revenue Agent Weber, to my mind are most important, and summarize practically the entire case for the prosecution.

I have heretofore made motions which are in the form of a continuing motion, whereby I was reserving my ob-

jections to these documents. However, I am now faced with this situation:

1955 These documents, in the language of the Supreme Court in the Holland case, are of this character:

"The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations.

"Their figures have a way of acquiring an existence of their own independent of the evidence which gave rise to them."

That is a very classic statement by the Supreme Court of what these Exhibits accomplish.

Now, I am compelled, in justice to the Defendant, to make an extensive cross examination on these two Exhibits and what I want the record to show, your Honor, is that by that examination I am not waiving my objections to their propriety.

Mr. Russo: As Mr. Batter himself has so cogently pointed out, they are admissible and the Court admits them and tells the jury under guarding instructions

1956 what the purpose of those two Exhibits are, that they are a resumé and that they may accept or reject the Agent's testimony concerning them.

It is not an invasion of the jury's province. It is an attempt to aid and assist the jury in understanding what the evidence is, and for that purpose I respectfully submit that all the cases hold that they may go to the jury under a guarding instruction from the Court.

Mr. Batter: Your Honor, I am not arguing that at all. All I am pointing out is that I am not waiving my objections by cross examining with respect to them.

The Court: All right.

Mr. Russo: All right.

The Court: We will take a short recess at this time, gentlemen, and then resume.

(Whereupon a short recess was taken, after which the following further proceedings were had in open Court, in the presence and hearing of the jury, to-wit):

The Clerk: The case on trial.

1957 RALPH A. WEBER, called as a witness on behalf of the Government herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Batter.

Q. Mr. Weber, are you the same Mr. Weber who was on the stand when Court adjourned yesterday?

A. No, sir.

The Court: As I understand it, the Government has rested subject to the cross examination of the present witness.

Mr. Russo: Yes, your Honor.

The Court: Is that it?

Mr. Russo: Yes.

The Court: You may proceed, Mr. Batter.

The Witness: I was on before the last witness, Mr. Batter.

Mr. Batter: Excuse me; before the last witness.

Now, your Honor, may I ask the Government to again distribute to the jury copies of Exhibit 279 so that they may follow the examination?

1958 The Court: All right.

Mr. Russo: 279?

Mr. Batter: Yes.

Mr. Russo: Is that the only one?

Mr. Batter: For the time being.

(Copies of Government Exhibit 279 were distributed to the jury.)

By Mr. Batter:

Q. Now, Mr. Weber, directing your attention to the sixth heading on Exhibit No. 279 reading from left to right, entitled, "To Whom Paid", let me ask you what if any distinction there is on that Exhibit when you show, as you do under the first item, "Achilli-Cons." or when you show about two inches down further on the page, "Achilli or Cons."?

1959 A. As I recall, Mr. Batter, the record indicated they dealt with Mr. Achilli and Mr. Cons, or Mr. Achilli or Mr. Cons.

Q. Is this correct, then, that where you have "Achilli-Cons," it is your construction that the record shows they dealt with both?

A. Yes.

Q. And then where it reads, "Achilli or Cons," it is your construction that they dealt with either one or the other?

A. Yes, sir.

Q. I see.

Now directing your attention to the heading on the extreme right of the exhibit, "Income Unrecorded and Unreported on the Books of Highland Motor Sales."

A. Yes.

Q. Where in the record do you find any of the material that appears under that title?

A. I believe, as I testified, that is the difference between the amount that was testified to and the amount that was shown on the Highland Motor Sales records and became a part of the record as I testified to it.

Q. Now then, when the title reads, "Income Unrecorded or Unreported," is that a conclusion of your own?

1960 A. Yes, sir.

Q. Directing your attention to the first item, "Harold Hubbe," in the column, "To Whom Paid" you have, "Achilli-Cons."

In the column 1948, you have the figure paid per testimony, $2050. Amount received per H.M.S.—does that mean Highland Motor Sales?

A. Yes.

Q $1524.18. Then at the extreme right under 1948 you have the figure $525.82.

A. Yes, sir.

Q. Now directing your attention to the testimony, to page 191 of the transcript—

Mr. Russo: Just a moment, Mr. Batter, while I follow you with that. What volume is that?

Mr. Batter: That would be the first day—April 12.

Mr. Russo: Oh, yes.

By Mr. Batter:

Q. Does that transcript show that the balance of $1850 was delivered to Cirrincione at his home in cash?

A. It does, but later testimony may indicate that Mr. Achilli was associated in the deal.

Mr. Batter: Your Honor, I ask that the last part

1961 of that answer be stricken as not responsive.

The Court: It may be stricken.

By Mr. Batter:

Q. Did you, Mr. Weber, make any investigation to ascertain whether or not this sum of $1850 which the witness Hubbe said he delivered in cash to Mr. Constantine Cirrincione's home was ever turned over to the Highland Motor Sales Company?

A. I did.

Q. And what was his response?

A. Are you speaking—

Mr. Russo: If your Honor please, that is not the question. He asked if he made a determination and then he said, what is his response.

I don't know what he is talking about.

By Mr. Batter:

Q. What did you find out when you made that investigation?

A. Mr. Cirrincione refused to make any statement whatsoever.

Q. Now then, despite the fact that $1850 was delivered to Mr. Cons at his home, and that he refused to make
1962 any statement with reference to it, on what theory did you charge as income unrecorded and unreported the sum of $525.82?

A. I believe the record indicates that Mr. Achilli had knowledge of the transaction.

Q. Will you find for me in the record where there is something on which you base that statement?

I give you Mr. Hubbe's testimony beginning at page 186 of the transcript.

A. On page 188:

"With whom did you have any transaction?

"A. Well, I bought a car there and dealt with Sam and Cons."

Q. And based on that statement—

A. Well, let me finish.

On page 189:

"Q. From whom did you deal in connection with the purchase of that car?

"A. Sam Achilli and Cons."

Then further:

"Q. With whom did you discuss price?

"A. Both Sam and Cons."

Again on page 189:

"Q. With whom did you discuss price?

1963 "A. Both Sam and Cons."

Then on page 190:

"Q. What was the price which you paid for the 1948 Plymouth club coupe?

"A. $2050.

"Q. How was that payment made?

"A. Well, on the day that I made the deal I gave them a check for $200 and—

"Q. You say 'they.' To whom did you give the check?

"A. Well, Sam and Cons. They were both there, and I just laid the check on the table. Who picked it up, I don't know."

It is upon that that I base the charge.

Q. Now then, Mr. Weber, on that very same Hubbe item, you were able to trace the $1850 through the testimony into the hands of Cons.

Have you been able to trace it beyond that point?

A. No, sir.

Q. You have not been able to trace $525.82 of that sum into the hands of Mr. Achilli or the Highland Motor Sales, is that correct?

A. That is true.

1964 May I make a further statement, though? On that last answer where I said no—

Mr. Batter: I think that would be proper on redirect.

Mr. Russo: He can explain his answer, if your Honor please.

The Court: He may proceed.

By the Witness:

A. Where I said no, I wasn't able to trace the $1850, I was in error. A portion of that was traced to the books of Highland Motor Sales.

By Mr. Batter:

Q. That is, all but $525.82, is that right?

A. That is true, yes, sir.

Q. So that $525.82 of it you have been unable to trace beyond the hands of Mr. Cons, is that correct?

A. That is true.

1965 Q. Now, referring back to the column "To Whom Paid", you have there, "Achilli-Cons." Isn't that a little bit misleading in the light of the fact the testimony

shows Mr. Cons got $1,850 and Cons, or Achilli got $200.00?

A. I am afraid I was not able to put the complete record into this schedule, Mr. Batter, and therefore Mr. Achilli received some and Mr. Cons received some and that is what is indicated here.

Q. Will you now expand upon that explanation to have the record show correctly what you did find?

A. I think we have just read the record.

Q. You stand on that?

A. Yes.

Q. Now, referring to the next item, Austin A. Michell, you show there that he paid the money to Mr. Cons and that according to his testimony he paid $2,200; that the books of Highland Motors show $1,524.18, and in the 1948 column on the extreme right you have charged as unrecorded income of Highland Motor Sales, $675.82, is that correct?

A. Yes, sir.

Q. Now, then, first with respect to the figures appearing on the books of Highland Motor Sales of 1966 $1,524.18, let me direct your attention to the item directly above that which is exactly the same amount, and then direct your attention to the fact that according to the testimony of Mr. Mitchell his car did have accessories on it that differed from the accessories on the Hubbe car.

How do you account for the same amount with different types of accessories?

A. I can only testify as to what I observed on the books and records of Highland Motor Sales.

Q. Does that figure of $1,524.18 include any and all accessories that may have been included in the sale?

A. That includes the total sales price as recorded on the books of Highland Motor Sales.

Q. Now, according to the transcript, page 209, of Mr. Mitchell's testimony, how was that $2,200 paid?

A. It was paid in cash.

Q. And was it paid to Cons?

A. (Reading):

"To whom did you deliver the cash?

"A. Cons Cirrincione, Mr. Cirrincione."

Q. Now, Mr. Weber, did you investigate and ascertain in fact that Mr Cons did receive $2,200?

A Will you repeat the question?

1967 Mr. Batter: Read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. Mr. Mitchell testified that he paid Mr. Cons the $2,200. Mr. Cons refused to make any statements. If you accept the word of Mr. Mitchell as having paid it, the investigation that Mr. Cons received the money did disclose that he did.

Q. If you accept the word of Mr. Mitchell that he paid it and Mr. Cons what?

A. Refused to make any statement.

Q. Now, based on the testimony of Mr. Mitchell you have not been able to trace that $2,200, or at least $675.82 of it any further than Mr. Cons, have you?

A. Well, that money of $675.82 as such was not traced to Mr. Achilli, but the net worth as we have presented it disclosed it to be in the hands of Mr. Achilli and upon that I base my theory that Mr. Achilli received it.

Mr. Batter: I ask that the last part of the answer be stricken as not responsive to the question, if the Court please, and that the jury be instructed to disregard it.

Mr. Russo: He asked how he determined it, if your Honor please. The answer is responsive.

1968 The Court: It may stand. Proceed.

By Mr. Batter:

Q. Let me ask you again: Have you been able to trace this $675.82 out of the $2,200 beyond Mr. Cons?

A. Well, as I just stated, Mr. Batter—

Mr. Russo: Just a minute, Mr. Weber. The question has been asked and answered, if your Honor please.

Mr. Batter: I think it requires a yes or no answer, your Honor.

The Court: He may answer.

A. In my opinion, yes.

By Mr. Batter:

Q. In your opinion?

A. Yes, sir.

Q. But in fact have you been able to trace it beyond Mr. Cons?

A. In my opinion we have, yes.

Q. I am not asking for your opinion. I am asking you in fact, have you been able to trace that money beyond Mr. Cons?

A. As a portion of the net worth, we have.

Mr. Batter: Your Honor, I ask that the witness 1969 be instructed to answer the question.

Mr. Russo: He has answered the question. I don't know what else he can answer.

The Court: It may stand. Proceed.

By Mr. Batter:

Q. Where in the net worth do you find this money, the $675.82, spent?

A. It is included in the assets acquired during the year 1948—

Q. Which particular asset?

A. (Continuing)—and included in the total figure of $69,651.96.

Q. Now, that is not a fact, but your conclusion, isn't that correct?

A. Yes, sir.

Q. Now, according to that and carrying your conclusion further, in which of those assets do you find that $675.82?

A. That cannot be specifically allocated.

Q. Now, referring to the next item, Leonard E. Studt, there again under the column "To Whom Paid" you show the name of Cons, in the 1947 column you show the amount paid per testimony, $1,050, the amount received by Highland Motor Sales, $510 and in the series of columns 1970 on the extreme right you show under the column 1947, $540, is that correct?

A. Yes, sir.

Q. Now, then, directing your attention to page 215 of the transcript, the lower half of the page, the testimony of Mr. Studt, what response do you find in answer to the question, "How was payment made for the car by you?"

A. (Reading):

"I gave him a check or cash when I took the car in the amount of $550, and then I gave him a check a week later for $509 which covered the car and the license fee."

Q. And the next question and answer is—?

A. (Reading):

"To whom was the check made payable?

"A. Highland Motors."

Q. Now, Mr. Studt in his testimony that you just read

said that a week later he gave a check to Cons for $509 payable to the Highland Motor Sales.

Directing your attention to the right-hand column of the two columns under the year 1947, you have there the figure of $510 as appearing on the Highland Motor
1971 Sales Company's books.

How do you reconcile that figure with the check for $509?

A. That was the amount that was recorded in the books and records of Highland Motor Sales.

Q. How was that recorded?

A. It was recorded—

Q. I mean, was there a check for $509 and $1.00 in cash, or was it all in cash or how was it recorded?

A. I cannot state at this time.

Q. You cannot state?

A. No, sir.

Q. Did Mr. Cons enlighten you any with respect to that $540.00 difference?

A. No, sir.

Q. Did you check the books of Highland Motor Sales a week later to ascertain whether there was recorded there a check from Mr. Studt in the amount of $509?

A. (No answer.)

Q. Do you want to look at his testimony again?

(Mr. Batter handed a transcript to the witness.)

A. I don't think I quite understand the question. Can I explain it as I understand it?

1972 Q. Well, let me put the question to you.

A. All right.

Q. I will change the question.

A. All right.

1973 Q. The testimony of Mr. Studt, as recorded on page 215 of the transcript, in response to a question by Government counsel, reads:

"I gave him a check or cash when I took the car in the amount of $550, and then I gave him a check a week later for $509, which covered the car and the license fee."

My question is, did you check the books of Highland Motor Sales a week apart to ascertain whether or not those two payments are recorded?

A. I checked all the books of Highland Motor Sales

for the years 1946, '47 and '48, and determined that the only money recorded on this transaction was $510.

Q. Did you look at the books a week after this event that Mr. Studt refers to and find or not find on the books of Highland Motors the second check?

A. The record on Highland Motor Sales, I believe, was May 3, 1947, and on that date the $510 was recorded.

Q. Now which is that, the first or second check?

A. I can't tell.

Q. Did you look on Highland Motors' books a week before then and a week later to ascertain if there was a second check in connection with this transaction?

A. I looked at the books for the year beginning
1974 January 1, 1947, to December 31, 1947, which included every week of that year.

Q. Did you specifically look for these two checks a week apart on the books of Highland Motor Sales?

A. I can't say that I looked for them specifically. I checked out all of the transactions that occurred.

Q. But you made no specific check a week before or a week after the one check that you claim is recorded, did you?

A. Yes—

Mr. Russo: He has answered that question, if your Honor please.

The Witness: I checked the whole year.

By Mr. Batter:

Q. Did you make a specific check a week before and a week later?

Mr. Russo: I object. He has answered that question several times.

Mr. Batter: I am entitled to an answer.

The Court: The objection is sustained.

By Mr. Batter:

Q. Now directing your attention to the next item, Grace Studt, for the year 1946, you show the amount paid
per her testimony of $1977.05, and the amount re-
1975 ceived per Highland Motor Sales books of $1477.05.

Then under the year 1946, in the far right-hand series of columns, you show the figure $500.

Now directing your attention to Government Exhibit No. 29, let me ask you whether that transaction is recorded on the books of the Highland Motor Sales in accordance with that sales slip.

A. Yes, it is.

Q. I hand you the transcript of the testimony of Grace Studt, beginning at page 408, and ask you to find out for me if you can when Grace Studt paid the $500 that you show she paid in excess of the amount shown on Government Exhibit 29.

A. (Witness examines transcript.)

Q. The question was, when she paid it.

The Court: We will take a short recess, ladies and gentlemen of the jury.

Mr. Batter: Your Honor, may the witness be instructed not to discuss the case during the recess?

The Court: Yes, he is so instructed.

(Recess taken.)

1976 (Whereupon the following further proceedings were had in open Court in the presence and hearing of the jury, to-wit:)

A. The answer to your question, Mr. Batter, reading from the record on page 430, your cross examination of Mrs. Studt:

"Q. You didn't get this car on November 23rd, 1946?

"A. We got the car on November—on that date.

"Q. Yes.

"A. And then we had to give him extra to buy the car."

By Mr. Batter:

Q. I asked you the date on which she made the payment. Do you find anything in the record disclosing the date?

A. No, sir. It is only in reference to the prior—the other dates mentioned.

Q. Now, the next item regarding Grace Studt, Exhibit 30, you show for the year 1946 the amount paid per testimony, $2,054.07, the amount shown on Highland Motor Sales' books, $1,554.07, and on the extreme right in
1977 the 1946 column you show $500 of unrecorded income.

I now hand you Government Exhibit 30, which is the sales slip of Highland Motor Sales, and ask you whether that is the amount that is recorded on the books of Highland Motor Sales?

A. The $1,554.07 is recorded, yes.

Q. Have you found anywhere in the evidence, in the testimony, when the $500 was paid that Mrs. Studt claims she paid in excess of the amount shown on the Exhibit?

A. I do not find the testimony discloses the specific date. It is only in reference to the date on which the automobile was purchased.

Q. Now, then, the next item respecting Grace Studt is Exhibit 31 and Exhibit 32-A. You show on Exhibit 279 the amount paid per her testimony, $2,007.20, the amount received by Highland Motor Sales, $1,507.20, and under the year 1947 at the extreme right series of columns, you show $500.

Now, I hand you Government Exhibits 31 and 32-A and ask you whether that is the transaction and whether it is recorded on the books in accordance with those Exhibits?

A. It is.

1978 Q. Now, Mr. Weber, directing your attention to the next item of Grace Studt, which is Exhibit 32, and with respect to which in the 1947 series of columns you show as the amount paid per her testimony, $2,030, the amount received by Highland Motor Sales, $1,500, and on the extreme right series of columns under the year 1947, you show the sum of $530; I hand you Government Exhibit 32, which is the sales slip of Highland Motor Sales and ask you whether the records of Highland Motor Sales' books conform to that sales slip?

A. They do not.

Q. In what respect do they not?

A. They don't show the tax. They record a sale of $1,500. This sales slip indicates the sale price as being $1,530, the down payment, $530, and a balance to finance of $1,000. The books of Highland Motor Sales disclose a sale of $1,500.

Q. So that the books of Highland Motor Sales vary from this Exhibit by $30—

A. Yes, sir.

Q. (Continuing)—and not the $530 that you show in the end series of columns—

A. No.

Q. —is that correct?

1979 A. No, no. They vary by $530.

Q. Then this Exhibit varies from the books by $530?

A. This Exhibit varies $30.

Q. That is all I asked you.

A. All right.

Mr. Russo: When you say "this Exhibit", what Exhibit do you have reference to?

Mr. Batter: Exhibit 32.

Mr. Russo: All right.

By Mr. Batter:

Q. Now, for the next item of Grace Studt there is no Exhibit number, but you show under the year 1936—

A. 1946?

Q. (Continuing)—1946, the amount received by Highland Motor Sales of $1,337.33.

You show nothing in the amount paid per testimony column, and in the extreme end columns you show $500 as withheld income.

Will you explain that, Mr. Weber?

A. I believe in Mrs. Studt's testimony she testified that she paid $500 over the invoice price on that automobile. She gave no evidence of what the invoice price was.

I have shown what the invoice or the recorded 1980 sales price was on the books of Highland Motor Sales.

Q. But she did not say in her testimony what the amount she paid was, did she?

A. She only stated that she paid $500 in excess of the invoice price.

Q. Now, Mr. Weber, directing your attention to the column, "To Whom Paid", with respect to each of these five purchases you show that name "Achilli", do you not?

A. Yes, sir.

Q. Now, let me direct your attention to page 417 of the transcript, and 418 where it reads:

"Q. And to whom did you pay that money?

"A. Well, I can't recall.

"Q. With whom did you deal?

"A. With Mr. Achilli, or the other fellow that was in the office.

"Q. But you did make the payment at the office, is that correct?

"A. Yes."

In view of the fact that she did not deal exclusively with Mr. Achilli, why do you show on your Exhibit there

that she paid the money to Mr. Achilli?

1981 A. I believe that in all of the transactions specifically testified to she stated that she had the transaction with Mr. Achilli.

1982 Q. But your column heading reads, "To Whom Paid," does it not.

A. It does.

Q. And she states here that she paid it either to Mr. Achilli or the other fellow that was in the office, is that correct?

A. That is true.

Q. But that is not in accordance with your schedule, is it?

A. The other testimony indicated to me that she was dealing specifically with Mr. Achilli on each occasion.

Q. Will you find that testimony for me?

A. (Witness examines transcript.) "November 23, 1946, did you have occasion to have a business transaction with Sam Achilli on that date?"

The answer is: "Yes, sir."

That is at page 411.

Further testimony on page 412, she received Exhibit 29 from Mr. Achilli.

Q. We are speaking of the payment of money, which is your column heading.

A. Well, the record indicated to me that she was dealing with Mr. Achilli.

Q. Now then, I have shown you one instance

1983 where she has testified that she dealt with others. That is on page 418.

Let me refer you now to page 432 where the following appears:

"Q. Did you make the payment to Mr. Achilli direct?

"A. I can't recall whether on each one we made the payment direct to Mr. Achilli or to the other fellow."

Is that correct?

Then appears:

"Q. What other fellow?

"A. Cons."

A. That is true.

Q. So that the record does not necessarily lend itself

to the construction that you have placed under that column, "To Whom Paid," does it?

A. By taking extracts specifically from the record, you may be right, Mr. Batter, but by taking the specific transaction, I believe it indicates Mr. Achilli also as being the sole dealings.

Q. Your exhibit shows Mr. Achilli alone?

A. Yes, sir.

Q. Now the testimony of Mrs. Studt is to the
1984 contrary, is it not?

A. In part.

Q. What do you mean by in part?

A. As she referred to each specific transaction, she referred to Mr. Achilli.

Q. That was with reference to buying the car, was it not?

A. And paying the money at that time.

Q. Show me where in each particular instance she refers to paying this extra money to Mr. Achilli.

A. (Witness examines transcript.) On page 430:

"And then we had to give him extra to buy the car. We told him we would pay the extra, and we did.

"Q. But you cannot recall how you paid that?

"A. In cash."

And I believe at that time she was referring to Mr. Achilli.

Q. You believe she was. The record doesn't say so, does it?

Mr. Russo: In the interest of time, if the witness would look at page 432, that will help him.

1985 By the Witness:

A.

"Then we made the additional payments.

"Q. You made whom an additional payment?

"A. Mr. Achilli."

By Mr. Batter:

Q. Will you keep on reading?

A.

"Q. Did you make the payment to Mr. Achilli direct?

"A. I can't recall whether on each one we made the payment directly to Mr. Achilli or not."

Q. Keep on.

A.

"or the other fellow.

"Q. What other fellow?
"A. Cons.
"Q. Constantine?
"A. Yes."

Q. So there is nothing in the record to show, as your exhibit does, that the payments were made directly to Mr. Achilli exclusive, is there?

A. The record indicated to me, Mr. Batter, that 1986 it was paid to Mr. Achilli.

Q. Then this is not a correct reflection of the record. It is your conclusion and opinion of the record, is that it?

A. It is as I read the record.

Q. Well, as you read the record now, does the wording that you have under that column, "To Whom Paid" require amendment or change?

A. I don't believe so.

Q. You say that despite the fact that on page 432, to which counsel has just drawn your attention, it reads:

"I can't recall whether on each one we made the payment directly to Mr. Achilli or the other fellow.
"Q. What other fellow?
"A. Cons."

A. Yes, I still think it should stand.

Q. That she made the payments exclusively to Mr. Achilli?

A. Yes. That is in the light of the full record.

Q. To save time, let me direct your attention to pages 427, 428 and 429 of the record, which I believe you will probably agree can be summarized in the short 1987 statement that she made the extra payment in small amounts, received no receipts, and has no record of them.

A. Yes, I recall that.

Q. Is that the substance of that testimony?

A. Yes—well, she made that statement. I don't know whether it is at this page or not. (Witness examines transcript.)

Yes, that is at that section.

Q. Mr. Weber, did you make an examination of the books of Highland Motor Sales specifically directed to ascertaining whether or not any part of that $2500, being $500 on each of five cars, found itself into the records of Highland Motor Sales?

A. Yes, I did. It was included in my examination.

Q. And you specifically directed part of your examination to an ascertainment of whether these funds were included in the books?

A. Yes, sir.

Q. And you found no part of them?

A. Yes, sir.

Q. Now then, in view of the testimony of Mrs. Studt that these sums were paid in small amounts of varying dates which she is unable to identify, do you feel 1988 justified—I will strike that—is it correct to place into the 1946 column the two $500 payments on the cars purchased on November 23 and November 29, 1946?

A. That was a long question. Will you read it, please?

(Question read.)

By the Witness:

A. That determination is a matter of opinion. Which portion of the payments were not reflected on the books of Highland Motor Sales could not be determined at this time. The payments being reflected in 1946 and possibly have been in 1947.

By Mr. Batter:

Q. You say they could or couldn't?

A. They could. But the records of Highland Motor Sales disclosed only those amounts as are reflected here and received in those years.

The man being on an accrual basis should have reported this money in the specific years and reported the sales as such, but not doing so, the date of the sale is the determining date.

Q. Other than the oral testimony of Mrs. Studt, you have found nothing to indicate that she did pay the 1989 $500 bonus for each of the cars, have you?

Mr. Russo: I don't think it behooves the Agent to go out and corroborate the witness' testimony, if your Honor please. That is what the witness testified to. He had a right—

Mr. Batter: He has made an independent investigation of Mrs. Studt's books and employees, and I am asking whether, outside of the oral statement of the witness, he has found anything at all to corroborate the $500 payment per car.

Mr. Russo: There is no other corroboration necessary.

Mr. Batter: I don't think that is a question for counsel.

The Court: He may answer.

By the Witness:

A. As I recall, we examined the books and records of the Veteran Cab Company, I believe, as they were at that time, and those records indicated the cost basis as she has testified here.

By Mr. Batter:

Q. Then you were able to ascertain and deter-
1990 mine from the records of the Veterans Cab Company when these payments were made, were you not.

A. Yes, I believe so.

Q. Then can you tell us just on what date and in what amount this $2530 was paid?

A. No, I can't.

1991 Q. Won't your examination—I understood you to say your examination of Veterans Cab shows they were paid.

A. It did.

Q. You made that examination. Why can't we find out what those dates are?

A. I don't have them available.

Q. You didn't think it important as a matter of proof in this case to establish the definite payments?

A. I don't think I quite understand your question, Mr. Batter.

Q. You prepared the proof in this case, did you not?

A. I marshalled the evidence.

Q. You did not consider it important as part of the evidence in this case to determine when and in what amounts the Veterans Cab Company paid this $2,530?

A. Yes.

Q. Then where is that evidence?

A. It is not available.

Q. Why is it not available?

A. It has either been lost or destroyed.

Q. The evidence in your possession has been lost or destroyed?

A. They are my own work papers, Mr. Batter.
1992 They are not evidence of the witness. There was no—

Q. Your own work papers have been lost or destroyed?

A. Partially.

Q. Referring to the next item, William Scalise, he testified according to this Exhibit that in 1946 he paid

$1,900 for a car that appears on the books of Highland Motor Sales as $1,555.30, and in the extreme right series of columns you show for the year 1946 the sum of $394.70.

Did you, in the case of William Scalise, as you say you did in the case of Leonard Studt, examine his books to ascertain whether in fact he paid $1,900 for that car?

A. As I recall, William Scalise was an individual that had no books and records at that time, and this was his own private automobile.

Q. His testimony is that he was in the tavern business and that he did keep regular books of account. I refer to page 329 of the record.

A. I will have to see the record.

Q. All right.

(Mr. Batter handed the transcript to the witness.)

A. On page 330 he stated that it did not appear 1993 in his books. On cross examination you ask:

"Why shouldn't that record of the purchase of the car appear upon your books?

"A. Well, it was my own money. It was my own business, too"—

"It was your own business, too", that was a question, and the answer, "Yes."

Q. But you made no investigation of his books to ascertain whether or not he in fact paid $1,900 for the car, did you?

A. No, sir. After he told me it was his personal automobile, I had no reason to go any further.

Q. Or to trace where he got the funds from?

A. No, sir.

Mr. Batter: Mr. Reporter, will you read the next to the last answer of the witness, please?

A. (Read by the Reporter.)

By Mr. Batter:

Q. Now, directing your attention to the next item, Homer Catt, and Exhibit 24, you show in the 1948 column $2,430 according to the testimony, and $1,632 according to the Highland Motor Sales books, and you have placed in the extreme right column a sum of $798 applicable 1994 to the year 1948.

I hand you Government Exhibit No. 24, which is a sales slip signed by Homer D. Catt, and ask you whether the price as it appears on that sales slip is in conformity with the records of Highland Motor Sales?

A. It is. The price was the question, is that right?

Q. Yes.
A. Yes.
Q. Now, then, in the column headed "To Whom Paid", you show "Cons".
A. Yes.
Q. Did you inquire from Cons whether or not that difference of $798 was in fact paid by Homer Catt and whether he in turn then turned it into Highland Motor Sales?
A. Mr. Cons refused to make any statement.
Q. Then beyond the oral testimony that the sum of $2,430 was paid for that car, you have been unable to trace the $798 that you show in the 1948 column in the extreme right, is that correct?
A. Well, reverting back again to the net worth, that is a portion that appears in that schedule.
Q. Well, where does it appear in the net worth 1995 statement?
A. It appears in the total additional increase for the year 1948 of $69,651.96.
Q. In which of the items comprising that total have you been able to trace that sum?
A. That cannot be specifically identified.
Q. Then you have not been able to trace this into any particular item in the net worth statement, have you?
A. As an individual item?
Q. Yes.
A. No.
Q. Now, directing your attention to the next item, Hans Moeller, Exhibits 25 and 26, you show in 1948, $2,400 and you show on Highland Motor Sales' books the sum of $1,836 and a difference of $564 which you show in the 1948 column on the extreme right.

In the column, "To Whom Paid" you show "Achilli-Cons." Directing your attention to page 349 of the transcript reflecting Mr. Moeller's testimony, does it not read there:

"Q. With whom did you deal?
"A. With Cons, the salesman.
"Q. What did you pay for that car?
1996 "A. $2,400.
"Q. How did you make that payment?
"A. With two cashier's checks.
"Q. Do you recall to whom you made payment?

"A. I handed the checks to the salesman."

Is that the testimony as it is reflected on page 349 of the transcript?

A. It is.

Q. Now, is your column, "To Whom Paid", you have it marked "Achilli-Cons."

You find nothing like that in the testimony, do you?

A. On that page, no.

Q. Do you on any other page of Mr. Moeller's testimony?

A. (No answer.)

Mr. Russo: In the interest of time, if the witness will refer to page 353—

The Witness: Yes.

"Q. Do you know Sam Achilli, Mr. Moeller?

"A. I do.

"Q. Was he present at the time, or at any time 1997 during the course of this transaction?

"A. He was.

"Q. Did he participate in the transaction with you?

"A. He O.K.'d it."

By Mr. Ratter:

Q. Well, then, Mr. Achilli's participation in the transaction was limited to O.K.-ing the transaction, according to the testimony, is that correct?

A. Yes.

Q. And you find nothing there to warrant placing under the column, "To Whom Paid", "Achilli-Cons", is that correct?

A. Based upon the participation of Mr. Achilli and Mr. Cons, a designation has been made, "Achilli-Cons."

Q. But your column is not headed "Participation." It is headed, "To Whom Paid", is it not?

A. It is.

Q. Directing your attention to Government Exhibits 25 and 26 on this Hans Moeller deal, is not Government Exhibits 25 a check for $1,500, a cashier's check payable to Hans Moeller and endorsed by Hans Moeller and by the Highland Motor Sales Company?

A. It is.

1998 Q. Is not Government Exhibit 26 a check for $900 to the order of Louise D. Moeller, endorsed

"Louise D. Moeller" and then bearing another endorsement that has not been identified with Highland Motor Sales?

A. That is the endorsement of D. C. Williams.

Q. Do you happen to know who D. C. Williams is?

A. Yes, sir.

Q. Who is D. C. Williams?

A. He is a bookie in the City of Elgin.

Q. This check to Mr. D. C. Williams does not show in any manner as being received by the Highland Motor Sales Company, does it?

A. No, sir.

1999 Q. Now the next item is Aryid Sundquist and Exhibit 27, which you show in the column, "To Whom Paid," Achilli, and in the 1948 column, $2,155 according to the testimony, and $1938, according to the Highland Motor Sales books, placing a difference of $217 in the extreme right column under the year 1948.

I ask you whether Exhibit No. 27 reflecting price is in accordance with the amount appearing on Highland Motor Sales books.

A. It is.

Q. Then accepting the oral testimony of Mr. Sundquist, in your investigation have you been able to find this sum of $217 that composes the difference between the amount appearing on the books of Highland Motor Sales and the testimony of Mr. Sundquist?

Mr. Russo: The question is vague, if your Honor please. I don't understand it.

Mr. Batter: Will the Reporter read the question, please.

(Question read.)

By the Witness:

A. Only as it is reflected in the net worth increase of Mr. Achilli for the year 1948, included in the figure of $69,651.96.

2000 By Mr. Batter:

Q. Again I ask you, Mr. Weber, can you point out what item in that composite total of $69,000 some odd that the $217 is reflected?

A. It cannot be identified specially.

Q. Now turning to the next item, John B. Jones, which you show in the 1948 column as $2200, and on the Highland Motor Sales books as $1534.38, and then ex-

tending to the 1948 column at the extreme right, the sum of $690.62.

Will you tell me how you arrived at the sum of $690.62?

A. By subtracting $1,534.38 from $2200.

Q. Will you make that subtraction for me, please?

A. Yes. (Witness does as requested.) The amount should be $665.62.

Q. Then has your opinion changed as to the $665.62 instead of $690.62? Is that right?

Mr. Russo: I object, if your Honor please. It is only a calculation, not an opinion.

The Witness: It is not an opinion.

Mr. Batter: Your Honor, it is his opinion. These three columns reflect his opinion.

The Court: The objection is sustained.

2001 Proceed.

By Mr. Batter:

Q. Now referring to the next item, Sam Mortellaro, you show in the 1947 column $2,537, and the amount received by Highland Motor Sales as $1,570.30, and in the extreme right series of columns, you show that in 1947 as $966.70.

Directing your attention to pages 378 and 379 of the transcript, does that state in Mr. Mortellaro's testimony that he got a sales slip but lost it or destroyed it?

A. Yes.

Q. Does it go further on page 381 and state that the price included a radio, heater, seat covers, standard accessories, and financing?

A. Yes.

Q. In the amount that you show appearing on Highland Motor Sales books, have you considered the accessories?

A. It is the total sales price as reflected on the books of Highland Motor Sales, which included accessories in some cases, taxes in some cases, and all other items.

Q. Were accessories ever sold separately?

A. Yes.

2002 Q. Did you check this price to see whether the price reported by Mr. Mortellaro and the accessories he got were reflected as such on the books of Highland Motor Sales?

A. Yes.

Q. Now referring to Herbert Christiansen, where you show in 1948 a price of $2050, and per Highland Motor Sales books show $1615.26. You then reflect in the 1948 column the sum of $434.74.

Now directing your attention to Mr. Christiansen's testimony, is it not a fact that the price he refers to includes the cost of financing?

Mr. Russo: What page, Mr. Batter?

Mr. Batter: I gave him the whole testimony. (Witness examines transcript.)

By the Witness:

A. Page 387:

"Q. Do you recall the exact amount of financing?

"A. No, I don't.

"Q. Would you say that that was approximately $1200 that you financed?"

The answer was:

"A. Yes."

2003 Q. Then it does include the price of financing?

A. No. Here is the amount, on page 389.

"Q. The amount that you financed.

"A. $1050."

That does not include the amount of financing.

His testimony disclosed that he paid $50 a month for 24 months. That would include the cost of financing.

Q. Now then, what other sums besides the $1050 make up that $2050?

Mr. Russo: Refer to page 386, in the interest of time.

By the Witness:

A. On page 390, I think we have it:

"Q. If I understand your testimony correctly, Mr. Christiansen—"

By Mr. Batter:

Q. Who asked that question?

A. Mr. Russo.

(Continuing):

"you were allowed $100 towards the purchase price of the car that you bought by virtue of the trade-in?

"A. Yes.

2004 "Q. And you paid $900 cash?

"A. Yes.

"Q. That is a total of $1,000, is that correct?

"A. Yes, that's correct.

"Q. And you financed the balance of $1050?
"A. That is correct.
"Q. So the car cost you at Highland Motor Sales $2050, is that correct?
"A. That's right."

That went over to page 391.

Q. Yes.

Now I direct your attention to page 395, where the witness said on cross examination:

"Q. You testified that you paid $900 in cash.
"A. Well, I can't remember that for eight years, either.
"Q. That you can't remember?
"A. It's right down here—"

Mr. Russo: If your Honor please, that goes to the credibility of the witness.

Just a moment, Mr. Batter.

That goes to the credibility of the witness, and 2005 that is a matter for the jury to determine.

Mr. Batter: Not at all, your Honor. It shows the sum total he shows here and the confusion between the witness' own mind as to whether it is $2,000, $1250, or what it is and which figure the witness has used.

Mr. Russo: The witness testified as to the transaction and amounts which he paid. That is a matter for the jury to determine whether or not the witness' credibility—

The Court: That is the rule, yes. Proceed.

By Mr. Batter:

Q. Now, Mr. Weber, the next series of transactions involve Leonard J. Cardella and Albert Papandrea, Exhibits Nos. 10 to 23, all in the year 1947.

Did you make an examination or have made an examination of the books of the partnership of Cardella and Papandrea for that year?

A. They were examined, yes, sir.

Q. Those books are no longer in existence, are they?

A. That is part of the record, Mr. Batter.

Q. Yes.

Now directing your attention to Government Ex-
2006 hibit No. 23, your Exhibit No. 279 shows that $2,015 was paid for the car which was recorded on the books of Highland Motor Sales at $1488.99, and you show a profit in the year 1947 unreported of $526.01.

You will recall in this case the checks were cashed by the one partner, the money given to the other partner who went out there and picked up a car and brought it back.

Now directing your attention to Government Exhibit No. 23, what profit did the partnership Papandrea and Cardella make on that transaction?

Mr. Russo: If your Honor please, I object. The profit that Cardella and Papandrea made on that transaction has absolutely no bearing on the issue in this case. It is irrelevant, incompetent and immaterial.

Mr. Batter: It goes to the credibility of the witness. The exhibit introduced by the Government shows that the firm of North American Motors, which is that partnership, cashed a check, supposedly paid for this car by cash. The Government alleges that Highland Motor Sales understated its selling price by about $600, and this exhibit
2007 shows that the people that bought the car made a profit of $35 on it.

He has investigated the books, and I think it goes to the very veracity of the amount that they paid for the car, and the reasonableness of expecting that a person would go from Chicago to Elgin and back, drive a car, carry $2,000 in cash to Highland Motor Sales, and not only make its regular profit but $600 on top of that, so that after investing their money for some days they could make $35.

The Court: The objection is sustained. Proceed.

2008 By Mr. Batter:

Q. Now, the testimony with respect to that car is that the money was paid to either Cons or to Achilli.

Did you ascertain whether or not that sum was in fact paid to Cons and whether in fact he paid it to the Highland Motor Sales?

A. As I recall the testimony, Mr. Batter, there was no specific allegation as to who that money was paid to. It was paid in some instances to Mr. Achilli and in some instances to Mr. Cons. Is that correct?

Q. That is the way you describe it on your Exhibit here.

A. Is that the way the testimony reads?

Q. You are describing it. Now, I am asking you if you have checked—

A. That is the interpretation that I received from the record.

Q. I am asking you if you checked with Mr. Cons whether he received such sum of money, and if he did, whether he turned it in to Highland Motor Sales?

A. Mr. Cons refused to make any statements.

Q. Did you interrogate him with respect to this particular transaction?

A. Mr. Cons refused to make any statements. He
2009 stood mute in all conferences.

Q. In these conferences, did you make any reference to this particular Exhibit, the car it refers to?

A. This specific transaction?

Q. Yes.

A. No.

Q. Now then, Exhibit No. 23 immediately above that one refers to a car allegedly costing $2015, appearing on the books of Highland Motor Sales at $1462.22, and you show $552.78 unrecorded profit.

Did you discuss with Mr. Cons whether or not he received in fact $2015 on that car?

Mr. Russo: If your Honor please, the witness has been asked that question a score of times and it has been answered a score of times.

Mr. Batter: He was never asked that question with respect to this car, your Honor.

Mr. Russo: He said in every conference at which Cons was present he stood mute and refused to answer.

How else can the question be answered? He has asked it a score of times.

2010 Mr. Batter: He has not been asked with respect to this car.

The Court: He may answer.

2011 A. Mr. Cons stood mute and refused to answer any questions.

By Mr. Batter:

Q. Now, Exhibit No. 21 shows a price per testimony of $2,010, the records of Highland Motor Sales, $1,448.19 and unreported income of $561.81.

Did you ask Mr. Cons whether or not he received the $2,010 on the sale of that car?

A. No. Mr. Cons stood mute. He refused to answer any questions.

Q. Refer to the item above that, Exhibit 20, reporting the sale of $2,035 per the testimony, $1,421.42 for the Highland Motor Sales books, and a difference of $613.58.

Did you ask Mr. Cons whether or not he received that sum of $2,035?

The Court: Well, as I understand it from the witness, Mr. Cons made no reply to him of any kind. Is that correct?

The Witness: That is correct, your Honor.

The Court: Well, the objection is then sustained. That covers all transactions, is that right?

The Witness: Yes, sir.

The Court: All right. The record may show that
2012 the witness testifies that Cons did not discuss any transaction with him. Is that right?

The Witness: That is true.

The Court: That ought to cover it, then.

By Mr. Batter:

Q. Now, referring to that same series of transactions covered by Exhibits 10 to 23, Mr. Weber, have you traced any of these sums appearing in the 1947 column on the extreme right of that page into the possession or hands of Mr. Achilli?

A. It is reflected in the net worth increase for the year 1937, the amount of $78,169.88.

Q. Can you trace any of these amounts into any specific items in that net worth statement?

A. Any specific item, no.

Q. Now, next I direct your attention to Hal Plumb, the very next item, where you show in 1946 the amount paid per testimony, $1,525, the amount received by Highland Motor Sales, $1,525, the said transaction taking place in November of 1946, with nothing extended into the three end columns under "Income Unreported", and then with a notation, No. 1, "Allowance on 1936 Ford", and the
2013 next line the testimony of Mr. John Bernhard with respect to a 1936 Ford with the same notation, $450, and in the "To Whom Paid" column, "Cons" and in 1946 you set up $450 of unrecorded income.

Is that correct?

A. That is true.

Q. Now, Mr. Weber, will you explain to this Court and jury how the 1936 Ford could have been sold to Mr. Bernhard in August of 1946 when it was not acquired by Highland Motor Sales or Sam Achilli until November of 1946?

A. If you will recall, Mr. Plumb was an elderly man.

Q. Yes.

A. He is in error as to the date of his purchase. Actually it was prior to this August date—

Q. Well—

A. (Continuing)—that the transaction took place. The transaction of John Bernhard was in August of 1946.

Q. Then this Exhibit does not purport to reflect the testimony as it was given here, but reflects your idea of such changes that should be made?

A. No, sir. It reflects the testimony as given. Mr. Plumb testified he purchased that car in November of 1946 and Mr. Bernhard testified he purchased the 2014 car in August of 1946, when in fact Mr. Plumb purchased that car prior to November of 1946, but the testimony is as of November, 1946.

Q. You will recall the testimony of Mr. Plumb, and I am referring now to page 529 of the transcript, when he was asked by Government counsel:

"Q. Now, do you remember approximately when it was that this transaction took place?

"A. Well, to the best of my recollection and memory, it was either in November or December.

"Q. Of what year?

"A. 1946. I connect it up because the weather was very cold."

Now, prior to August the weather would not be very cold, would it?

A. No, sir.

Q. And Mr. Plumb explained why he set the date in November.

Mr. Russo: I object, if your Honor please. That is a question of the jury's recollection of the testimony and the jury's right to test or consider the credibility of 2015 the witness, Hal Plumb.

The Court: You may proceed.

By Mr. Batter:

Q. Now, directing your attention to page 527 of Mr. Plumb's testimony, does he give this answer:

"A. So then we were talking after the sale and I says, 'I've got an old Ford coupe and I need a new car, because I don't think this Ford will ever get through the winter, and in my business I need a new car', and I says, 'I'll make you a proposition: If you will sell me a Plymouth, a new Plymouth, I will make you a present of the Ford coupe.'"

Is that correct?

A. He did.

Q. Now, Mr. Weber, I believe you qualified as an income tax expert.

A. Yes, sir.

Q. If Mr. Plumb made Mr. Achilli a present of that car, by what authority under the income tax law do you say that $450 of unrecorded and unreported income should be charged against Mr. Achilli?

A. I believe the law will sustain that a transac-
2016 tion given in consideration of an act will be taxable income, and this car can be construed as being consideration for the transfer of the title of the new property.

Q. But the omission of that would not be a fraudulent act; it would simply be a question of construction of law, is that true?

A. That is true. You could argue it.

Q. Well, it would be a question of construction of law, isn't that true?

A. That is true.

Q. Now, you said that in fact Mr. Plumb purchased this car before August. What in the record do you find to support that assertion?

A. Nothing.

The Court: Ladies and gentlemen of the jury, we will now recess until two o'clock p.m. You will return back here at that time, please.

(Whereupon the further hearing in the above-entitled trial was recessed until 2:00 o'clock p.m. of the same day, May 4, 1955.)

2017

* * (Caption—No. 53-CR-153) * *

Before Hon. Win G. Knoch,
and a Jury.

Wednesday, May 4, 1955,
2:00 o'clock p. m.

Court met pursuant to recess.

Present:

Mr. Russo,
appeared for the Government;

Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States of America, *vs.* Achilli, the case on trial.

(Whereupon the following further proceedings were had in open Court in the hearing and presence of the jury, to-wit:)

2018 The Court: You may proceed.

RALPH A. WEBER, called as a witness on behalf of the Government herein, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Cont'd) by Mr. Batter.

Q. Now, Mr. Weber, respecting the entries on Exhibit 279 regarding Frank M. Warner, Exhibits 39 and 40, you show that the person to whom the money was paid was Mr. Achilli.

Let me show you Government Exhibits Nos. 39 and 40. I ask you who signed those checks and what endorsements appear thereon?

A. Exhibit No. 39 is a check drawn on the Union National Bank and Trust Company, Elgin, Illinois, dated February 4th, 1948, "Pay to the order of Highland Motor Sales", in the amount of $195, and is signed by Frank M. Warner.

It bears the endorsement of, "For Deposit Only, Highland Motor Sales."

Exhibit No. 40 is a check drawn on the Union National Bank and Trust Company of Elgin, dated February 2019 3rd, 1948, payable to the order of cash in the amount of $305 and is signed by Frank M. Warner. The endorsement is that of C. J. Cirrincione.

Q. Now, the receipt of that check and its endorsement is not reflected on your Exhibit 279, is it, in the form of to whom it was paid?

A. No, sir.

Q. You show it was paid to Mr. Achilli, do you not?

A. Yes, sir.

Q. And there is nothing on Exhibit No. 40 to indicate that that check for $305 endorsed by Mr. Cirrincione was paid to Mr. Achilli, is there?

A. Will you repeat that question?

Mr. Batter: Read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. No, sir.

By Mr. Batter:

Q. Now, then, with respect to Government Exhibit 39, that is made out to the Highland Motor Sales and endorsed by Highland Motor Sales, is that correct?

A. Yes, sir.

Q. Turning next to Florence Wildhagen, 1941 Chevrolet, which you have keyed to the trade-in by Frank Warner.

2020 What is there in the testimony that will support your allegation of the Wildhagen purchase as the Warner trade-in?

A. There is nothing in the testimony, Mr. Batter, only as I have testified to it.

Q. Sir?

A. Only as I have testified to it. In my testimony I identified it as the car.

Q. You testified from this Exhibit, did you not?

A. Yes, sir.

Q. But other than your testimony on this Exhibit there is nothing in the record that ties that car up with the car that Mr. Warner turned in, is here, or traded in?

A. I believe in my testimony I identified that car as being the car that was turned in by Mr. Warner the same as I identified the record of Highland Motor Sales being presented on here.

Q. But you identified it only as reading from the Exhibit and explaining why you put the numerals on it?

A. From my own investigation I determined that that was the same car and as such I testified to it here and made that comparison at the time of preparing this statement.

Q. What investigation did you make, and what 2021 led you to believe that it was the same car as a result of that investigation?

A. The comparison of the motor numbers and serial

numbers of those two automobiles—or that automobile, I should say.

Q. What was the motor and serial number of that automobile?

A. At this time I do not know.

Q. Now, next I direct your attention to the long list of cars under the name of Hanley Clark. In the column, "To Whom Paid" you have written, "Achilli-Cons."

Directing your attention to the direct examination of Mr. Clark as it appears at the foot of page 491 and the top of page 492, what does the record show as the person to whom payment for the cars was made?

2022 A. At this particular point of the record, on page 491 and 492, Mr. Clark testified that he made payments to Mr. Cons:

Q. Now didn't he really make it more explicit? The question was:

"To whom was payment for each of these cars made?"

The answer was:

"Cons."

Isn't that so?

A. That is the answer at that point.

Q. Now, Mr. Weber, directing your attention to the sixth item under Hanley Clark, the 1941 Chevrolet on February 15, 1947, the amount according to the testimony is $950 and the amount according to the Highland Motor Sales books, as appearing on Exhibit 279, is zero, which amount of $950 you carry over into 1947.

What does your investigation show with respect to that 1941 Chevrolet as being a car that was owned by Highland Motor Sales?

A. The testimony as given by Mr. Clark, and the books and records of the Omark and Clark, I believe was the name of it, which disclosed the purchase of that automobile from Highland Motor Sales.

2023 I believe that was the extent of it.

Q. The books and records of Hanley Clark and Clark & Omark, as the firm was named, it was testified are not in existence any longer.

Did you examine those books while they were in existence?

A. I did.

Q. Did you examine them as to the specific transactions or did you make an audit and regular examination of those books?

A. I examined them for the specific transactions.

Q. And the books of Clark & Omark do show the disbursement of $950 purportedly for this 1941 Chevrolet on February 15, 1947, from Highland Motor Sales?

A. They did.

Q. What records of Hanley Clark did you transcribe or make photostats of that would indicate the form of payment this $950 took?

A. Speaking specifically of this one transaction, I don't believe I can say at this time which records were photostated for this transaction.

As I recall, some of the transactions were done in cash. There were no invoices or receipts. We did not photostat the books of original entry of Clark & Omark. All we
2024 photostated were the canceled checks that were available.

The instances of cash were a matter of record in Mr. Clark's books.

Q. Now, on this Hanley Clark series of trades, four checks were produced, and there is involved 34 cars.

Is it your testimony that on 30 of those 34 cars, the books of Hanley Clark show them to have been paid for in cash?

A. I would say that if we don't have the canceled check to identify the purchose, then the canceled check that was written to cash through which Mr. Clark stated he obtained the cash was not clearly identifiable with any transaction.

Q. And on this particular item, you do not have any canceled check, do you?

A. No, sir.

Q. Nor did you photostat and get a canceled check of such item on Mr. Clark's books as he informed you purported to pay for this car, did you?

A. There were none, sir.

Q. There were none?

A. That we could definitely identify. There were checks around the dates of the purchases, but they could not
2025 be definitely identified with these transactions.

Q. Now then; did your examination of the books of Highland Motors show that on February 15, 1947, they owned a 1941 Chevrolet, such as the one that was purportedly sold to Hanley Clark?

A. I believe this car was identified by serial number.
Q. Where?
A. Am I correct? On Exhibit 34.
Q. That is taken from Hanley Clark's records, isn't it?
A. May I see Exhibit 34, please?
(Mr. Batter handed document to witness.)

The Witness: That particular transaction we could not identify the sale of a 1941 Chevrolet around that date on the books of Highland Motor Sales nor could we identify any sale around that date to Hanley Clark on the books of Highland Motor Sales.

By Mr. Batter:

Q. Did your investigation of the books of Highland Motor Sales show that at that time they owned this particular 1941 Chevrolet?

A. No, sir. The books and records of Highland
2026 Motor Sales did not disclose that.

Q. Now taking the next item, the 1941 Olds, without going into the same lengthy examination, would your answer be the same?

A. No, sir. That automobile is identified by serial number.

Q. That automobile is identified by serial number on whose books?

A. On the books of Hanley Clark, and all of the automobiles on the books of Highland Motor Sales were identified by serial number, and that serial number did not appear at any place on the books of Highland Motor Sales.

Q. It did not?
A. It did not.

Q. So that you are unable to say that on that date, February 22, 1947, that Highland Motor Sales owned this 1941 Olds, are you?

A. Except in the testimony of Mr. Hanley Clark, that he purchased that automobile from Highland Motor Sales on that date, and that they were passing title. From that I drew the conclusion that Highland Motor Sales did own that automobile on that date.

Q. But if Highland Motor Sales owned that auto-
2027 mobile on that date, at some time or other prior to that time, there would be a purchase of it, would there not?

5

A. Not necessarily. I believe the testimony here has indicated that certain automobiles were traded without value or value was not disclosed on the books of Highland Motor Sales, and therefore this could be one of those automobiles.

Q. But you are unable to say that this car was definitely owned by Highland Motor Sales on that date, are you?

A. I can only say that Highland Motor Sales did not disclose on their books and records ownership of that automobile.

Q. Now dropping down two lines to a 1940 DeSoto on March 7, 1947, you again show zero with respect to Highland Motor Sales records.

Is there anything that you found in your investigation which definitely establishes that Highland Motor Sales was the owner of that 1940 DeSoto on March 7, 1947?

A. Only as I stated before, that Mr. Clark testified on that date he purchased that automobile from Highland Motor Sales and received good title to it from them.

Q. Then would the same answer be true with re-
2028 spect to the 1941 Lincoln, which you show at $1045, the 1937 Ford which you show at $475, the 1941 Ford which you show at $875, the 1942 Olds which you show at $1300?

A. No, sir.

Q. Leave out the Olds?

A. Yes, sir.

Q. All right. The 1942 Pontiac at $1500, the 1941 Plymouth at $900, the 1941 Plymouth at $1250 the 1942 Olds at $1450, the 1942 Buick at $1750, the 1942 Cadillac at $1500.

A. My answers to those would be a combination of the two answers I have given on the previous two occasions.

Q. If there is a combination of the two, perhaps you had better restate it.

A. Well, from the 1937 Ford down to the 1938 Ford—Let's say all of the items which you mentioned from the 1937 Ford to the 1941 Plymouth were identified by serial number, and that serial number, or that automobile identified by that serial number could not be found on the books and records of Highland Motor Sales.

Then the three transactions, the 1941 Plymouth, the 1942

Olds and—just those two, the 1941 Plymouth and the 1942 Olds, could not be determined as being sold by High-
2029 land Motor Sales on those dates or around those dates.

The 1942 Buick again was identified by serial number, and that automobile could not be identified on the books of Highland Motor Sales.

As to the 1942 Olds on which I stopped you, that automobile is identified on page No. 2 as having been traded by Dorothy Stevens, and is a prime example of what the books and records of Highland Motor Sales disclose in connection with the trades in these transactions.

Highland Motor Sales does not disclose a trade of that automobile. Mrs. Stevens testified that she did trade that automobile, and that automobile is traced here to the sale to Mr. Clark.

2030 Q. Now then, check me on this, Mr. Weber: I have made an addition here that I would like you to check. The '41 Chevvy, which is the sixth item, at $950, the '41 Olds, the next item, $1,150, and then skipping one item, taking the next one, the '40 De Soto at $950, then the '41 Lincoln at $1,045 and the '37 Ford at $475, the '41 Ford at $875, the '42 Olds—no. We left that one out.

'42 Pontiac at $1300.

'41 Plymouth, $900.

'41 Plymouth, $1,250.

'42 Olds, $1,450.

'42 Buick, $1,750.

'42 Cadillac, $1,500.

Those items add up to how much money?

A. Would you check me, please, Mr. Batter?

Q. I figure $18,495.

A. I want to read these figures back. I am not sure I have them right. $950, $1,150, $450, $950—

Q. Wait a minute.

A. Yes?

Q. $950 is the '41 Chevvy, is that right?

A. I just put them down on a piece of paper.

Q. $950, $1,150, $950, $1,045, $475, $875—

2031 A. All right. The $450 is out. We have $950, $1,150, $950, $1,045, $475, $875, $1,300—

Q. No. We left out the $1,300—no. This is another $1,300. That's a '42 Pontiac. That is right.

A. $900.

Q. Right.
A. $1,250, $1,450, $1,750 and $1,500.
Q. Yes.
A. Is that right?
Q. Yes.
A. $13,595.
Q. Right. So that $13,595 of that money that you show in 1947 as income unreported and unrecorded on the books of Highland Motor Sales is in fact, in so far as your investigation is concerned, comprised of cars you are unable to say were the property of Highland Motor Sales? Is that correct?
A. No, sir. I say the books and records of Highland Motor Sales did not disclose those automobiles, but that the testimony of Mr. Clark that he purchased them from Highland Motor Sales on that date did disclose their ownership and that he was receiving good title from them on those dates.

Q. But you found nothing in your investigation of
2032 the Highland Motor Sales Company's books that show that these cars were the property of Highland Motor Sales, did you?

Mr. Russo: The question is repetitious and repetitious, if your Honor please.
Mr. Batter: I do not think so, your Honor.
The Court: He may answer.
Mr. Russo: He has answered the question a number of times.
The Court: He may answer.
A. You are now questioning my investigation. I am not certain at this moment that my investigation did not disclose that some of these cars did belong to Highland Motor Sales.
By Mr. Batter:
Q. Do you have anything in this Court Room—
A. There were some witnesses whom we could not locate at this time whose automobiles these may have been and whose cars we might have identified during the investigation.

Q. Do you have anything in this Court Room showing your investigation of the books of Highland Motor Sales that will disclose any ownership on the part of High-
2033 land Motor Sales in the particular cars that comprise this list of $13,595?

A. No, sir.

Q. May I have Exhibit 34 back?

A. Yes.

(The witness handed a document to Mr. Batter.)

Q. Now, turning to the second page of Exhibit 279, Mr. Weber, the first item of which appears to be C. Bernard Magnuson, with a series of purchases, alleged purchases, and in the "To Whom Paid" column you show "Achilli-Cons."

Now, I show you page 450 of the transcript and ask you whether or not on that date the witness testified that the payments were made to Cons on all the cars?

A. At this point in the record he does say payments were made to Mr. Cirrincione.

Q. Directing your attention to the 1942 Plymouth, the second item or transaction in January, 1947, the testimony shows $1,100 as the price and nothing appears on Highland Motor Sales' books.

Did your investigation of the books of Highland Motor Sales Company disclose that at that time they owned and sold to Magnuson the 1942 Plymouth?

2034 A. No, sir. The books and records of Highland Motor Sales did not disclose the sale of that automobile.

Q. Do they disclose the ownership of one that could have been sold?

A. No, sir.

Q. Do they show the ownership of a 1941 Buick that could have been sold in January, 1947?

A. May I see Government Exhibit 33, please?

Q. Yes.

A. The 1942 Plymouth was identified by Serial Number and was not disclosed on the books of Highland Motor Sales. The 1941 Buick was not identified by Serial Number and there was no sale on or about that date.

Q. Now, which one had the Serial Number?

A. The 1942 Plymouth.

Q. The Serial Number on the 1942 Plymouth appearing on Government Exhibit No. 33—does that establish that that car was owned by Highland Motor Sales?

A. No, sir.

Q. Now, dropping down three lines to the 1940 Plymouth, the testimony shows a price of $700 and nothing on Highland Motor Sales.

Let me ask you with respect to that item: Is there anything in the books and records of Highland Motor
2033 Sales that will disclose the ownership of that car at that time that could have been sold to Magnuson?

A. No, sir.

Q. So that with respect to Magnuson, there is $3,000 reflected in those three cars that you have included in 1947 unreported profits about which there is no ownership established in Highland Motor Sales, is there?

A. According to the books and records of Highland Motor Sales, no, sir.

Q. Is there any place excepting the records of Magnuson, whose books are missing, by which it can be established definitely that Highland Motor Sales was the owner of those cars?

A. No, sir.

Q. Is the same thing true with respect to the 1940 Olds —no—the 1939 Chevrolet appearing in the amount of $650 in the 1948 column?

A. Yes, sir.

2036 Q. Now referring to Truman Winters, a 1937 Chevrolet in 1946, which you show at $700, and to whom paid, Highland Motor Sales. Then you show a shortage of $72 on that item.

Let me direct your attention to the transcript, page 831, the testimony of Mr. Winters on direct examination, and ask you whether or not he testified that he paid the money to the salesman of the Highland Motor Sales.

A. It does.

Mr. Russo: In justice to the witness, if your Honor please, I suggest that counsel also permit the witness to read the following question and answer.

Mr. Batter: The witness didn't read the question and answer. I asked him what the testimony showed.

Mr. Russo: You only asked him one question.

Mr. Batter: Yes.

Mr. Russo: Then read the next question and answer.

Mr. Batter: Wouldn't that be proper redirect examination?

Mr. Russo: You are calling for the jury to draw an
2037 erroneous conclusion.

Mr. Batter: What have you been doing with this whole exhibit?

Mr. Russo: I have been putting in evidence and letting them draw their own conclusions.

Mr. Batter: Oh, you have?

By Mr. Batter:

Q. Now, Mr. Weber, respecting Howard V. Seyller, you show a 1946 Chrysler on December 21, 1946, at a price of $2,232, and the Highland Motor Sales books, according to your statement, shows $2,178.30. That is a difference of $54.70.

Let me draw your attention to page 761 of the transcript, where it states:

"I believe it was $2230 some odd, but that included, I believe, license and a few incidentals."

In your figure, reflected on the Highland Motor Sales books, that $54.70 difference, did you take into account the license and a few incidentals?

A. The figure of $2,178.30 is the total amount disclosed on the books of Highland Motor Sales as being received from Howard V. Seyller.

Q. And does that include a license.

2038 A. It includes everything that they included.

Q. Did they include a license?

A. At this time I can't say specifically whether they did or not. But that includes all of the money that they received from Howard V. Seyller, as they reported it.

Q. Now respecting Norbert Koschnick, you show a 1936 Plymouth on which there was a price of $400 according to the testimony, and nothing on the books of Highland Motor Sales.

In the column, "To Whom Paid" you have stated, "Achilli."

Now directing your attention to page 758 of the transcript, let me ask you whether on that page the witness says that the money was paid to Mr. Achilli.

Mr. Russo: If your Honor please, I insist that that is the wrong method of doing that. If he is going to call attention to specific excerpts of particular pages, then I object. If he is going to call attention to the entire testimony, then I have no objection.

Mr. Batter: I shall do so, counsel.

Mr. Russo: Let's read it all. Don't let's read excerpts.

2039 Mr. Batter: My complaint is that your exhibit only shows part of it.

Mr. Russo: We will let the jury decide that, Mr. Batter.

By the Witness:

A. On page 757 of the record—

By Mr. Batter:

Q. First I asked you on page 758. Let's start with that.

A. Page 758:

"Q. To whom did you deliver the cash, the $150 in cash?

"A. Well, it was in Sam's office, in his room.

"Q. You paid it in Sam's office, in his room?

"A. In the office there, in that little room."

Q. Now there is nothing there to indicate that it was paid to Mr. Achilli, is there?

A. No, sir.

Q. Now take a look at the rest of the testimony and see whether or not that changes it any.

A. Page 757:

2040 "Q. With whom did you deal there?

"A. Sam Achilli."

Mr. Russo: Read on, Mr. Weber.

The Witness:

"Is he the same Sam Achilli—"

By Mr. Batter:

Q. Who is doing the examining?

A. (Continuing):

"with whom you dealt at Highland Motor Sales?

"A. Yes, sir."

Q. Let me see that.

Now the testimony on page 757 says with whom did you deal. It does not say to whom did you pay the money, does it?

A. The testimony on page 757 states that he dealt with Sam Achilli. There is no place in the record that he states he dealt or talked with anyone else.

He states on page 758 that the money was paid in Sam's office, in his room.

Q. Is there anywhere in the record where it states that the money was paid to Sam Achilli, as you state in your exhibit?

A. I believe the testimony just read indicates that.

Q. Does the testimony state that, that it was

2041 paid to Sam Achilli?

A. No, in so many words it doesn't.

Q. Now, Mr. Weber, with reference to Joseph J. Ingrassia, you show in 1947 and in 1948, and I particularly direct your attention to the "To Whom Paid" column, you show the name Achilli.

Now directing your attention to page 836 of the testimony, does that indicate that it may have been paid to someone else other than Achilli?

A. At this point in the record it indicates that it was paid—"I gave it, I think, to either Sam or Cons, I don't know which.

"Q. By Sam, do you mean Sam Achilli?

"A. Yes."

Q. Do you find anything else in the record of that testimony that would correct the testimony that it may have been Cons?

2042 A. On Page 833:

"Q. Directing your attention to December 13th, 1947, did you at or about that time have a transaction with Highland Motor Sales?

"A. Yes, sir.

"Q. With whom did you deal there?

"A. With Mr. Achilli.

"Q. What was the nature of that transaction?

"A. I purchased a used tow truck."

Q. Is there anything in the testimony you have just read that would vary the testimony from the preceding page that the payment may have been made to Cons?

A. I believe the witness was indicating that in dealing, he was transpiring a business transaction and could have been making payment to him at that time.

Q. "Dealing" and "making payment" in your mind then are synonymous?

A. In connection with these transactions I believe they are.

Q. Under those circumstances are you prepared to correct your Exhibit—

A. No, sir.

Q. —the title heading?

2043 A. No, sir.

Q. In view of the fact that you maintain that title to be correct, do you find anything in there other than what I have shown you to show that payment was made to Achilli?

A. The witness testified he dealt with Mr. Achilli

and in dealing with him h
with him. On page 839:

"Q. Directing you
of Government Exhibi
or not it bears any e
"A. Yes.
"Q. What endorse
"A. Sam Achilli a

Q. Who is William J.

A. William J. Biehl,
George S. Frey & Associa
Industrial Management o

Q. Here in Chicago?

A. Yes, sir.

Q. And the check was

A. Well, can we see E

Mr. Batter: Get

2044 Mr. Gagen: Sir?

Mr. Batter: 73.

(Government Exhib
ness.)

A. The check was ma
is drawn on the Third N
nois. It is signed by Winn
J. Ingrassia, dated July
$1,750, and it bears the
and William J. Biehl.

By Mr. Batter:

Q. With respect to thi
ing of Joseph J. Ingrass
your investigation have y
of books or records that
that 1941 Cadillac in Hig
it was sold on July 15th

A. Yes, sir.

Q. What?

A. I talked to Mr. B
traded that automobile i
that automobile is the sa
Mr. Ingrassia.

Q. You talked with
else?

2045 A. Do you want

was transpiring his business

attention to the reverse side
No. 73, will you state whether
lorsements?

ients does it bear?
d a William J. Biehl."
Biehl?
believe, is associated with
es, or some such organization,
Management Engineers.

endorsed to him?
hibit 73, please?
Exhibit No. 73.

t 73 was handed to the wit-

e payable to Sam Achilli. It
tional Bank of Rockford, Illi-
bago Motor Sales, Inc., Joseph
15th, 1948, in the amount of
endorsements of Sam Achilli

$1,750 check under the head-
, which you show in 1948, in
u found anything in the form
ill establish the ownership of
land Motor Sales at the time
1948?

ehl who told me that he had
on a new Chrysler and that
e automobile that was sold to

Mr. Biehl and—go on. What

at answer read back?

Q. Yes.

Mr. Russo: Let the Clerk read it back.

Mr. Batter: All rght.

Mr. Russo: I mean, let the Reporter read it back.

A. (Read by the Reporter.)

By Mr. Batter:

Q. Now, that is not in the record, is it?

A. No, sir. You asked me if my investigation disclosed anything.

Q. I asked you for your investigation of the Highland Motor Sales' books and records.

A. That is right.

Q. Did they disclose any ownership of that car on that date?

Mr. Russo: That was not the question he asked before, if your Honor please, but he can answer it. I just want to point it out to the jury that he is changing his question.

A. The books and records of Highland Motor Sales did not disclose that automobile.

2046 By Mr. Batter:

Q. As being owned by them?

A. No, sir.

Q. Now, Mr. Weber, is it not a fact that Government Exhibit No. 73, being a check for $1,750 of Winnebago Motor Sales signed by Joseph Ingrassia in the amount of $1,750 to the order of Sam Achilli and endorsed by Sam Achilli and then by William J. Biehl, is in fact the transfer of the ownership of that car from Biehl to Ingrassia and the money passing from Ingrassia to Biehl through the channel of Mr. Achilli's endorsement?

A. Will you read the question, please?

Mr. Batter: Will the Reporter read the question.

Q. (Read by the Reporter.)

A. I have no knowledge of that.

By Mr. Batter:

Q. Neither have you any knowledge of the car being the property of Highland Motor Sales, do you?

A. I do have that knowledge.

Q. You do have that?

A. Yes.

Q. Where do you have that knowledge?

2047 A. From Mr. Biehl.

Q. Is Mr. Biehl's explanation inconsistent with the transfer that I have expounded to you?

A. Yes, sir.

Q. In what respect?

A. He stated that he traded this automobile in on a 1948 Chrysler and was given no allowance, and he paid a certain price for it.

Q. We do not have his testimony to that effect, do we?

A. No, we don't. You requested it through my investigation.

Q. But we do not have his testimony to that effect, do we?

A. No, sir.

The Court: We will take a short recess at this time, ladies and gentlemen, and then resume, please.

(Whereupon a short recess was taken after which the proceedings were resumed, in open Court in the hearing and presence of the jury as follows, to-wit:)

2048 The Court: Proceed.

By Mr. Batter:

Q. Now, Mr. Weber, turning to Walter Schwab, you show a 1937 Dodge sold to him on October 8, 1946, in the amount of $600.

I show you the testimony of Mr. Schwab, as recorded on page 825 of the transcript, and ask you what year model he states was involved.

A. A 1938 Dodge.

Q. With Mr. Schwab testifying to a 1938 Dodge and the record showing a 1937 Dodge of Mr. Rippberger, how do you associate those two cars with the item No. 10?

A. My investigation discloses that they were the same automobile.

Q. What was your investigation and how did it disclose it?

A. Mr. Rippberger stated that he purchased a Chrysler from Highland Motor Sales and traded in the Dodge.

I sent a request to the Secretary of State asking for a follow-up on the title of that automobile. The Secretary of State returned to me the subsequent owner of that automobile to be Walter Schwab.

I then contacted Mr. Schwab, asked him if he

2049 had purchased an automobile from Highland Motor Sales, and he stated he had, that he had purchased that Dodge.

Q. Do you have that document from the Secretary of State?

A. No, I don't.

Q. Turning next to Henry A. Gorder, for the year 1946 you show, according to the testimony, two items, $885 and $500. That makes a total of $1385. You show the record for the Highland Motor Sales as $537.13 and $847.83. That makes a difference of 4¢.

But turning over to the last three columns under 1946, you have unreported income charged of $347.87.

Will you explain that?

A. The books of Highland Motor Sales disclosed that they received cash of $537.13 and allowed on a trade-in $847.83. They carried the cost on their books of $847.83, whereas in fact, according to the testimony here, $885 was paid to Highland Motor Sales and only $500 was allowed on a trade-in.

There was a difference of $347.87 of cash that was not reflected on the books and records of Highland Motor Sales.

Q. Isn't that reflected in the trade-in in cash in the net instance even excepting for 4¢?

2050 A. No, sir.

Q. $885 plus $500 is $1385, isn't it?

A. Yes, sir.

Q. $537.13 plus $847.83 is $1384.96, is it not?

A. Yes, sir.

Q. Doesn't that make a difference of 4¢?

A. That does.

Q. And still you carry over $347.87, and on the line below that, a zero?

A. Yes, sir.

Q. How do you get such a difference?

A. They have an excessive cost on their records of $347.87.

Q. But the combined cost is only off 4¢, is it not?

A. The two figures as you are comparing them are only off 4¢.

Q. Aren't they the correct figures as you have them here?

A. The cash paid to Highland Motor Sales of $885 is reflected on the books of Highland Motor Sales as $537.13. Where in fact, they actually received $885. They have a cost of $847.83, where in fact their cost was only $500.

Q. You say in fact, you mean according to the
2051 testimony?

A. Yes.

Q. But according to the testimony, the combined items aggregate $1385, do they not?

A. They do.

Q. And according to the books of Highland Motor Sales the combined items aggregate $1384.96, do they not?

A. They do.

Q. That leaves a difference of 4¢?

A. That does.

Q. But you show in the 1946 column $347.87.

A. That is right.

2052 Q. Now, Mr. Weber, regarding the transaction with Dr. A. N. Ludwig, I direct your attention to your testimony appearing on Page 1890 of the record as you gave it yesterday wherein you say:

"Dr. A. Ludwig testified he purchased a 1947 Plymouth on July 26th, 1947. He dealt with Mr. Achilli, and paid $1250.00 in cash and was given allowance for his 1941 Plymouth of $697.50."

Is that your testimony yesterday?

A. It is.

Q. Now, directing your attention to Dr. Ludwig's testimony at page 809 of the record, what does he say there, that page of the record?

A. At that point he says that he delivered the two checks that totalled $250.

Q. Yes. Take a look at Dr. Ludwig's testimony and tell me whether or not the balance of it was financed.

A. On page 807:

"Q. In addition to the car that you traded in, what if any other consideration did you give?

"A. I endorsed over two checks and there was
2053 a balance, carried a balance of $1,000."

His statement there is the consideration, $1,000. He then further states that the checks were $250.

"Q. What was the name of the company through which you financed that automobile?

"A. Elgin Acceptance Company, I believe was the name of it.

"Q. Where did you make the payments?

"A. Highland Motor Sales."

Q. Now, Mr. Weber, is it not a fact that the difference between the $1,020 shown on Highland Motor Sales Company's records and the $1,250 shown in the testimony of Dr. Ludwig, that is, $230, is very likely the finance charge?

A. No, sir.

Q. What would be the finance charge on an item of $1,000, or an item of $1,050?

Mr. Russo: Which do you want him to tell you, $1,000 or $1,050?

Mr. Batter: $1,050.

A. I do not believe I can say, Mr. Batter.

By Mr. Batter:

2054 Q. Well, then, you are not able to say that that is not the finance charge, are you?

A. Yes, sir.

Q. If you don't know what the finance charge would be how can you say that that is not the finance charge?

A. I know what a finance charge would be.

Q. I ask you: What would it be?

A. It would be a charge assessed by the finance company for the loaning of money.

Q. And what would it be likely to amount to on a $1,000 automobile loan?

A. That would vary according to the finance company.

Q. But $230 is a fair and reasonable figure, is it not, in your experience for financing, considering the fact that a finance company always takes insurance?

A. Depending on the period for which it was financed, it could be.

Q. It would be a fair and reasonable charge?

A. It could be.

Q. Now, then, directing your attention to the lower third of the page with reference to Duane W. Mull, 1941 Hudson, April 24, 1948, according to the testimony, $850 and zero on the books of Highland Motor Sales, can

2055 you testify as a result of your investigation that in fact Highland Motor Sales was the owner of the 1941 Hudson on April 24th, 1948?

A. Can I see Exhibits 41 or 43, please?

Q. Yes.

(Government Exhibit 43 was handed to the witness.)

A. With Exhibit 43 plainly identified as the purchase

of that automobile, the endorsement thereon to Highland Motor Sales by Duane W. Mull, together with Mr. Mull's statement that the automobile was purchased from Highland Motor Sales, I believe I can say that the automobile was in the possession of Highland Motor Sales on that date.

Q. And that they did not just act as a conduit for the purchase and sale of that car?

A. I can only say that they represented themselves to be the owners of that automobile on that date.

Mr. Russo: When you say "they", who do you mean, Mr. Weber?

A. Highland Motor Sales.

By Mr. Batter:

Q. To whom did they represent themselves to be the owners?

A. To Mr. Mull and Mr. Knaack.

2056 Q. Would that same situation be true with respect to each of the other items—

A. It would.

Q. (Continuing)—under Mull where you show a zero value?

A. It would.

Q. Mr. Weber, I direct your attention to the testimony of Mr. Mull on pages 583 and 584 of the record wherein this question is asked:

"Q. Now, in your course of doing business there did you have occasion to finance cars other than those that you purchased from Highland Motor Sales?

"A. Yes; I believe so.

"Q. And did you finance some of them with the Elgin Acceptance Corporation?

"A. Yes.

"Q. So that the financing of a car through the Elgin Acceptance Corporation does not necessarily mean that car was purchased from Highland Motor Sales, does it?

"A. No; not necessarily."

Now, in the light of that testimony are you prepared to say that that car was owned by Highland Motor

2057 Sales on April 24th, 1948?

A. Considering the complete testimony, I am.

Q. I hand you the complete testimony of Mr. Mull and ask you upon what you can base that statement?

A. Starting on page 540:

"Q. Directing your attention to on or about April 24th, 1948, did you as Avenue Motor Sales have a transaction with Highland Motor Sales?

"A. Yes.

"Q. What was the nature of that transaction?

"A. The purchase of an automobile."

Then after various objections, on page 542:

"Q. What kind of an automobile did you buy?

"A. A 1941 Hudson."

That continues there throughout the testimony.

Q. That evidence is all based on Government Exhibit 41, is it not?

A. Correct, which was taken from the books and records of the Avenue Motor Sales as testified herein.

Q. And not from the books and records of Highland Motor Sales?

2058 A. They do not appear on the books and records of Highland Motor Sales.

Q. Now, then, Mr. Weber, directing your attention to the 1947 Plymouth recorded opposite Exhibits 41-48, dated June 1, 1948, in the amount of $1,850 with zero value for Highland's books, let me direct your attention to Government Exhibit No. 48 and ask you to read the endorsements on that Exhibit.

A. "Ayenue Motor Sales, Duane W. Mull, Sam Achilli, George Musso, Knetzer Motor Sales Company, St. Louis and Second Streets, Edwardsville, Illinois," and it looks like, "Robert L. Knetzer."

Q. In view of that check just passing through the hands of Mr. Achilli and ending up with Knetzer Motor Sales Company, are you in a position to testify and state that that 1947 Plymouth was actually the property of Highland Motor Sales?

A. Would you care to have me identify the endorsements on that check?

(Mr. Batter handed the check to the witness.)

A. George Musso was a salesman for Highland Motor Sales. Knetzer Motor Sales Company is known to 2059 have made various sales of new cars in Southern Illinois.

Q. But this was a check that Knetzer got from Avenue Motor Sales.

A. No.

Q. I mean, from Elgin, that was addressed to Avenue Motor Sales.

A. The check was apparently given to Knetzer Motor Sales by George Musso, who received it from Sam Achilli, who received it from Duane W. Mull.

Q. So that the Highland Motor Sales was just a conduit for the movement of that check of Elgin Acceptance Corporation to the Knetzer Motor Sales Company, is that correct?

A. I cannot say that, no, sir.

Q. Can you say that is not correct?

A. I have no knowledge. Coupling that with Exhibit 41, that Duane W. Mull purchased that automobile from Highland Motor Sales, I say that the car was—or rather, that the check was given to Highland Motor Sales or to Sam Achilli.

Q. That is depending upon the testimony of Mr. Mull, is it not?

A. That's for sure, yes, sir.

2060 Q. Directing your attention to Item 41-45, a 1939 Plymouth, May 8, 1948, $950 with zero value for Highland Motor Sales, let me draw your attention to Government Exhibit No. 45, and tell me who it is made out to and what endorsements there appear on it.

Mr. Russo: I want to correct a part of that statement. That is not a zero value. That is recorded for Highland Motor Sales, and let that question be directed to that.

Mr. Batter: I accept the correction.

Mr. Russo: Thank you.

By the Witness:

A. Avenue Motor Sales, Robert J. Knaack, D. C. Williams, Percy Boettcher.

By Mr. Batter:

Q. Now, Mr. Knaack was a partner of Mull's, was he not?

A. Yes, sir.

Q. There is no endorsement of Highland Motor Sales on that check at all, is there?

A. No, sir.

Q. Nevertheless you did include as unreported income of Highland Motor Sales the sum of $950, did you not?

A. Mr. Mull testified that he purchased that car from Highland Motor Sales and paid that check to them.

2061 Q. But there is no record of their receipt of that check on there, is there?

A. No, sir.

Q. Drawing your attention to Exhibit 41-44, a 1941 Olds on May 15, 1948, wherein the testimony shows consideration of $1175 and the books of Highland Motor Sales—What was that phrase that you wanted me to use, counsel?

Mr. Russo: You just read it off there and read it right, and you won't hear from me.

By Mr. Batter:

Q. (Continuing)—records a zero price, I think it is, for Highland Motor Sales.

Let me draw your attention to Exhibit 44, and ask you to tell me whose check it is and what endorsements appear thereon.

A. It is the check of the Elgin Acceptance Company drawn on the First National Bank of Elgin, signed by Earl H. Gromer, made payable to the Avenue Motor Sales, dated May 18, 1948, in the amount of $850.

Notation on the face of the check says:

"A '41 Olds club sedan, Motor G332179, Serial 76-39839."

Endorsements: Avenue Motor Sales by Robert J.

2062 Knaack, Sam Achilli, pay to the order of Chicago City Bank and Trust Company, for deposit only, Sid Luckman Motors, Inc.

Q. Have you ever heard of an accommodation endorsement?

A. Yes, sir.

Q. Could this well be an accommodation endorsement on the part of Sam Achilli?

A. I don't believe I am in a position to say, sir.

Q. Neither are you in a position to say that the Highland Motor Sales on May 15, 1948, was the owner of a 1941 Olds, are you?

A. Basing my statement on that testimony of Mr. Mull, I am in a position to say it was the property of Highland Motor Sales.

Q. But basing it purely on the testimony of Mr. Mull?

A. Yes, sir.

Q. Despite the fact that no consideration passed to Highland Motors?

A. By the same token that Mr. Achilli could have been an accommodation endorser, Sid Luckman could have cashed this check for him.

Q. Knowing the relationship between Sam Achilli and the Elgin Acceptance Corporation, do you seriously
2063 believe that Sid Luckman was needed to cash a check of Elgin Acceptance?

A. That I don't know.

Q. I didn't think so.

Mr. Batter: If the Court please, I have now exhausted my preparation on this Exhibit No. 279 and I am prepared to treat this as my conclusion of cross examination on that particular exhibit.

I still have Exhibit No. 280 to go through, and I did work until midnight last night on Exhibit 279. I think I can save the time of the Court if we could adjourn now and pick Exhibit 280 tomorrow morning.

The Court: Will it be agreeable to start at nine o'clock tomorrow morning?

Mr. Batter: Delighted.

Mr. Russo: Yes, your Honor.

The Court: All right, we will do it that way, gentlemen.

Ladies and gentlemen of the jury, we will now recess until nine o'clock tomorrow morning. We will start at nine instead of the customary time, please.

2064 (Whereupon the trial of the above-entitled cause was adjourned until the hour of 9:00 o'clock a.m. of the following day, Thursday, May 5, 1955.)

2065

* * (Caption—No. 53 CR 154) * *

Before Hon. Win G. Knoch,
and a Jury.

Thursday, May 5, 1955,
9:00 o'clock a.m.

Court met pursuant to adjournment.

Present;
Mr. Russo,
appeared for the Government;
Mr. Batter,
Mr. Gagen,
appeared for the Defendant.

The Clerk: No. 53-CR-154, United States *v.* Achilli, the case on trial.

(Whereupon the following further proceedings were had herein, in open Court, in the presence and hearing of the jury, to-wit:)

Mr. Batter: Shall I resume, your Honor?

2066 The Court: Yes.

Mr. Batter: Can we exhibit to the jury copies of Government Exhibit 280?

The Court: Yes.

Mr. Russo: Yes.

(Copies of Government Exhibit 280 were thereupon distributed to the jury.)

RALPH A. WEBER, called as a witness herein on behalf of the Government, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination (Cont'd) by Mr. Batter.

Q. Now, Mr. Weber, you are the same Mr. Weber who was on the stand at the close of Court yesterday?

A. Yes, sir.

Q. Mr. Weber, directing your attention to Government Exhibit 280, the third line reads, "Cashier's Check No. 28824, Exhibit No. 95" and extended into the column under December 31, 1948, there appears the amount of $35,000.

A. Yes.

Q. Is that item keyed with and part of the in-
2067 debtedness to the Union National Bank on that date of $25000?

A. It is.

Q. As I recall, $23,000 of that $25,000 is part of the

consideration for the issuance of that check, is that correct?

A. That is true.

Q. Now, is it not a fact that Mr. Gordon in his testimoney testified that the $35,000 check, in so far as the difference between the $23,000 and $25,000 was concerned, was supported and backed by his personal guarantee—

A. Yes.

Q. To the bank?

A. Yes, sir.

Q. On what theory do you show an asset value net of $12,000 to Mr. Achilli here?

A. I believe Mr. Gordon testified that Mr. Achilli produced all of the money necessary for this transaction.

Q. Well, then, is it my understanding that it is your testimony in so far as the net worth statement is concerned that the borrowing of $23,000 by Mr. Sam Achilli and Mrs. Ruth Achilli and Theodore Gordon can create an equity of $12,000?

2068 A. The borrowing by Mr. and Mrs. Achilli of $23,000 cannot in itself create an equity of $12,000. It creates a liability of $23,000.

Q. But in so far as combining the two are concerned, the $35,000 cashier's check and the $23,000 borrowing, can that create an equity of $12,000 in Mr. Achilli?

A. Mr. Flora testified that the bank issued for consideration $35,000, a cashier's check in the amount of $35,000.

The ordinary course of business of the bank is to receive consideration of $35,000 for a cashier's check for $35,000.

He further testified that the bank lent to Mr. and Mrs. Achilli $23,000. Therefore, there is a balance of $12,000 that had to be advanced in order to obtain that cashier's check for $35,000.

Q. Where did that $12,000 come from?

A. I don't know.

Q. Did you make any effort to find out?

A. I did.

Q. What effort did you make?

A. I inquired of the banks. Mr. Achilli would not tell me.

Q. Do you mean the bank would not tell you what
2069 their records showed as to why they issued a $35,-
000 check?

A. Oh, yes. Their records showed that they received $12,000 from Mr. Achilli in connection with this $23,000 loan.

Q. Do you find that in the evidence in any way when Mr. Flora testified?

A. No, sir. You asked me whether my investigation disclosed that.

Q. That is right. I am asking you now if you find that in the evidence in any way?

A. No, sir.

Q. Did you also find out from the bank where Mr. Achilli got the $12,000 that they issued this check for.

A. No, sir. They had no knowledge of it.

Q. Did you ever hear of the Gibson City Bank?

A. Yes, sir.

Q. Do you know that it is associated with or connected with or affiliated with the Union National Bank of Elgin?

A. No, sir.

Q. Do you know that that $12,000 was procured on notes from the Gibson City Bank?

A. No, sir.

Q. Now, then, as far as your net worth state-
2070 ment is concerned, by signing a note together with
Mr. Gordon and his wife at the bank, the Union National Bank, and procuring a check for $35,000, Mr. Achilli increased his net worth $12,000?

A. Yes, sir.

Q. Do you really believe you can increase your net worth that simply?

A. You can reflect your net worth that simply, yes, sir.

Q. But you cannot create it, can you?

A. The cash of $12,000 was not, should we say, in the open until such time as it became part of that $35,000 cashier's check.

Q. What do you base that statement on? Where was any cash shown to be turned into the bank?

A. The difference between the $23,000 and the $35,000 is $12,000—

Q. Yes.

A. (Continuing)—and the bank stated that they issued the check in the amount of $35,000 and received $12,000 from Mr. Achilli and $23,000 in the form of a loan.

Q. They did not tell you they received $12,000 in cash, did they?

A. That, I don't recall.

2071 Q. And Mr. Flora did not testify to any such thing, did he?

A. No, sir.

2072 Q. Directing your attention about half way down the page to the year 1948, item in the amount of $15,000 under the column December 31, 1948, the legend reading: "Theodore Gordon, Martin Seybold—Cashier's Check No. 132,224," Government Exhibit 172, you show that as an asset of Mr. Achilli's on December 31, 1948.

What does the evidence show as to the issuance of that check?

A. May I see Exhibit 172?

Q. (Mr. Batter handed document to witness.)

A. It shows here check dated December 18, 1948, drawn on the First National Bank of Elgin, payable to Sam Achilli in the amount of $15,000, endorsed "Payable to Theodore Gordon, Sam Achilli," and then Theodore Gordon.

Q. What consideration did the bank receive for the issuance of that check?

A. I believe Mr. Seybold stated they received $15,000.

Q. I hand you the transcript containing the evidence of Mr. Seybold, and ask you to find for me the testimony of Mr. Seybold respecting that check.

Mr. Russo: What volume and page is that, Mr. Batter?

Mr. Batter: His testimony begins at page 1165 2073 on April 21.

(Witness examines document.)

The Witness: Would you give me the next volume? Leave this one here.

Mr. Batter: Yes, I will leave that. What is the last page of that volume?

The Witness: Page 1276.

(Transcript handed to witness by Mr. Batter.)

By the Witness:

A. Mr. Seybold's testimony regarding this cashier's check begins on page 1287 of the record, and after being identified, reads:

"Q. Mr. Seybold, I show you Government Exhibit 172 for identification, purporting to be a cashier's check of the First National Bank of Elgin, dated December 18, 1948, bearing number 132,224, payable to the order of Sam Achilli, in the amount of $15,000.

"I will ask you if that is a check, a cashier's check, issued by the First National Bank?

"A. It is.

2074 "Q. Was it issued on or about the date it bears?

"A. It was.

"Q. Was that check subsequently paid?

"A. It was.

"Q. Directing your attention to the reverse side of Government Exhibit No. 172 for identification, I will ask you to state, please, whether or not it bears any endorsements.

"A. It does.

"Q. What endorsement does it bear?

"A. Payable to Theodore Gordon, Sam Achilli, and then it is endorsed Theodore Gordon, and then various banks' endorsements."

That is the extent of that testimony there. That second part was on page 1288 and is completed there.

On page 1289 it is offered in evidence.

By Mr. Batter:

Q. At that point Mr. Seybold does not state what the consideration to the bank for the issuance of that check was, does he?

A. Further on page 1288—

Q. Will you answer that question, please?

2075 A. I hope to, sir.

Q. I say at that point.

Mr. Batter: Read the question, Miss Reporter.

(Question read.)

By the Witness:

A. No, he doesn't.

By Mr. Batter:

Q. Now go on.

A. Reading further on page 1288 of the record—

Mr. Russo: Just a moment. Let me understand that question. Consideration by the bank for the issuance of that check? Is that your question, Mr. Batter?

Mr. Batter: No, consideration to the bank.

Mr. Russo: To the bank, all right.

By the Witness:

A. Reading further on page 1288:

"Q. Mr. Seybold, I will ask you whether or not in so far as the records of the First National Bank of Elgin are concerned, you have testified concerning every transaction and liability of Sam Achilli during the period 1945 through 1948, inclusive."

2076 The answer is:

"A. Yes, sir."

By Mr. Batter:

Q. At that point, Mr. Seybold still does not testify what the consideration moving to the bank for the issuance of that $15,000 check was, does he?

A. I believe Mr. Seybold testified that all of these records were kept in the ordinary course of business, and the prima facie evidence is the fact that the check was issued for $15,000, consideration was $15,000.

Q. But there is no testimony as to what the consideration was for the issuance of that check, is there?

A. The entire testimony, I believe, discloses the consideration.

Q. Will you find it for me?

Mr. Russo: He said the entire testimony, Mr. Batter.

Mr. Batter: Let him find it. You mean the entire testimony of Mr. Seybold?

Mr. Russo: That is right.

The Witness: Yes.

By the Witness:

A. On page 1166 of the record, the record dis-

2077 closes a foundation for the books and records which are referred to here, which are kept in the ordinary course of business, and it being the ordinary course of business for the bank to issue cashier's checks only on the presentation of consideration of that amount, I believe you can construe from the record that it is reflected in there.

By Mr. Batter:

Q. Let me have the check, please.

A. You have it.

Q. Then it is your testimony based upon Mr. Seybold's testimony that he has testified with respect to all transactions between the bank and Mr. Achilli, that this check

of $15,000, cashier's check dated December 18, 1948, the bank would have no record of the consideration for it?

A. No, sir.

Q. But none was produced, was there?

Mr. Russo: His answer to the question was different from the second question you posed, Mr. Batter.

By Mr. Batter:

Q. Let me put it to you this way: Is it my understanding that Mr. Seybold testified and brought in-
2078 to court all the records of the bank pertaining its transactions with Mr. Achilli during the years 1946, 1947 and 1948, is that correct?

A. I believe that is part of the record. You have the record there. You can check it.

Q. But that is your understanding, is it?

A. That is my understanding, yes, sir.

Q. Then on December 18, 1948, the bank issued a cashier's check to Mr. Achilli for $15,000, which cashier's check was endorsed Pay to Mr. Theodore Gordon, and endorsed by Mr. Gordon.

Has there been produced here the bank's record of the issuance of cashier's checks to show what consideration moved to the bank for the issuance of that $15,000?

A. I believe the check itself is evidence of what was presented for that check.

2079 Q. You mean this check is evidence of what the bank got for the issuance of its check?

A. Yes, sir.

Q. And you do not believe—or do you believe that the bank has a record or register of cashier's checks issued?

A. Yes, sir.

Q. But that was not produced here, was it?

A. No, sir.

Q. Now, immediately above that item there appears an item, Marvin Affeld, $7,500, Exhibits 217, 218 and 219.

Mr. Weber, I now hand you the complete record of this trial since April 26th, at which time we had reached the stage of 206 in Exhibit Numbers, and ask you to find for me where, if anywhere, Government Exhibits 217, 218 and 219 are in evidence?

(Mr. Batter handed volumes of transcript to the witness.)

A. You are right, Mr. Batter. I am sorry. They were identified, but they were not offered or received.

Q. I wish you would agtain just check the record to be certain that all the volumes you have from the first one on are in chronological order, that is, that you have them all, that all the pages are accounted for, or
2080 all the volumes are accounted for.

(The witness examined the volumes of transcript.)

A. They apparently are.

Q. And those Exhibits are not in evidence?

A. No, sir, but the testimony regarding that transaction is in the record.

Mr. Russo: Let me see those Exhibits, please.

By Mr. Batter:

Q. So those Exhibits are not in evidence, and that statement in your Exhibit is in error, is it not?

A. The Exhibit, yes, sir.

Q. Exhibit No. 217 for identification was marked and so was 218, at page 1531 of the transcript, is that correct?

A. It was.

Mr. Russo: What was that page number, Mr. Batter?

The Witness: 1531.

By Mr. Batter:

Q. And that was during the time while Mr. Affeld was on the witness stand?

A. It was.

2081 Q. Now, then, Exhibit 219 for identification was likewise marked, was it not, during the testimony of Mr. Affeld?

A. It was.

Q. Now, directing your attention to page 1532 of the transcript reflecting the testimony of Mr. Affeld, tell me what the last question and answer on that page is. Read it to me, please, or read it into the record.

A. (Reading):

"Q. Where was that money placed, if you know?

"A. That I don't know, because Mr. Gromer wrote the check. I don't know."

Q. Now, in view of the fact that this was a check written—withdraw that.

Will you also read the first question and answer on the succeeding page?

A. (Reading):

"Q. Was it credited to your account in Mr. Gromer's office?

"A. Yes."

Q. In view of the fact Mr. Affeld testified that this was a check drawn by Mr. Gromer and not Mr. Achilli, you set up this $7,500 asset, but you did not set up any corresponding $7,500 liability, did you?

2082 A. In the light of all of the testimony in the record pertaining to that transaction, I find no record where a liability existed.

Q. Did you find any record of where Mr. Achilli had issued a check for $7,500?

A. No, sir.

Q. Then if Mr. Achilli simply extended to Mr. Affeld his credit of $7,500, how does that create an asset of $7,500 to Mr. Achilli?

A. As I recall the testimony—

Q. I have it here.

A. Thank you.

Q. I will give it to you again, Mr. Affeld's testimony.

(Mr. Batter handed transcript to the witness.)

Mr. Russo: There is some related testimony to that from Mr. Gromer, too, if I recall.

Mr. Batter: If you will direct my attention to it I will give it to the witness, counsel.

The Witness: On page 1530 of the record of the testimony of Mr. Affeld there is this answer:

"A. Well, at that time I was building my home

2083 and I needed $7,500 to complete it so I talked to Mr. Achilli about it. He said he would talk to a man by the name of Mr. Gromer and I should stop down and see Mr. Gromer the next morning. I did, and Mr. Gromer arranged for the money.

"Q. How much was that loan that you arranged for at that time?

"A. $7,500."

Government Exhibit 217 for identification was a trust deed dated November 15, 1948, in the amount of $8,250.

By Mr. Batter:

Q. That was what Exhibit for identification?

A. 217.

Q. What was 218?

A. It's a Trust Deed.

Q. What was 219?

A. A release of deed.

Q. Have you finished perusing the testimony?

A. Of Mr. Affeld, yes, sir.

Q. Now, then, is it not a fact that that transaction involved only the extension of credit to Mr. Affeld of $7,500 to be paid out against builder's or construction cer-
2084 tifications? He was building his home, was he not?

A. Will you read that question, please?

Mr. Batter: I will withdraw it. It is rather a compound question.

By Mr. Batter:

Q. The testimony shows that at that time Mr. Affeld was building a home, does it not?

A. It does.

Q. And that constituted credit placed to his account at the office of Mr. Gromer for the purpose of drawing against as construction progressed, is that not a fact?

A. Will you read that question, please?

Q. (Read by the Reporter.)

A. I do not believe it is a fact, no, sir.

By Mr. Batter:

Q. Directing your attention to page 1532 of the transcript on the direct examination of Mr. Affeld, does there appear a question:

"Q. What was the amount of money that you received upon the execution of that note?

"A. I did not receive the money. They agreed I should finish my home and turn the bills in to them in the amount of $7,500."

Is that the testimony as it reads on that page?

2085 A. It is.

Q. Now, then, in the light of that testimony is this $7,500 anything more than an extension of credit to Mr. Affeld of $7,500 to be drawn against as the building progresses?

A. At that point it may be, but when those payments are made it no longer becomes an extension of credit.

2086 Q. What was the date of the note in that case?

A. November 15, 1948.

Q. Does the record show that any of that money was drawn against during the year 1948?

A. I can't recall at the moment, sir, where it is in the record.

Q. Now then, in setting up that $7500 asset, did you set up a corresponding liability of $7500 to meet the obligations as they were to be drawn upon?

A. No, sir.

Q. Simply created another asset of $7500?

A. Yes, sir. I heard no testimony as to a liability against that asset.

Q. Did Mr. Affeld not testify:

"I did not receive the money. They agreed I should finish my home and turn the bills in to them in the amount of $7500"?

A. He did.

Q. Isn't that testimony?

A. All right. On November 15, 1948, a trust deed was in the hands of Mr. Achilli in the amount of $8250. He had an asset at that date of $82.50.

Q. Is the trust deed an asset of his or is it security?

2087 A. It is a note. It is security.

Q. Now with a note of $8250, did he have a liability?

A. To my knowledge, no.

Q. You say that despite this testimony,

"They agreed I should finish my home and turn the bills in to them in the amount of $7500"?

A. Yes, sir.

Q. And the recognition of bills to the extent of $7500 is not, in your mind, a liability?

A. They are to a—depending upon the time on which they are paid, yes.

Q. Aren't they a liability at the time you extend that credit?

A. At the time you accept them, they are a liability.

Q. But you set up an asset here of $7500 and no corresponding liability at all, did you?

A. No, sir.

Q. I see.

Now, Mr. Weber, the seventh figure down under the column 12/31/48 is $17,898.48, and reading from right to left under December 31, 1947, there appears the figure of $17,284.01.

Then under Exhibit Numbers you have 113, 114, 2088 115, 116 and 117. Under Witne s, you have Robert E. Wales, and under Asset, you have Red Lion.

Directing your attention to Government Exhibits Nos. 113, 114, 115 and 116, are those documents made out in the name of Red Lion, Inc.?

Mr. Russo: There is another one, Mr. Batter, Exhibit 117.

Mr. Batter: Yes.

By Mr. Batter:

Q. First directing your attention to Government Exhibit No. 113, is that signed Red Lion, Inc. by Sam Achilli?

A. It is.

Q. Directing your attention to Government Exhibit No. 114, is that signed Red Lion by Sam Achilli?

A. It is signed Red Lion, Sam Achilli.

Q. Directing your attention to Government Exhibit No. 115, composed of three sheets, the second page being a duplicate of the first, are the first, second and third pages marked Red Lion?

A. They are.

Q. And directing your attention to Government Exhibit No. 116, is that marked Red Lion, Inc. by Sam Achilli?

A. It is.

2089 Q. Now directing your attention to Government Exhibit No. 117, composed of five sheets, is it not a fact that in each instance on these five sheets it is entitled Red Lion, and nowhere thereon does the name Sam Achilli appear?

A. That is true.

The Court: Ladies and gentlemen of the jury, we will now recess so the Court may take care of the motion call this morning.

(Recess taken.)

2090 (Whereupon the following further proceedings were had herein, in open Court in the hearing and presence of the jury:)

The Court: You may proceed.

Mr. Batter: May I resume, your Honor?

The Court: Yes.

Mr. Batter: Will the Reporter please read the last question and answer, so I can pick up my train of thought.

The Court: Yes.

The Reporter: The last question and answer is now going through the typewriters in the office, Mr. Batter. We can get it for you in just a minute, if you desire.

Mr. Batter: I would appreciate it if you would, please.

(There was a short interruption, after which the following further proceedings were had in open court in the presence and hearing of the jury, to-wit:)

Miss Kennedy: The last question was:

"Q. Directing your attention to Government Ex-
2091 hibit No. 117, composed of five sheets, is it not a fact that in each instance on these five sheets it is entitled 'Red Lion' and nowhere thereon does the name 'Sam Achilli' appear?

"A. That is true."

Mr. Batter: Thank you.

By Mr. Batter:

Q. Now, Mr. Weber, I direct your attention to Government's Exhibit No. 1, the individual tax return of Mr. Achilli for the year 1946.

Directing your attention to Schedule D thereof under the heading, "Long Term Capital Gains and Losses" does that Exhibit contain an item, "Brick residence purchased in December, 1945, sold in December, 1946, cost $11,000", amongst other things?

A. It does.

Q. Where does that asset of $11,000 appear in your net worth exhibit?

A. I believe that is the property located at 167 Liberty Street.

Q. You show that item under a contract of sale on December 31st, 1946. Exhibit D to which I again draw your attention shows that it was owned by the Defendant
2092 on December, 1945.

Do you show that in your net worth statement for December, 1945?

A. No, sir.

Q. Mr. Weber, I direct your attention to Government Exhibit No. 2, Mr. Achilli's individual tax return for the year 1947, and to miscellaneous deductions appearing on page 3.

A. Yes.

Q. Is there an item there, "Development expense on oil well paid Lichlyter Oil Company, Evansville, Indiana, $4,113.40"?

A. There is.

Q. Have you made an investigation to find out when that asset was acquired?

A. I did.

Q. When was it acquired?

A. The development expenses were paid during the years 1947.

Q. In that same bracket there is an item, "Investment on oil well found worthless and abandoned, McGregor Oil Company, Fairfield, Illinois, $5,000.00.

When was that asset acquired?

A. 1947.

2093 Q. What record do you have of that asset being acquired in 1947? Do you have your work papers here?

A. No, I do not.

Q. Are you able to establish in any way in the form of documents the acquisition of that asset in 1947?

A. No, sir.

Q. Now, Mr. Weber, directing your attention to Government Exhibit No. 3, the individual income tax return of Mr. Achilli for the year 1948, and specifically to Schedule D, Schedule of Gains and Losses from Exchanges of Sale of Property, is there an item there, "Sale of stock in Red Lion acquired in 1945", showing a cost basis of $4,673.18?

A. There is.

Q. Do you have such an item in your net worth statement for December 31st, 1945, 1946 and 1947?

A. No, sir—oh, excuse me. Yes, sir.

Q. Where do you have it?

A. It is included in the Red Lion under W. A. Turpin, $18,400. Mr. Turpin testified that that was the total amount paid by Mr. Achilli for the land, buildings, stock and fixtures.

Q. Let me again direct your attention to Exhibit D, attached to the 1948 return. Does that not read,

2094 "Sale of stock in Red Lion"?

A. It does.

2095 Q. Mr. Weber, I hand you Government Exhibit 273 for identification, and ask you whether there appears therein a special meeting of shareholders of Red Lion, Inc., under date of November 15, 1945, wherein the list of stockholders appears as Sam Achilli, 280 shares; Ruth Achilli, 10 shares; Harriet L. Turpin, 10 shares.

A. There does.

Q. Despite that record, you have not recorded in your net worth statement the ownership of stock on December 31, 1945, in Red Lion, Inc., have you?

A. I have.

Q. Where?

A. In this figure of $18,400.

Q. That is not entitled, Red Lion, Inc. Stock, is it?

A. It is entitled, Red Lion. It includes the stock.

Mr. Batter: May I have Exhibit 84?

Mr. Russo: What is Exhibit 84? You have got everything over there.

Mr. Batter: Oh, excuse me.

By Mr. Batter:

Q. Directing your attention to the testimony of Mr. Turpin, which begins on page 1014 of the record—

Mr. Russo: Page 1014?

2096 Mr. Batter: 1014. That is April 20th.

By Mr. Batter:

Q. Will you tell me whether the subject matter of the discussion or the testimony of Mr. Turpin is Government Exhibit 84 or whether it covers more than that?

A. (Witness examines transcript.) It does.

Q. What else does it cover? Does it cover the sale of Red Lion stock separately from Exhibit 84?

A. No, sir.

Q. It does not?

A. No, sir.

Q. Now then, directing your attention to Government Exhibit No. 84, would you tell us what that document is and whether that makes provision for the sale of capital stock of Red Lion, Inc.?

2097 A. This is an agreement between Sam Achilli, William A. Turpin and Harriet L. Turpin, dated November 10th, 1945, to convey all of the real estate, giving its legal description, for the sum of $18,400, and also to convey—it reads:

> "The party of the first part agrees to deliver possession to said second party of said premises and including all the furniture, fixtures and equipment in said premises and also including all bottled goods then on hand in said premises."

It appears to me, Mr. Batter, that there is nothing left to the corporation after this has been conveyed.

Q. It may appear that way to you, but there is no provision in there for the sale of the capital stock, is there?

A. No, sir. Excuse me. There is one more thing I wanted to mention in regard to this.

Q. All right.

A. It says:

"In case the party of the second part defaults in
2098 his performance, the party of the second part hereby waives all rights to the possession of or income from said premises pending any foreclosure proceedings until the period of redemption from any sale thereunder expires, and agrees to pay, according to the statute, double the rental value of said premises to the receiver."

Q. So that if there was a tenant, the Red Lion, Inc. was a tenant, that rent provision would be the rent from the Red Lion, Inc., would it not?

A. Will you read that question, please.

Q. (Read by the Reporter.)

A. It would.

By Mr. Batter:

Q. Now, then, Mr. Weber, drawing your attention to the bottom of page 2 of Exhibit No. 280 directly above the total line there appears an item entitled, "Less: Account Payable to E. Gromer Omitted Partnership Income", and under the column 1946 there appears the figure $7,477.71, under the column 1947 there appears the figure of $18,065.77 and under the column December 31, 1948, there appears the figure of $10,534. Just what is that item?

2099 A. That, sir, is one-half of the specific items of unreported income shown on Exhibit 279 that has been testified to here and represented what can be construed as a legal liability of Mr. Achilli at this particular time, December 31st, 1946, 1947, and 1948.

Whether it is a liability or not is a question that can be argued, but we have given him consideration of that amount and have placed it in there for his benefit rather than for his detriment.

Q. That is your opinion?

A. Yes, sir.

Q. Now, then, to the extent that the figures on Exhibit 279 should vary from the figures that are actually shown there, these figures would correspondingly vary, wouldn't they?

A. If the figures on Exhibit 279 were decreased, the net additional income under the net worth method of computing it would increase, and if those figures correspondingly on Exhibit 279 increased, the net figure under this method would decrease.

Q. Let me put it this way: If the totals appearing on Government Exhibit No. 279 were found to be overstated, then the credit that you give him would be reduced, would it not?

2100 A. It would.

Q. Where in the testimony do you find any warrant for the placing of these three figures, $7,477.71 in 1946, $18,065.77 in 1947 and $10,534 in 1948, other than in your own testimony?

A. Nowhere, sir.

Q. Nowhere. As a matter of fact, Mr. Gromer testified, did he not, that he had no knowledge of any omitted partnership income at the time that he prepared the returns?

A. He did.

Q. Now, Mr. Weber, you are an income tax expert?

A. Yes, sir.

2101 Q. In your experience as an income tax expert, have you ever come in contact with the case of Commissioner of Internal Revenue *v.* Wilcox, 327 U.S. 404, 66 Supreme Court, 546, decided by the Supreme Court of the United States on February 25, 1946?

Mr. Russo: I object, if your Honor please. Whether he has read Wilcox *v.* the Commissioner doesn't have any bearing on the issues. That is a question of law for the Court to determine, not for the witness.

The Court: The objection is well taken.

Mr. Batter: Nevertheless, your Honor, he has presented figures in there, and I am testing his knowledge respecting the figures that he has put on that exhibit. He has taken one-half of the sums there.

The Court: I don't think that would be a proper method of testing him. The objection is well taken.

Mr. Batter: No further cross examination.

2102 *Redirect Examination by Mr. Russo.*

Q. Mr. Weber, on cross examination Mr. Batter asked you this question:

"Did Mr. Cons—"

That is in relation to a transaction involving Mr. Studt, where he was questioning of challenging the difference between $509 and $510, and he asked you this question:

"Did Mr. Cons enlighten you with respect to that $540 difference?"

Now, I ask you, did Mr. Achilli ever enlighten you about any of the differences concerning which there has been testimony here?

A. No, sir.

Q. Do you know Mr. Cons?

A. Yes, sir.

Q. Do you know whether or not he is still employed by Highland Motor Sales?

A. As of November of last year, Mr. Cons told me that he was the sales manager of Highland Motor Sales. As late as a week ago Saturday I saw him on the premises of Highland Motor Sales, and the same day I saw him driving an automobile containing the dealer's license
2103 plates of Highland Motor Sales.

Q. Now, Mr. Batter asked you about the item, "Less: Account payable to E. Gromer omitted partnership income."

I ask you, had that item not been reflected there, what would have been the effect on the total income tax liability of Mr. Achilli?

A. It would have been increased for each of the years December 31, 1946, 1947 and 1948.

Mr. Batter: I object to that and ask that it be stricken. It is an opinion directly contradictory with the case of Wilcox that I started to inquire about before. I think the Court should not permit the witness to testify regarding opinions.

Mr. Russo: I am not asking him to testify concerning any legal opinion. I am asking him to state the effect of giving—

The Court: The objection is overruled. Proceed.

By Mr. Russo:

Q. Will you repeat that answer?

A. The net worth increase for each of the years would have increased during the years 1946, 1947 and 1948
2104 to the figure that is directly above and entitled, "Additional Income."

Q. And what effect would it have had on his ultimate tax liability?

A. It would have increased correspondingly.

Mr. Russo: That is all, Mr. Weber.

Recross Examination by Mr. Batter.

Q. Mr. Weber, apropos to the question and answer just propounded, if the correct legal determination of the situation between Mr. Gromer and Mr. Achilli should be that these funds are in fact a liability as of that date, would not the figures appearing at the foot of page 2 of Exhibit 280 be doubled and decrease the net worth?

Mr. Russo: If your Honor please, as the question is put it calls for a legal conclusion.

Mr. Batter: I don't think any more so than his did.

The Court: He may answer.

The Witness: Repeat the question, please.

(Question read.)

2105 Mr. Russo: I will renew my objection, if the Court please:

The Court: The objection is sustained. Counsel may inquire as to any other method, but as to assuming it is the correct legal method, I think that is objectionable. The objection is sustained.

By Mr. Batter:

Q. Mr. Weber, if instead of taking off, at the foot of page 2 of Exhibit 280, one-half the sum involved in the totals on Exhibit 279, you were to take off the total sum, that would then decrease the net worth, would it not?

A. Yes, sir.

Q. And likewise decrease the taxable net income?

A. Yes, sir.

Q. And likewise decrease any tax owing if there should be one?

A. Yes, sir.

Mr. Batter: That is all.

Mr. Russo: That is all, Mr. Weber. Thank you.

(Witness excused.)

Mr. Russo: If your Honor please, because of the 2106 tremendous volume of exhibits that Government counsel had occasion to handle, I don't think it is at all remarkable that I forgot to offer Exhibits Nos. 217, 218 and 219.

I offer them now, if your Honor please, nunc pro tunc.

Mr. Batter: Your Honor, they were offered and not admitted. The ruling was withheld.

I have the same objection to them now that I had to them then, with the further objection that Government has closed its case and it is improper to offer them now.

The Court: What were the reasons they were objected to in the first instance?

Mr. Russo: I am informed, if your Honor please,—I don't have the recollection myself—that at the time they were offered, the Court reversed its ruling.

Mr. Batter: That is correct.

Mr. Russo: It passed me up inadvertently, and I now move, if your Honor please, again that they be received nunc pro tunc.

The Court: If I could have a copy of the record indicating what the objections were.

Mr. Batter: That is what I am looking for, your Honor.

2107 The Court: Oh, fine.

Mr. Batter: Here it is.

Mr. Russo: It is on page 1535, may it please the Court.

The Court: The jury may take a recess and the Court will discuss this matter with counsel.

(Whereupon the following proceedings were had herein, out of the presence and hearing of the jury:)

The Court: I withheld them on the basis of Government's statement that they would connect them up. As far as the connection, the only thing I recall is perhaps there is some testimony of Mr. Gromer's about them.

Mr. Batter: There isn't that I can recall.

Mr. Russo: Very well, your Honor. I will withdraw the offer.

The Court: All right. They are withdrawn then, those three exhibits.

Are you through now?

Mr. Russo: Yes, your Honor. We rested the other day.

Whereupon The Government Rested Its Case In Chief.

Mr. Batter: If the Court please, I have a motion 2108 for judgment of acquittal. I am going to sign it and submit it to the Court in just one minute.

I would like to argue that motion now in open court here or in chambers. If the Court will give me ten minutes to assemble my thoughts.

The Court: All right, that will be agreeable.

Mr. Russo: I suppose I will get ten minutes to compose mine, also.

The Court: I am sure you will have the same.

(Recess taken.)

(Whereupon the following further proceedings were had herein in chambers and outside the presence and hearing of the jury:)

Mr. Russo: Let the record show, Mr. Reporter, that I have just been served with a copy of the motion for judgment of acquittal.

Mr. Batter: Your Honor, I now file a motion for judgment of acquittal, and in support thereof I am going to make my argument quite short and very much to the point.

I do not intend to reargue at this point the question of suppression of evidence or the right of the Government to proceed on a net worth basis. I have raised the points in my motion, and the Court has heard me, and I have nothing to add to what has been said before.

I am going to address myself primarily to the failure of the Government to make out a prima facie case,
2110 and the fact that the evidence now shows that the net worth method is not warranted as a method of proof, primary proof, as distinguished from corroborative proof where the specific items as the Government has developed them in Government Exhibit 279 are such that the income can be determined without resort to the net worth method.

If the net worth method is to be used simply as corroboration, that is a different thing, and here it is surprising how closely the specific items listed on Government Exhibit 279 approximate the net worth as it is developed on Exhibit 280.

Now, then, specifically addressing myself to Government Exhibit 279, it utterly fails to place these moneys in the hands of the Defendant. We have had over forty witnesses produced by the Government testifying to paying various sums for these cars, and paying them to various persons.

2111 The testimony has been vague in so far as it has been supported by documents. In the case of a series of automobile dealers, none have had any records, and where there were some records they were very sketchy records produced by the Government as a result of photostats taken before the records were lost, but the essential point to me is this, that not only does Government Exhibit 279 reflect items that only by the furthest

stretch of the imagination can be alleged to be additional income, but also the testimony shows that it has passed through a number of hands.

Sometimes it passed directly to Achilli, according to the testimony. Sometimes it passed to Cons. There is no evidence whatsoever that Cons turned in every nickel he got or that he got every nickel that the witnesses have testified they paid to him. These witnesses are entirely uncorroborated.

Moving on from Cons, we have the bookkeeping
2112 organization and the books not reflecting this income, assuming that it reached that far. Whether Cons was an embezzler or whether the bookkeeper was an embezzler, we do not know. That is part of the burden of proof the Government bears to carry this into the hands of Mr. Achilli, and it has not been done.

There is just too big a gap between the testimony of the various buyers of cars and the question of whether or not they really paid it, then to whom they paid it, and the channels the money moved through, to be in a position to charge it as income.

Now, diverting for a moment to Government Exhibit 280, one of the cardinal rules of a net worth statement as expounded by the Supreme Court in the Holland and related cases last December, is that it has got to have a reasonable degree of accuracy at the beginning and it has got to have a reasonable degree of accuracy
2113 at its close and at the varying points in between to the extent that that can be done.

This Exhibit No. 280 lacks all probative value. It does not include all of the assets either at the beginning and it includes things at the end that are in fact not assets. It omits liabilities that are in fact liabilities and it places upon the Defendant a net worth that has not been established.

I think the cross examination has clearly shown the liberties taken by the witness in preparing this statement in order to arrive at net worth at all that would result in additional income.

Bear this in mind, your Honor: The Supreme Court in the Holland case specifically charges that where the Government fails to investigate the leads, the Court may assume them to be true and take the case from the jury.

Here Exhibit 1, which is the tax return for 1946, shows

the sale of a piece of property that on the tax re-
2114 turn shows was acquired in 1945, a brick residence.
It does not appear in the net worth statement at all.

With respect to two items of oil investments written off in 1947, the witness testified orally, but does not have his papers and does not have anything at all to support his thought that they were acquired in 1947.

The investigation required by the Supreme Court as it is set forth in the Holland case and related cases has not been made here.

Now, then, just moving along, we have such ridiculous items as the setting up of an asset of $35,000 with a corresponding $23,000 debt, just that simply and just that easily. There is no accounting at all for the premise or the basis on which the bank issued a check for $12,000 in excess of the loan.

We have the item of $17,598.48 in connection with the
Sun-Ray Electric. These contracts reflected in those
2115 Exhibits are specifically with the corporation.
I think now the Court is more enlightened than it was when it made some of these rulings as to the fact that there is a separate corporation there. Whereas the place is known as the Red Lion, there also is a Red Lion Corporation.

As a matter of fact, the prosecution has introduced an Exhibit, 273-A, of some of the minutes of that corporation.

We have shown that there was omitted entirely from the opening net worth the stock of that corporation owned by the taxpayer. That was developed on cross examination this morning from the minute book there and from the contract, under the cover of which the Government sought to come, and that contract covers purely the purchase of nothing at all about an operating company.

That item is important, too, for this reason, because in 1948 half of that stock was sold, so that we have the
omission from the opening net worth of 100 per cent
2116 of the stock, the conversion of the assets resulting
from the sale of 50 per cent reflected in the assets of the taxpayer at the end, and the omission of the other 50 per cent of the stock that he still held.

Then we have this $15,000 cashier's check issued to a

Mr. Theodore Gordon by a bank here, and whether by design or by accident, or whether it was because other names were used than the taxpayer's, the source of that check has not been shown.

Now, without reflecting upon the Government's efficiency, obviously if you are going to set up an asset of $15,000 you are going to say where it came from and how it resulted. None of that has been shown.

Then we have the further ridiculous situation on evidence that has now been stricken, and the exhibits are not in evidence, of a $7,500 credit set up for Mr. Affeld. Not a nickel of that has been shown to have been expended by December 31st, 1948, and in the net
2117 worth statement there appears an asset of $7,500 and no corresponding liability.

These items of that nature are enough, in the years 1948 and 1946, if they are considered as amendments or revisions or changes or adjustments of the net worth statement, to completely wipe out any deficiency.

Now, there is one other point that is extremely important. Despite the fact that Earl Gromer testified that when he made these returns he believed them to be true and correct and had no knowledge of any thievery, and apparently the Government believes him, too, because he has not been indicted, the Government in its net worth statement here sets up half of the sums it develops on Exhibit 279 and have adjusted the net worth accordingly.

I submit, your Honor, that under the case of Commissioner *v.* Wilcox, 327 U.S. 404, and 66 Supreme Court 456, decided by the Supreme Court of the United
2118 States with only one dissenting opinion in 1946—and five of the judges who decided that case are still on that bench—they held that an embezzlement where not condoned is not income to the embezzler.

From page 405 I read as follows:

> "The sole issue is whether embezzled money constitutes taxable income to the embezzler under Section 22(a) of the Internal Revenue Code."

And on page 408 the Court analyzes the law as follows:

> "Taxable gain is conditioned upon one, the presence of a claim of right to the alleged gain, and two, the absence of a definite, unconditional obligation to

repay or return that which otherwise would constitute a gain . . . "

and they held in that case that the embezzlement was not income to the embezzler.

Now, the Uniform Partnership Act of the State of Illinois is very clear. If you will indulge me a moment, I would like to find that reference.

2119 Now, assuming for this purpose that the proof is such that these funds are traced into the hands of and lodged in Sam Achilli, the law of the State of Illinois controlling partnerships and the law of income taxation as laid down by the Supreme Court in U.S. *v.* Wilcox, does not make any of that sum income.

Section 21 of the Uniform Partnership Act, Chapter 106½ of the Illinois Revised Statutes, reads:

"Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

Section 24 of the same Chapter reads:

"The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to
2120 participate in the management."

Section 25, referring to partnership property, reads:

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

"(2) The incidents of this tenancy are such that:

"(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners."

Now, then, Section 210 of Title 38 of the Illinois Revised Statutes entitled, "Embezzlement by Officer, Clerk, Agent, Servant, Solicitor, Broker or Apprentice. Penalty, reads:

"Be it enacted by the People of the State of
2121 Illinois, represented in the General Assembly: if

any officer, clerk, agent, servant, solicitor or broker of any incorporated company, or if any clerk, agent, servant, solicitor, broker, apprentice or officer of any person, co-partnership, society or association, receiving any money, substitute for money or thing of value whatsoever in his fiduciary capacity, shall embezzle or fraudulently convert or appropriate the same or any part thereof to his own use, or with intent to embezzle, shall take, secrete or otherwise dispose of, or fraudulently withhold, appropriate, lend, invest or otherwise use or apply any money substitute for money, or thing of value received by him in such fiduciary capacity, or the portion thereof, belonging to his principal, employer or fiduciary, without the consent of the company, person, co-partnership, society or association for or on account
2122 of which the same was received by him, he shall be deemed guilty of larceny and shall be punished as provided by the criminal statutes of this State for the punishment of larceny, irrespective whether any such officer, agent, clerk, servant, solicitor, broker or apprentice has or claims to have any commission or interest in such money, substitute for money, or thing of value so received by him."

2123 Now Defendant's Exhibit 5, which is the complaint of Earl H. Gromer in Chancery, Circuit Court of Kane County, General No. 51-487, sets forth the following allegations:

"6. That from on or about the 30th day of December, A. D. 1944, up to and including the present time, the said defendant"

Which is Sam Achilli—

"has wrongfully done or neglected to do the following:

"(a) Has over the plaintiff's repeated objections thereto, employed persons whose presence in and about the premises of said firm and in their conduct of the firm's business was and now is detrimental to the plaintiff and to said partnership.

"(b) Has paid to such employees out of partnership funds exorbitant and unearned wages, salaries and commissions to the detriment and loss of the plaintiff and said partnership.

"(c) Has withdrawn and converted to his own
2124 use large sums of money, the property of the partnership, without consulting the plaintiff or procuring his assent thereto to the detriment and loss of the plaintiff and said partnership.

"(d) Has paid out of partnership funds exorbitant and unnecessary sums of money for entertainment, travelling, auditing fees and miscellaneous expenses of which no detailed record has been kept by the said defendant to the detriment and loss of the plaintiff and said partnership.

"(e) Has withdrawn as remuneration for his services over the objection of plaintiff and without his assent funds and moneys from said partnership in excess of the amount fixed and agreed upon by said partners.

"(f) Has failed to devote his full time to the operation of said partnership business as agreed by the parties hereto and in violation of said partnership agreement has engaged in the buying and selling of new and used automobiles for his sole benefit and profit to the detriment and loss of the plain-
2125 tiff and said partnership.

"(g) Has repeatedly misled the plaintiff relative to the said partnership business by misrepresentation and erroneous answers to questions propounded by the plaintiff to the detriment of the plaintiff and the said partnership.

"(h) Has failed to account for the proceeds of the sales of partnership property despite plaintiff's repeated requests therefor to the detriment and loss of the plaintiff and said partnership.

"(i) Has engaged in the business of 'Wholesaling Cars' contrary to good business practices and despite plaintiff's repeated objections thereto to the detriment and loss of the plaintiff and the said partnership.

"(j) Has failed to account to plaintiff for commissions, bonuses, reserve accounts, payments and other items of income due the said partnership to the detriment and loss of the plaintiff and said partnership.

"(k) Has without plaintiff's knowledge engaged
2126 in the practice of selling new and used automobiles

in areas covered by other Chrysler Corporation franchises thereby and by reason thereof violating the terms of the said partnership's franchise with said corporation which violation constitutes grounds for revocation of said franchise by the said corporation.

"(l) Has refused despite plaintiff's repeated requests therefor, to account for and deliver to plaintiff, plaintiff's one-half (½) of the moneys on deposit in the Union National Bank and Trust Company of Elgin, Illinois, an account known and described by said partners as the 'Speedway Tucker Sales Account'.

"(m) Has threatened to dispose of other partnership assets by sale or otherwise and not account to the plaintiff for his share thereof to the detriment and and loss of the plaintiff and said partnership."

Therefore we have here. assuming that these funds can be considered as traced in the hands of Mr.
2127 Achilli, an embezzlement that has not been condoned but that has been published and spread upon the public records of the State of Illinois in 1951, four years after the years here at issue.

So that we find ourselves in this position. In the first place, the evidence regarding these alleged sums of money, to my mind, does not make out a prima facie case.

In the first place, the witnesses themselves have been very weak.

In the second place, it has left a gap of the salesman and the bookkeepers between the placing of this money into the hands of the defendant.

Let's carry this just a little bit further.

Exhibit 279 does not meet the requirements laid down by the Supreme Court in the Holland and related cases in this respect. The Supreme Court states that the Government not only must show an increase in net worth, but must show a likely source of income from which such net worth can arise.

The remarkable thing about this case and Exhibit
2128 No. 280, to the extent that it can be relied upon at all, is that cash payments have not been traced into the acquisition of any of these assets. Every transaction that appears in there, be it purchase or sale, has been

exposed to the light of day with attorneys, checks, the banks having records, the attorneys having records.

We haven't had here, your Honor, the surreptitious accumulation of cash and then the conversion of that cash into an asset. We haven't had the usual case that you run into where a defendant buys property with large sums of cash that he extracts from his pocket. That is entirely missing here.

The Government cannot point to a single asset in this Exhibit 280 where Mr. Achilli has used cash to acquire these assets. It has been check transactions all the way through.

Mr. Gromer has testified extensively on it. It has been a case of the garage paying the money or of Gromer paying the money or making arrangements with a bank and the bank paying out the money. I have never
2129 seen a case so clean from the angle of the source of the use of the means of acquiring assets.

You can separate Exhibit 279 from Exhibit 280 completely. I believe that after the cross examination that has taken place, Exhibit 279 does not meet the requirements of a prima facie case of any money falling into the hands of Mr. Achilli.

But assuming that it does, it does not meet the requirement of the Supreme Court nor does it meet the premises required for Exhibit 280 because those moneys have not found their way into these assets.

The witness Weber has testified that he examined the safety deposit box of the defendant, and found no money there. If the moneys reflected in Exhibit 279 are in fact extractions laid on the shouders of the defendant, they are somewhere else. They are not here. They don't fit into this net worth.

To summarize, there is a complete absence of a prima facie case here. There is no premise to proceed on
2130 the basis of a net worth case.

The specific items of proof have not been shown to the extent that the specific items relied upon meet the requirements of the Supreme Court. They are not traceable into Exhibit 280.

Exhibit 280 fails to meet the requirements of the Supreme Court in so far as at the beginning there are omissions from the assets, which under the rule of law laid down by the Supreme Court, this Court is charged

with accepting as true, since the Government has failed to trace or investigate them. At the end we find assets there that are just ridiculous. They are not assets.

On those grounds, your Honor, we move for judgment for acquittal for all years.

Mr. Russo: Mr. Batter argues that there is not sufficient evidence to warrant conviction, that the Government has failed to prove facts to constitute a prima facie case, has failed to prove any wilful intent on the part of the defendant to evade taxes—

Mr. Batter: May I interrupt one moment? I should have added to my argument that one of the neces-
2131 sary elements the Government must prove is wilfulness. That has not been done here.

Mr. Russo: As a matter of fact, the entire thing is unsupported by counsel's argument.

In so far as the weight of the evidence is concerned, I respectfully submit that your Honor, who has sat on that bench for nearly four weeks, has listened to it, and there is more than sufficient evidence to warrant the defendant's conviction. The Government has more than made a prima facie case.

On Item 3, that the Government has failed to prove any wilful intent on the part of the defendant to evade taxes, the evidence of intent is overwhelming. The suppression of sales made by Highland Motor Sales, the suppression of income, the receipt by the defendant personally of black market money that is not reflected on those records, and there are others that don't occur to me at the moment.

With respect to the argument that Government has failed to prove that the method of accounting em-
2132 ployed by the taxpayer does not clearly reflect his income, I submit, if your Honor please, that there is this in evidence. The books that Mr. Batter is talking about are the partnership books. The books to which Article 4 relates are the individual books.

Mr. Weber testified that he had a conversation with Mr. Achilli, and Mr. Achilli told him that he didn't have any individual books. So there is nothing on which that can be based because there is nothing from which anything reflecting his income can be founded.

With respect to Mr. Batter's oft reiterated argument

on the method of proof, I don't think that it is necessary now to go into that because the Court has decided that several times.

As to the statement that Government failed to prove it necessary to resort to net worth and expenditures method in adducing his proof against the defendant, it had no other alternative. The defendant didn't have any individual books.

"The Government in introducing proof of the
2133 contents of the defendant's books and records did violate the defendant's rights under the Fourth and Fifth Amendments."

That has previously been disposed of by the Court. One, there are no individual books of the defendant in evidence. Two, the evidence secured by Special Agent Weber from the partnership books, those books were made available to him willingly, and there is no violation there. The Court has already passed on that.

Mr. Batter argues that we have failed to establish a likely source of alleged increased net worth as currently taxable income.

We have got more evidence of source in here than you can shake a stick at. We have the suppressed sales and suppressed income from Highland Motor Sales for each of the three years. We have evidence of gambling in 1946, from which the jury can infer whether or not there was income.

We have evidence of real estate transactions where
the defendant sold certain properties. Two occur to
2134 me now. One was a purchase by Dr. Swainson and another was the purchase of a piece of property by Mrs. Wagner. There is evidence of oil investments.

All of those are sources from which the jury can infer that the current taxable income in each of those years could have had its source. We don't have to prove the very source of where a dollar came from. All we have to point out to the jury is the likelihood that there is a source from which that increased net worth can come.

Mr. Batter states the net worth computation adduced by the Government is composed of acquisitions made by check and bank transactions; none has been traced to the cash allegedly unreported.

We don't have to trace that cash to anything except

to point to a source from which it could have come from Mr. Achilli, whether it was cash, currency or bank checks or other transactions. That is immaterial, and furthermore, that is a question for the jury.

Now on this question of—Oh, he said something
2135 here about leads, and he says the Government must take as true what he says because the Government failed to follow leads. He misread the Holland case.

What Holland says is this:

> "When the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. Such refutation might fail when the Government does not track down relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence."

The defendant here refused to talk to the Agent Weber. When the investigation developed that he was cheating his partner, suppressing the sales, suppressing income, he had nothing further to say to the Agent. We followed every lead. Every lead that has been testified to was initiated and discovered and followed out by the
2136 Agent without any help from the taxpayer.

There was another thing that I wanted to read to your Honor. That is connected with the net worth technique concerning which the Court says this:

> "As we have previously noted, this is not the first net worth case to reach this Court. In United States *v.* Johnson, supra, the Court affirmed a tax-evasion conviction on evidence showing that the taxpayer's expenditures had exceeded his 'available declared resources.' Since Johnson and his concealed establishments had destroyed the few records they had, the Government was forced to resort to the net worth method of proof."

Here there was no destruction of individual records. There just never were any existent.

> "This Court approved on the ground that 'to require more * * * would be tantamount to holding that skilful concealment is an invincible barrier to

proof.' * * * Petitioners ask that we restrict the Johnson case to situations where the taxpayer has
2137 kept no books. They claim that Section 41 of the Internal Revenue Code expressly limiting the authority of the Government to deviate from the taxpayer's method of accounting, confines the net worth method to situations where the taxpayer has no books or where his books are inadequate. Despite some support for this view among the lower courts—citing cases—we conclude that this argument must fail. The provision that the 'net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer,' refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years. * * * The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except in so far as it calls upon taxpayers to account for their unexplained income. Petitioners' accounting system was appropriate for their business purposes; and, admittedly, the Government did not detect any specific false entries therein.

2138 This is exactly the situation here. When the investigation started at the outset the Agent found that the income tax returns filed by the Defendant were in perfect accord with the partnership returns of income that had been filed by the partnership.

Now with respect to embezzlement and to the case of Commissioner *v.* Wilcox, we have here a situation, if your Honor please, where there are two partners, each with a 50 per cent interest.

Under the law, whether it be statutory in Illinois or under the common law, a partner cannot steal from himself, no more than he can sue himself. We have taken that into consideration in the computation of the net worth increases.

We have shown that the specific items that have been adduced here in evidence totalled twice $7,477.71, twice $18,065.77; and twice $10,534.00.

Now the reason for that is this: That is partnership income, and the defrauded partner is liable to the

2139 Government for his share, his 50 per cent interest of the specific items of unreported income that the Government has been able to prove.

We show the entire amount that we have proved as the money he has spent in the acquisition of these assets, but we say he is only taxable for half. Gromer is taxable for the other half. So we give Gromer his credit and we only charge him with half of it.

So the situation in Commissioner *v.* Wilcox has not developed here.

There is no question of embezzlement because he had a right to make those sales and to take in that money. The only obligation he had was to account to Gromer. Whether or not he has accounted to Gromer in years subsequent thereto has no bearing here.

We are saying we have proved in 1947 specific items of unreported income of $20,000. Gromer is liable
2140 for half. We will give him that half and charge him only for the half that we were able to prove.

In so far as the rest of his argument is concerned, I think it is perfect nonsense. The Government has made a prima facie case, and I think that everything else is a matter for the jury.

Mr. Batter: Now, if your Honor please, I want to make a very short reply dealing with four subjects.

First, the individual books of the taxpayer. The Courts have held in numerous cases that where all the taxpayer's affairs are in substance reflected on the books of his business, that in fact the books of his business are his books. The Tax Court has met that issue a number of times.

Here we have a situation where the taxpayer's affairs have either been run through the partnership—constantly we find in the testimony of Gromer, "That was paid by the partnership, that was paid by the partnership, that was paid by the partnership, that was paid by
2141 garage, that came out of garage money.

Separated from that, we have in Gromer's books all of these transactions. So that the requirement of individual books has been met.

2142 Now, then, with respect to the issue of gambling, the taxpayer's return for 1946 shows that in December of 1946 he sold the equipment of that pool hall.

In another schedule of the 1946 tax return it shows that he had a rental income of $1,000 from that before the sale, the rental income, the rental of the equipment.

When he made the sale, he sold it for $3,300. The very thought that a property that can be sold for only $3,300 but that has yielded during the only year the question arises, which is 1946, a gross rental of $1,000, shows the limits and strains imposed upon the Government in its endeavor to bring gambling into this picture.

What did we have there? A penny ante game amongst a few neighbors with a chip going into the pot, and the result and outcome of it all was that it would only bring on the market for the year 1946, $3,300, and even that was so poor that in the succeeding year a further loss had to be taken because the person that bought it was un-
2143 able to meet his obligations at that nominal figure, so this question of gambling income which affects only the year 1946 is like straining at a gnat's eyelash, to use that as a source of income.

The Government says that once this case reached the stage of thorough investigation that Mr. Achilli refused to discuss the matter with them and refused to give them any leads.

Your Honor, the leads I have talked to you about are right in evidence by the Government. They appear right on the tax return.

You cannot create income for a man by just ignoring what he has said under oath. At least you have to investigate it and find out whether or not those items belong there, but no, here we have this brick building which the tax return shows was bought in December, 1945, not appearing in the net worth statement at all.

Here we have these oil properties that appear as losses in the year 1947, in the 1947 return, and
2144 we have the amazing statement of the expert of the Government that he does not have any of his papers here to support his position that they were acquisitions in 1947.

Now, of course, it is not our fault if they do not have their papers here, or if they choose to ignore it or perhaps try to cover it by a statement from the stand that that was the year.

Now, with respect to the remarks counsel makes about determining these so-called unreported items between the two partners, he is not privileged to make the law.

I have read to you the statute of the State of Illinois which governs, just as the statute of the State of Texas governs the Wilcox case, and the statute of Illinois imposes a fiduciary relationship upon that partner and you can well see why, because a complaining partner would not only have the right of restitution to the partnership of all the funds, but of all the increments of it,
2145 not just the half, and that is why the Supreme Court held that an embezzlement not condoned or forgiven, and this certainly was not as we can see from Defendant's Exhibit 5, is not taxable income to the embezzler.

That concludes what I have to say, your Honor.

The Court: Well, the Court at this stage of the proceedings is not determining the guilt or innocence of the Defendant. The question is whether there is sufficient proof presented here to continue the matter before the jury, and consequently the Court is of the opinion that there is and the motion for judgment of acquittal will be denied.

We will proceed at two o'clock, gentlemen, please.

(Whereupon the further hearing in the trial of the above-entitled cause was recessed until two o'clock p.m. of the same day, Thursday, May 5, 1955.)

2146 • • (Caption—No. 53-CR-154) • •

Before Hon. Win G. Knoch
and a Jury.
Thursday, May 5, 1955,
2:00 o'clock p.m.

• • •

2147-2150 • • •

2151 EDWARD J. WARD, called as a witness on behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Mr. Ward, will you state your name and address for the Reporter, please?

A. Edward J. Ward, 841 Spring Street, Elgin, Illinois.

Q. What is your business, Mr. Ward?

A. Salesman.
Q. Salesman for what company?
A. Shell Oil Company.
2152 Q. Directing your attention to on or about the date of September 25, 1946—
First let me ask you this. Do you know of an automobile company by the name of the Highland Motor Sales?
A. I do.
Q. Do you know where they are located?
A. On Lake Street in Elgin.
Q. Elgin, Illinois?
A. Yes, sir.
Q. Directing your attention to September 25, 1946, did you have a transaction with that company?
A. I did.
Q. Will you explain the nature of that transaction?
A. The company designated me to shop around for an automobile on a bid, and we had a car to trade in on it. My memory has been refreshed on this.
We paid $880 approximately by check from the Shell Oil Company to the Highland Motors, and we had a trade-in allowance of about $565 or $570 on the car.
Q. Mr. Ward, do you have with you that check in payment?
A. No, sir. That belongs to the Shell Oil Company.
2153 Q. What kind of a car was it that you traded in?
A. Special club deluxe coupe—Pardon me. Did you say traded in or purchased?
Q. Traded in.
A. I believe it was a Nash.
Q. And for that you were allowed about $565, in round figures?
A. That is right.
Q. And you paid $880, and that makes a price of $1447 for the new car.
What kind of car did you get?
A. Special club deluxe coupe, Plymouth.
Q. At the time you purchased that car, were you as a result of your shopping around familiar with the list price of automobiles?
A. Not too familiar, no, sir.
Q. Did you consider when you paid $1447 for this

car that you were paying any premium above the market?

Mr. Russo: Just a moment, Mr. Ward.

Objection, if your Honor please. What he considered is not relevant here.

The Court: Objection sustained.

By Mr. Batter:

Q. Did you pay any premium above the list price 2154 for that car?

A. No, sir.

Q. Were you asked to pay any premium above the list price for that car?

A. No, sir.

Mr. Batter: Your witness.

Mr. Russo: No cross.

Mr. Batter: Thank you, Mr. Ward. That will be all.

(Witness excused.)

HOWARD A. FLOYD, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address for the record, please?

A. Howard A. Floyd. 19 North Spring Street. That is the business address. My residence is 531 Cookane.

Q. In Elgin?

A. Right.

2155 Q. What is your business, Mr. Floyd?

A. I am president and representative for the union.

Q. For what?

A. For the American Federation of Labor, Elgin Trades Council.

Q. Elgin Trades Council?

A. Yes.

Q. Where are they located?

A. 19 North Spring Street.

Q. In Elgin?

A. Right.

Q. Were you in that position in 1946 and 1947?

A. Right.

Q. Do you know of an automobile company by the name of the Highland Motor Sales Company?

A. I do.

Q. Where are they located?

A. Highland Avenue. I couldn't give you the number but it is on Highland Avenue, between Grove and Wellington Avenue.

Q. In Elgin, Illinois?

A. Yes.

Q. Directing your attention to on or about the date of August 13, 1946, did you have a business transaction with the Highland Motor Sales Company?

2156

A. Yes.

Q. And with whom did you deal?

A. Well, with the Highland Motors but particularly at this time with Sam Achilli.

Q. What was the nature of the transaction you had at that time?

A. We bought a 1946 Windsor four-door sedan.

Q. That is a Chrysler or Plymouth?

A. Chrysler.

Q. How did you pay for it?

A. By check.

Q. Do you have that check?

A. Yes, I do. (Witness produced document.)

Mr. Batter: I will ask that this be marked Defendant's Exhibit No. 7 for identification.

(The document was thereupon marked Defendant's Exhibit 7 for identification.)

By Mr. Batter:

Q. Mr. Floyd, I hand you Defendant's Exhibit No. 7 for identification, and ask you what that is.

A. Well, that is a check from our Elgin Trades

2157

Council to Highland Motor Sales, as it states on there, for $1871.

Q. Will you speak up a little so the jury may hear you.

A. That is a check from the Elgin Trades Council. Their name is printed right on there. Check to the Highland Motor Sales for that 1946 Chrysler Windsor Sedan in the amount of $1871.11.

Q. What is the signature appearing in the lower right-hand corner of the check?

A. That is our secretary-treasurer, Leonard F. Gromer, who was secretary-treasurer of the union.

Q. And on the left-hand margin of that check, is there a legend?

A. You mean—Oh, yes.

Mr. Russo: Just answer the question, Mr. Witness. Is there a legend?

By the Witness:

A. Yes.

By Mr. Batter:

Q. What is that legend?

Mr. Russo: Just a moment. When was it put on there?

By Mr. Batter:

2158 Q. When was that legend put on there?

A. In 1946 when the car was bought.

Mr. Russo: At or about?

The Witness: Sir?

Mr. Russo: At or before or after the time the check was delivered?

The Witness: When the check was delivered it was written.

Mr. Russo: All right, sir.

By Mr. Batter:

Q. Now will you read that legend, please?

A. "1946 Chrysler Labor Day." That meant that we bought—

Q. Just a moment now. And how is that check endorsed?

A. Highland Motor Sales by R. H.—I believe—Carlson.

Q. What is the significance of Labor Day in that legend on the left-hand margin of the check?

A. Well, we have our Labor Day Festival on Labor Day. We have a three-day Labor Day celebration, and we give that away as our grand prize for the Labor Day Celebration.

Q. Now when you purchased this car—Let me ask you this first.

2159 Were you familiar with the list price of this type Chrysler car at the time you purchased it?

A. Well, I couldn't say for sure. Yes, I must have had an idea about what it would run because—

Mr. Russo: I object and move that the answer be

stricken, if your Honor please. He doesn't say positively that he knows. If there is some doubt in his mind, I want it clarified.

Mr. Batter: He can give his best recollection.

The Court: Proceed.

By the Witness:

A. I would have to have a pretty good idea because you have to do this for the members. It has to pass the committee so you can't come in with any false figures.

By Mr. Batter:

Q. Now when you purchased this car, were you asked to pay any premium over the list price?

A. No, sir.

Q. The Reporter doesn't get your nod.

A. I said, No, sir. No, we weren't.

Q. Now, Mr. Floyd, directing your attention to
2160 on or about July 17, 1947, did you have a transaction with Highland Motor Sales at that time?

A. I did.

Q. What was the nature of that transaction?

A. The same as before exactly.

Q. You mean you purchased another Chrysler?

A. Another, the same kind of a Chrysler and for the same purpose.

Q. How did you pay for that?

A. By check. (Witness produced document.)

Mr. Batter: I will ask that this be marked Defendant's Exhibit No. 8 for identification.

(The document was thereupon marked Defendant's Exhibit 8 for identification.)

By Mr. Batter:

Q. I hand you Defendant's Exhibit No. 8 for identification, and ask you whether that is the check that was used in payment of the car purchased in 1947.

A. That is right.

Q. Whose check is that?

A. That is the Elgin Trades Council's own check to Highland Motor Sales.

2161 Q. By whom is it signed?

A. Leonard F. Gromer, Secretary and Treasurer.

Q. What is the amount of the check?

A. $2253.69.

Q. What endorsement does the check bear?

A. "For deposit only, Highland Motor Sales," and Earl Gromer, signed by Earl Gromer.

Q. Do you know who Earl Gromer is?

A. Yes, sir.

Q. Is he related to Leonard Gromer who signed the check?

A. He is a cousin.

Q. He is a cousin?

A. But no bearing in business, as far as their business is concerned, but he is a cousin.

Q. Now, Mr. Floyd, when you paid $2253.69 for that Chrysler on July 18, 1947, were you asked to pay any premium over the list price?

Mr. Russo: The question has been asked and answered, if your Honor please.

By the Witness

A. No.

Mr. Batter: It was asked with respect to 1946, not 1947.

2162 The Court: He may answer.

By the Witness:

A. No.

By Mr. Batter:

Q. You were not?

A. No.

Mr. Batter: I now offer in evidence as Defendant's Exhibits 7 and 8 the two checks.

Mr. Russo: No objection, if your Honor please.

The Court: They may be received.

(The documents previously marked, respectively, Defendant's Exhibits 7 and 8 were thereupon received in evidence as Defendant's Exhibits 7 and 8.)

Mr. Batter: You may cross examine.

Mr. Russo: No questions.

Mr. Batter: Thank you, Mr. Floyd.

(Witness excused.)

2163 H. H. PILLINGER, JR., called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?

A. Dr. H. H. Pillinger, Jr.—

The Reporter: Will you spell your last name, please?
The Witness: Pillinger, P-i-l-l-i-n-g-e-r.
By the Witness:
A. —and the address is Route 3, Box 910A.
By Mr. Batter:
Q. Elgin, Illinois?
A. Elgin, Illinois.
Q. What is your business, Doctor?
A. Physician and surgeon.
Q. Where do you have your offices?
A. 164 Division Street, Elgin, Illinois.
Q. Do you know a company in Elgin by the name of Highland Motor Sales?
A. I do.
Q. Doctor, directing your attention to on or about June 18, 1948, did you have a business transaction with the Highland Motor Sales?
A. I did.
2164 Q. With whom did you deal?
A. Mr. Achilli.
Q. What was the nature of that transaction?
A. Trading in a Chevvy coupe on a Chrysler coupe, a new Chrysler.
Q. Was that a new Chrysler coupe?
A. It was a new Chrysler.
Q. What were you allowed for that trade-in?
A. $1600.
Q. What was the price of the Chrysler you purchased?
A. $2600.
Q. How did you pay the difference?
A. In cash.
Q. In cash?
A. Yes.
Q. And to whom did you pay that cash?
A. To Mr. Achilli.
Q. Did you get a receipt at the time that you paid that sum of money?
A. At that time I did, yes.
Q. Do you have that receipt?
A. I don't know whether I have it or not, I didn't have time to look for it, I was notified so late.
Q. Did you get a bill of sale at the time that
2165 you purchased the car?

A. I did.
Q. Do you have that?
A. Again I have to answer the same way. I am not sure.
Mr. Batter: You may cross examine.

Cross Examination by Mr. Russo.

Q. Doctor, do you know whether or not that transaction was recorded on the books and records of Highland Motor Sales?
A. I imagine it was, sir.
Q. I don't want you to imagine. Do you know?
A. I didn't see it recorded, sir.
Mr. Russo: Very well. That is all.
Mr. Batter: That is all, thank you, Doctor.
(Witness excused.)

* * *

2166 MICHAEL J. GOGGIN, called as a witness on behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Mr. Goggin, will you state your name and address, please?
A. Goggin, Michael J., 383 Condon, Elgin, Illinois.
Q. Mr. Goggin, what is your business?
A. I am a drugstore owner, sir; pharmacist and drugstore owner.
Q. Will you speak up a little bit so the jury can hear you?
A. Yes.
Q. What was your business in 1946?
A. I was a pharmacist.
Q. You were what?
A. I was a pharmacist.
Q. Employed?
A. Employed by another store.
Q. Mr. Goggin, do you know a company by the name of Highland Motor Sales Company?
A. I do, sir.
2167 Q. Where are they located?

A. Wellington—192 South Wellington.
Q. That is in Elgin, Illinois?
A. Elgin, Illinois.
Q. Directing your attention to on or about October 10th, 1946, did you have a transaction with that company?
A. I did, sir.
Q. With whom did you have your transaction?
A. Mr. Achilli.
Q. Mr. Achilli?
A. Yes.
Q. What was the nature of that transaction?
A. I purchased a 1946 Chrysler Windsor club coupe.
Q. And how did you pay for that car?
A. I paid about—it was close to $700 down, $690-something, and financed the balance.
Q. What was the balance?
A. The difference between the figure of $700—it was just less than $700, $690-something. It was over $1,995, $1,995 and some cents.
Q. Now, at the time that you purchased that Chrysler coupe were you asked to pay any premium—
A. No, sir.
2168 Q. Over the list price?
A. No, sir.
Mr. Batter: Cross examine.

Cross Examination by Mr. Russo.

Q. Mr. Goggin, do you know what the list price of that car was?
A. The way I received it, sir?
Q. At the time you purchased it, what was the list price of that car?
A. I paid nineteen—
Q. I did not ask you what you paid. I asked you what the list price was.
A. I couldn't tell you that for certain.
Mr. Russo: That is all.
Mr. Batter: That will be all, Mr. Goggin. Thank you.
(Witness excused.)

2169 RICHARD STETTNER, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you give the Reporter your name and address, please?

A. My name is Richard Stettner. I live at 1300 Larkin Avenue in Elgin, Illinois.

Q. What is your business. Mr. Stettner?

A. I operate a retail drug business in Elgin.

Q. What was your business in 1946?

A. I was a pharmacist working for Cooper's Pharmacy in Elgin, Illinois.

Q. Do you know of a company by the name of Highland Motor Sales Company?

A. Yes, sir.

Q. Where are they located?

A. I think it's on Wellington in Elgin, Illinois.

Q. In Elgin, Illinois?

A. Yes, sir, Elgin.

Q. Directing your attention to on or about March 30th, 1946, did you have a business transaction with

2170 that company?

A. About that time I bought a car from Highland Motors because I had just gotten out of the Service.

Q. With whom did you deal?

A. I don't remember exactly. I remember dealing with Sam Achilli personally in the deal.

Q. What did you buy at that time?

A. I think it was a Plymouth two-door sedan.

Q. A new car?

A. Yes, sir.

Q. How much did you pay for that car?

A. A little over $1,100, I believe.

Q. How did you pay for it?

A. By check.

Q. Do you have that check?

A. I may have it at home. I don't know, sir.

Q. You don't have it with you?

A. No, sir.

Q. At the time that you purchased that car were you

asked to pay any premium above the prevailing price?

A. No, sir.

Mr. Batter: Cross examine.

Cross Examination by Mr. Russo.

Q. What was the prevailing price, Mr. Stettner?

A. I wouldn't know. I remember—

Q. You don't know whether you did or not, then, do you?

A. I paid the list price for it because I checked with several other dealers in Elgin.

Q. What was the list price?

A. Somewhere around $1,100, I stated.

Q. Was that a new car or a used car?

A. It was a new car.

Q. You paid $1,100 for it?

A. Approximately $1,100.

Q. What year model was it?

A. I don't know. It was one of the first ones out. I think it was a '46 or '45—I don't even remember. It was the first car I bought when I came out of the Service.

Q. What is your recollection now as to what the list price was?

A. Well, I remember it was around $1,100.

Q. Is that the amount that you paid?

A. Yes, sir.

Q. And you fix the list price by the amount that you paid?

A. Yes, sir.

Mr. Russo: Very well, sir. That will be all.

Mr. Batter: Thank you, Mr. Stettner.

(Witness excused.)

* * *

DONALD DIERKING, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Would you state your name and address, please, sir?

A. Donald Dierking, 560 Bird Street.

Q. Elgin, Illinois?

A. Elgin, Illinois.

Q. What is your business, Mr. Dierking?
A. Motor lift operator. I work for Elgin Steel Kitchens.
Q. For the Elgin Steel Kitchens Company?
2173 A. Yes.
Q. Will you speak up, please, so that the jury can hear you?
A. Yes.
Q. What was your business in 1946?
A. The same as now.
Q. With the same company?
A. Yes.
Q. Directing your attention to on or about March 13th, 1946—withdraw that.
Have you ever heard of a company by the name of Highland Motor Sales?
A. Yes, sir.
Q. Where are they located?
A. At, I believe, 162 Wellington Avenue, Elgin.
Q. That is in Elgin, Illinois?
A. Elgin, Illinois.
Q. Directing your attention to on or about March 13th, 1946, did you have a transaction with that company?
A. Yes, sir.
Q. What was the nature of that transaction?
A. In what way do you mean, sir?
Q. Did you buy something or did you sell something?
A. Yes. I bought a 1946 Chrysler Windsor.
2174 Q. Chrysler what?
A. Chrysler Windsor.
Q. With whom did you deal?
A. Sam and Cons.
Q. How much did you pay for that car?
A. It was $1,645 and some cents. How many cents, I don't know.
Q. How did you pay for that car?
A. Cash.
Q. At the time you paid for that car were you requested to pay any premium?
A. No, sir.
Q. Did you get a bill or receipt when you purchased that car?
A. Yes, I did.

Q. And was the receipt for the amount—do you still have that receipt?

A. I may have it at home somewhere, but I would have to look it up. I never throw anything away, so it's around some place.

Q. Does the receipt differ any from the amount of money that you paid for the car?

A. No, sir.

Mr. Russo: I object, if your Honor please, unless
2175 he has got the receipt.

The Court: He may answer.

By Mr. Batter:

Q. Will you answer the question?

A. Pardon?

Q. Will you answer the question?

A. What was that now?

Mr. Batter: Will you read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. I don't believe it does. I don't see how it could, because I would have hollered about it if it did.

Mr. Batter: Cross examine.

Cross Examination by Mr. Russo.

Q. What is your name, sir?

A. Donald Dierking.

Q. Jerke?

A. Dierking.

Q. Mr. Dierking, what was the list price of that 1946 Chrysler Windsor?

A. I really don't know what the list price was.

Q. Then you don't know whether you paid
2176 above the list price or not, do you?

A. No.

Mr. Russo: That is all.

The Witness: I shouldn't of, anyway.

Mr. Russo: That is all.

Redirect Examination by Mr. Batter.

Q. Mr. Dierking, you said you should know?

A. Pardon?

Q. Did I understand you to say you should know?

A. I should know how much it cost?

Q. Yes.
A. No. I knew—
Q. What was that last remark you just made when counsel shut you off?
A. In what way, sir?
Mr. Batter: Maybe we had better have the Reporter read it back.
(The record was thereupon read as follows:
"A. I shouldn't of, anyway.")
The Witness: I say, I should of known what I paid. I don't know what the list price of the car was.
Mr. Batter: That will be all. Thank you very much.
(Witness excused.)
2177 • • •

ROBERT D. MAYER, called as a witness on behalf of the Defendant herein, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address to the Reporter, please?
A. Robert D. Mayer, 484 Slade Avenue, Elgin.
Q. Will you speak up so the jury can hear you?
A. Yes.
Q. What is your business, Mr. Mayer?
A. Police Officer in the City of Elgin.
Q. What was your business in 1946?
A. The same thing, sir.
Q. How long have you been a Police Officer?
A. Last September, twenty years.
Q. Mr. Mayer, do you know of a company called Highland Motor Sales Company?
A. Yes, sir.
Q. Where are they located?
A. On Lake Street at Wellington in the City of Elgin.
2178 Q. That is in Elgin, Illinois?
A. Yes, sir.
Q. Now, Mr. Mayer, directing your attention to on or about November 23rd, 1946, did you have a transaction with the Highland Motor Sales Company?

A. Yes, sir.
Q. With whom did you deal?
A. The deal was between Mr. Achilli and Mr. Cirrincione.
Q. And yourself?
A. And myself.
Q. What was the transaction?
A. I bought a 1946 Special De Luxe Plymouth sedan from the organization.
Q. How much did you pay for that 1946 Plymouth sedan, Special De Luxe?
A. $1382.
Q. How did you pay for it?
A. Personal check.
Q. You dealt with Mr. Cirrincione and Mr. Achilli?
A. Yes.
Q. To whom did you give the check?
A. To the best of my recollection both of these gentlemen and myself were in the office and I inquired what the price was and they told me and I wrote a check and
2179 laid it on the desk. Which gentleman picked it up, I don't know.
Q. Do you have that check with you?
A. No, sir.
Q. At the time you purchased that car were you asked to pay anything additional, any premium for it?
A. No, sir.
Q. Did you make any cash payment in addition to the check that you gave?
A. No, sir.
Mr. Batter: You may cross examine.

Cross Examination by Mr. Russo.

Q. What is your capacity out there, Mr. Mayer?
A. Lieutenant of Police.
Q. Lieutenant, were you asked to produce that check?
A. Sir?
Q. Were you asked to produce that check?
A. That is right.
Q. You were asked to produce it?
A. Yes, sir.
Q. But you did not bring it?
A. No, sir.

Q. Now, you testified that you paid $1382 for the 2180 car.

A. Yes, sir.

Q. Do you know what the list price of that car was in 1946?

A. No, sir.

Q. And you don't know whether you paid any bonus or not, do you?

A. No, sir.

Mr. Russo: That is all.

Redirect Examination by Mr. Batter.

Q. But whatever the amount was that you did pay, was reflected in that check, was it?

A. Yes, sir.

Mr. Batter: That is all.

Recross Examination by Mr. Russo.

Q. Do you know whether or not that check is reflected on the books and records of Highland Motor Sales, Lieutenant?

A. No, sir.

Mr. Russo: That is all.

Mr. Batter: Thank you, Mr. Mayer.

(Witness excused.)

2181 WALTER E. GRANT, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter:

Q. Will you state your full name and address, please?

A. Walter E. Grant. 821 Carr Street, Elgin, Illinois.

Q. What is your business, Mr. Grant?

A. Police officer.

Q. Where?

A. City of Elgin.

Q. How long have you been a police officer?

A. Fifteen years.

Q. What is your present rank?

A. Patrolman.

Q. Have you heard of a company by the name of Highland Motor Sales Company?

A. Yes, I have.
Q. Where are they located?
A. They are located—I don't know the correct address—but it is Lake and Wellington in Elgin, the City of Elgin.
Q. Elgin, Illinois?
A. That is right.
2182 Q. Mr. Grant, directing your attention to on or about March 23, 1946, did you have a transaction with that company?
A. In April of 1946 I did have.
Q. With whom did you deal?
A. With Sam Achilli.
Q. What was the nature of the transaction?
A. I purchased a 1946 Plymouth Special Deluxe Sedan.
Q. How much did you pay for that car? Was that a new car?
A. That was a new car, yes.
Q. How much did you pay for it?
A. I paid $1309.63.
Q. How did you make payment?
A. I made payment with two checks.
Q. Do you have those checks with you?
A. I have those checks with me.
Q. May I see them, please?
A. You may. (Witness produced documents.)
Mr. Batter: I will ask that these be marked Government Exhibits 9 and 10 for identification.
(The documents were thereupon marked, respec-
2183 tively, Defendant's Exhibits 9 and 10 for identification.)
By Mr. Batter:
Q. Now, Mr. Grant, directing your attention to Defendant's Exhibit No. 9 for identification, will you tell me whether or not that is your check?
A. That is my check.
Q. Is that your signature in the lower right-hand corner?
A. That is my signature.
Q. And what is the date and the amount of that check, and to whom is it made payable?
A. The check is made payable to the Highland Motor Sales, and that was on 4/20 or April 20th of 1946.
Q. The amount of it is—?
A. $1,000.

Q. How is that check endorsed?
A. "Highland Motor Sales, 192 Wellington Avenue, Elgin."
Q. Is that a rubber stamp endorsement?
A. It is a rubber stamp endorsement.
Q. Now, Mr. Grant, directing your attention to Defendant's Exhibit No. 10 for identification, will you tell me what that is?
2184 A. It is a check to the Highland Motor Sales, in the amount of $309.63, and that was on April 23 of 1946.
Q. It is signed by you?
A. It has been signed by me. That is my own signature.
Q. How was that check endorsed?
A. Endorsed, "Highland Motor Sales, 192 Wellington Avenue, Elgin," with a rubber stamp.
Q. Mr. Grant, what was the occasion for giving two checks on two separate dates for this purchase? Can you explain that?
A. I can. At the time I was notified the car was in the salesroom, I had been notified, and at the time I didn't have the additional money, so I wrote the check, the one check to bind or as a deal binder, and the other check was the remainder of the amount which I owed on the car.
Q. Now at the time that you had this transaction with the Highland Motor Sales Company, were you asked to pay any premium or bonus for this car?
A. At no time was I ever asked to pay a premium or a bonus.
Mr. Batter: I now offer in evidence Defendant's
2185 Exhibits Nos. 9 and 10.
Mr. Russo: No objection.
The Court: They may be received.
(The documents previously marked, respectively, Defendant's Exhibits 9 and 10 were thereupon received in evidence as Government's Exhibits 9 and 10.)
Mr. Batter: You may cross examine.

Cross Examination by Mr. Russo.

Q. Mr. Grant, what was the list price of that car at the time you bought it?
A. The list price was what I paid for the car.
Q. How do you know that?

A. I was told what the price would be. It was shown to me prior to the time that I paid for the car, what the manufacturer's list price was on the car.

Q. You were told that the manufacturer's price was $1309.63?

A. That was with tax included.

Q. Taxes included?

A. That is right.

2186 Q. Anything else?

A. No, sir.

Q. Where did you see this list price?

A. Mr. Achilli showed me what the factory price was on the car, what it was to be sold for.

Q. What did he show you?

A. What was that?

Q. What did he show you?

A. Well, he just had a statement there that showed what the price of the cars were to be.

Q. What kind of a statement was it? Was it a printed statement, a written statement, newspaper, or what?

A. A printed statement.

Q. On whose stationery? What was the name of the manufacturer?

A. I can't tell you.

Q. You don't know?

A. No, sir.

Mr. Russo: All right, sir. That is all.

Mr. Batter: Thank you, Mr. Grant. That is all.

The Witness: Thank you.

(Witness excused.)

2187 HERMAN GOLDSTEIN, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your full name and your address, please?

A. My name is Herman Goldstein.

The Reporter: Will you spell your last name, please?

The Witness: G-o-l-d-s-t-e-i-n.

By the Witness:

A. (Continuing) 314 Hill, Elgin, Illinois.

By Mr. Batter:

Q. What is your business, Mr. Goldstein?

A. Shoe repair.

Q. And what was your business in 1948?

A. Shoe repair.

Q. Will you speak up a little louder so the jury can hear you?

A. I was in the same business.

Q. That was in Elgin?

A. Elgin, 208 East Chicago Street.

Q. Mr. Goldstein, have you heard of a company
2188 by the name of Highland Motor Sales?

A. Did I heard of them?

Q. Yes.

A. Yes.

Q. Where are they located?

A. Well, I don't exactly know the name of the street, but in Elgin.

Q. What city?

A. In Elgin.

Q. Elgin, Illinois?

A. Yes, sir.

Q. Directing your attention to on or about April 17, 1948, did you have a transaction with that company?

A. Yes, sir.

Q. With whom did you deal?

A. Mr. Sam Achilli.

Q. Will you speak up, please?

A. Sam Achilli.

Q. What was the nature of the transaction?

A. Well, I wanted to trade my car and I came in to see Mr. Achilli. I had a 1939 Chrysler, and I asked him if I could get a new car.

He says, "I am expecting some cars in, and as soon as I
2189 get them in, I will call you."

In the meantime, while I was in the garage, I saw a car standing there still with the paper on the doors. And I said, "How about this one here?"

Mr. Achilli said to me, he said, "This car is bought—I mean, another fellow was supposed to get the car, but we sent him a notice, and I will send him another one, and if he doesn't show up," he says, "you might have that car."

Well, I stopped over about three or four days later, and I said, "How about that car?"

Sam says to me, "I think you could have that car," and that is the way it was.

Q. What was that car?

A. A 1948 Chrysler New Yorker.

Q. And how much did you pay for that car?

A. I paid, I traded in, I think I got $400 for my 1939 and I paid him—

Q. 1939 what?

A. 1939 Chrysler, the smallest one, the Royal. I paid him $1,000 and my car, and then I had $1550, something in that neighborhood, in balance to pay for the car.

Q. The $1,000 that you paid, did you pay that in
2190 cash or by check?

A. To be frank about it, I don't remember.

Q. How did you pay the balance of $1550?

A. The balance I had financed.

Q. You financed that?

A. Yes.

Q. Now then, if you paid $1,000 in either cash or check, $400 trade-in, and $1550 later, that would make $2950. Is that the price that you paid for the car?

A. Yes, sir.

Q. Now then at the time that you purchased that car, did you get a bill or invoice for the car?

A. I think I did.

Q. Do you have it?

A. I would have to look it up. I was called on short notice to appear here, and I didn't have a chance to. I could probably trace it and find it some place.

Q. Now with respect to the $1,000 payment that was made, do you have a receipt or a check to cover that payment?

A. I think I could find that.

Q. Do you have it with you?

A. No.

Q. During this transaction, did anyone at any time
2191 suggest to you or ask you to pay a premium or bonus?

A. No, not at all.

Mr. Batter: You may cross examine.

Mr. Russo: No questions.

Mr. Batter: Thank you, Mr. Goldstein.

The Witness: Thank you.

(Witness excused.)

2192-2195 • • •

2196 Mr. Batter: Mr. Powell.
(The witness was thereupon duly sworn.)

GEORGE POWELL, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?
A. George Powell, 287 North Commonwealth, Elgin, Illinois.
Q. Will you speak up, Mr. Powell, so the jury can all hear you?
A. Yes, sir.
Q. Mr. Powell, what business are you in?
A. Retired.
Q. What business were you in 1946?
A. Sand, gravel and excavating.
Q. Were you in business for yourself or as an employee?
A. For myself.
Q. Where were you in business at that time?
A. Elgin, Illinois.
Q. Do you know a company by the name of Highland Motor Sales?
2197 A. I do.
Q. Where are they located?
A. Elgin.
Q. Directing your attention to about October 7th, 1947, did you have a transaction with that company?
A. I did.
Q. With whom did you deal?
A. Well, I dealt with Mr. Sam Achilli, to make the deal. His manager took care of it after that.
Q. What was the nature of the transaction you had at that time?
A. I bought a Plymouth.
Q. A new car?
A. That is right.
Q. What model was it?
A. 1947.
Q. What type of car?

A. Four-door.
Q. How did you pay for that car?
A. Partly cash and partly check.
Q. How much cash did you pay?
A. $1,000.
Q. What was the amount of that check?
A. $732.33.
2198 Q. Do you have that check with you?
A. I have not.
Q. Did you get a bill of sale at the time?
A. I did.
Q. Did you get a receipt for the $1,000 that you paid?
A. Just—I think it was all on the one—
Q. One receipt?
A. —bill of sale.
Q. Do you have that?
A. No, I haven't. I don't have the bill of sale.
Q. Now, then, when you purchased that car in October of 1947 were you asked to pay any premium or bonus for getting the car?
A. No, I was not.
Q. And did the bill of sale or receipt that you got at that time show and disclose the full price that you paid for it?
A. It did.
Mr. Batter: Cross examine.

Cross Examination by Mr. Russo.

Q. Was that a new car, Mr. Powell?
A. Yes, sir.
2199 Q. You testified you paid $1,000 for it?
A. No.
Q. How much did you pay for it?
A. $1,732.33.
Q. $1,732.33.
A. That is right.
Q. Do you know the list price of that car at that time?
A. Well, they showed me the list.
Q. They showed you a list?
A. Yes.
Q. And the list that they showed you bore the same price you are testifying about now?
A. I think it was about a dollar and a half difference on

that, because the licenses were transferred. There was $1.50 transferring the licenses.

Q. You paid $1,000 by check?
A. No; $1,000 cash.
Q. $1,000 cash?
A. Yes.
Q. And the trade-in on that?
A. No trade-in. The balance was my check.
Q. How did you pay the balance?
A. Check.
2200 Q. $1,000 cash and the balance of the $1,732.33 by check?
A. Yes, sir.
Q. Is that correct?
A. Yes.
Mr. Russo: That is all.
Mr. Batter: Thank you, Mr. Powell.
(Witness excused.)
Mr. Batter: Mr. Kidwell.

LAMAR J. KIDWELL, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?
A. Lamar J. Kidwell, 605 Adams Street, Elgin.
Q. Are you the same Mr. Kidwell who testified heretofore, who was called as a witness by the Government?
A. Yes, sir.
Q. Now, Mr. Kidwell, what is your employment?
A. Lampe Construction Company.
Q. What is your office there?
A. Secretary and Treasurer.
2201 Q. Have you checked the records of the Lampe Construction Company with reference to transactions it may have had with Highland Motor Sales Company?
A. Yes, sir.
Q. Directing your attention to on or about August 8th, 1947, did the Lampe Construction Company have a transaction with the Highland Motor Sales Company?
A. They did.

Q. What was that transaction?
A. It was the purchase of an automobile.
Q. What kind of an automobile did they buy?
A. Chrysler.
Q. How was it paid for?
A. By check.
Q. Do you have any document or record of the Lampe Construction Company indicating that?
A. I have the cash disbursements record.
Q. May I have that?
A. Yes.

(The document was thereupon marked Defendant's Exhibit No. 11 for identification.)

Mr. Russo: If you want the Government to stipulate that Mr. Kidwell bought a car or Lampe Construction
2202 Company, the Government will be glad to stipulate.

Mr. Batter: Will the Government further stipulate that they bought another car on March 8th, 1948, and in either case they were not asked to pay any premium?

Mr. Russo: Yes, indeed.

Mr. Batter: It is so stipulated, your Honor. Thank you, Mr. Kidwell—just a minute, please.

By Mr. Batter:

Q. Mr. Kidwell, in addition to the purchases for the Lampe Construction Company that have been stipulated by counsel, did you have a transaction on your own—
A. That's right.
Q. (Continuing) —with the Highland Motor Sales Company?
A. Yes, sir.
Q. Directing your attention to about June 11th, 1947, did you have a transaction with the Highland Motor Sales Company?
A. Yes, sir.
Q. With whom did you deal?
A. I think it was Mr. Achilli, and also Cons.
Q. What was the nature of that transaction?
2203 A. I purchased a 1947 Plymouth.
Q. How much did you pay for that Plymouth?
A. In the neighborhood of $1,400.
Q. How was that payment made?
A. I can't recall.

Q. At that time were you asked to pay any premium or bonus in connection with that purchase?

A. No, sir.

Q. Did you receive an invoice or bill of sale when you made that purchase?

A. I did, yes.

Q. Did it vary from the amount of money or cash or check that you paid?

A. No, sir.

Mr. Batter: You may cross examine.

Cross Examination by Mr. Russo.

Q. Mr. Kidwell, do you know whether that transaction was reflected on the books and records of Highland Motor Sales?

A. I wouldn't have any way of knowing.

Mr. Russo: That is all, sir.

Mr. Batter: Thank you, Mr. Kidwell.

(Witness excused.)

2204 * * *

ASHLEY ARNOLD, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Mr. Arnold, will you state your full name and address for the record, please.

A. My name is Ashley Arnold, 811 Brook Street, Elgin, Illinois.

Q. Mr. Arnold, will you speak up so the jury can hear you?

A. Yes.

Q. What is your business, Mr. Arnold?

A. I am a banker.

Q. What institution are you connected with?

A. Union National Bank and Trust Company of Elgin.

Q. What is your official capacity or title with that institution?

A. Vice-President.

Q. How long have you been with the Union National Bank and Trust Company?

2205 A. Ten years.

Q. What was your position in 1947?

A. I believe at that time I was Vice-President.

Q. Do you know of a company called Highland Motor Sales Company?

A. Yes, I do.

Q. Where are they located? That is, in what city?

A. Elgin.

Q. Elgin.

A. Yes.

Q. I direct your attention to the date of August 8th, 1947. Did you about that time have a transaction with Highland Motor Sales Company?

A. We did, yes.

Q. With whom did you deal?

A. I think with Cons. I am not sure.

Q. What was the nature of that transaction?

A. We had at that time a 1941 Buick which had been damaged, and we traded that 1941 Buick for a 1947 Chrysler.

Q. What was the consideration for that Chrysler?

A. As I recall the figures, the figure was $856.25, which was part of an insurance check and a bank money order for $1,887. I believe that made a total of $2,543.25.

2206 Q. I wonder whether we have those figures right. You said you made a trade-in, didn't you?

A. Well, yes. We had a 1941 Buick at that time which was wrecked—

Q. Oh.

A. (Continuing) —and we turned that in and the insurance check on that was $656.25.

Q. Oh. I see.

A. And a bank money order for $1,887, which made a total of $2,543.25.

Q. And the car that you purchased was a Chrysler?

A. Yes.

Q. At the time that you negotiated this purchase with Mr. Cons and Mr. Achilli, was any proposal made to you to pay a premium or a bonus in the purchase of that car?

A. There was not.

Mr. Batter: You may cross examine.

Mr. Russo: No questions.

Mr. Batter: Thank you, Mr. Arnold.

(Witness excused.)

* * *

2207 FLETCHER C. LAMPHERE, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?
A. Fletcher C. Lamphere, 10 Vine Street, Elgin, Illinois.
Q. Mr. Lamphere, what is your business?
A. Banking.
Q. With what institution?
A. Union National Bank and Trust Company of Elgin.
Q. What is your title with that company?
A. Vice-President.
Q. How long have you had that title?
A. Approximately ten years.
Q. Do you know of a company called Highland Motor Sales Company?
A. Yes, sir.
Q. Where are they located?
A. Wellington Avenue in Elgin.
Q. In Elgin?
A. Yes.

2208 Q. Directing your attention to the date of on or about January 10th, 1948, did you have a transaction with the Highland Motor Sales Company?
A. Yes, I did.
Q. With whom did you deal?
A. I dealt with Mr. Cirrincione, and Mr. Achilli.
Q. What was the nature of that transaction?
A. I purchased a 1948 Chrysler New Yorker Club Coupe.
Q. What did you pay for that car?
A. With the tax it was $2,754.
Q. How did you pay for it?
A. To the best of my knowledge it was a check for $1,300 and the balance was carried on a note through a bank.
Q. Did you—do you have that check with you?
A. No, I don't.
Q. At the time that you made this transaction did either Cons, Mr. Cirrincione or Mr. Achilli suggest to you or intimate to you or in any way at all mention that a premium or bonus had to be paid on this purchase?

A. No.

Mr. Batter: That is all. You may cross examine.

2209 Mr. Russo: No questions, Mr. Lamphere. Thank you.

Mr. Batter: Thank you.

(Witness excused.)

* * *

ELMER SCHICK, called as a witness herein on behalf of the Defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?

A. Elmer Schick, 481 River Bluff Road, Elgin, Illinois.

Q. What is your business, Mr. Schick?

A. I am a distributor of beverages.

Q. What is the name of your company?

A. E. H. Schick Distributing Company.

Q. Are you the owner or proprietor of that company?

A. Yes, sir.

Q. What was your business in 1947?

A. The same business.

Q. Sir?

A. The same business.

2210 Q. Will you speak up so the jury can hear you, please?

A. The same business.

Q. Mr. Schick, do you know of a concern by the name of Highland Motor Sales?

A. Yes, sir.

Q. Where are they located?

A. Well, they are on the—

Q. In what town are they located?

A. Elgin, Illinois.

Q. Directing your attention to September 6th, 1947, did you on or about that time have a transaction with the Highland Motor Sales Company?

A. Yes, sir.

Q. With whom did you deal?

A. With Mr. Achilli.

Q. What was the nature of that transaction?

A. Well, I got a new car, a Plymouth car.
Q. What did you pay for that car?
A. $1,313.30.
Q. How was that paid, by cash or by check?
A. By check.
Q. Do you have that check?
A. Yes, sir.
Q. May I see it, please?
2211 A. Yes.
(The witness handed Mr. Batter a document.)
Mr. Batter: Will you mark this as Defendant's Exhibit 12 for identification, please.
(The document was thereupon marked Defendant's Exhibit 12, for identification.)
Mr. Batter: Will you mark this Defendant's Exhibit 13 for identification, please.
(The document was thereupon marked Defendant's Exhibit 13, for identification.)
By Mr. Batter:
Q. Now, Mr. Schick, directing your attention to Defendant's Exhibit 12, I will ask you what that is.
A. What is that? This piece of paper?
Q. Yes.
A. That's my bill of sale.
Q. That is your bill of sale?
A. Yes, sir.
2212 Q. And that bill of sale shows the purchase of a 1947 Plymouth coupe on September 6 at what price?
A. At $1687.55.
Q. And then what does it show respecting the next item?
A. The allowance for a 1940 Nash, $400.
Q. That leaves a balance of how much?
A. $1287.55.
Q. And then there was added to that a small item of tax of how much?
A. $525.75.
Q. That makes a total of—?
A. $1313.30.
Q. Now, Mr. Schick, I direct your attention to Defendant's Exhibit No. 13, and ask you what that is.
A. That is a check for $1319.05.
Q. Whose check is it?

A. It is my check.
Q. To whose order is it drawn?
A. Highland Motor Sales.
Q. And how is it endorsed?
A. Highland Motor Sales.
Q. Is this check and the car that you traded in the full payment that you made for this 1947 Plymouth coupe?
2213 A. Yes, sir, it is.
Q. I notice there is a slight difference of about $5.75 between the check and the sales slip. Do you recall what that is?
A. That is the differential of a half a year's state license.
Q. Now, Mr. Schick, did anyone during the course of this transaction ask you for a premium or bonus to be paid on the purchase of this car?
A. No, sir.
Mr. Batter: I now offer in evidence Defendant's Exhibits Nos. 12 and 13 for identification as Defendant's Exhibits 12 and 13.
Mr. Russo: No objection.
The Court: They may be received.
(The documents previously marked, respectively, Defendant's Exhibits 12 and 13 for identification were thereupon received in evidence as Defendant's Exhibits 12 and 13.)
Mr. Batter: You may cross examine.
2214 *Cross Examination by Mr. Russo.*
Q. Mr. Schick, what did you say your business was?
A. I am a beverage distributor.
Q. What kind of beverages do you distribute?
A. Beer, ale and mixes, soft drinks.
Q. Did you ever sell any beer or mixes to Sam Achilli?
A. No, sir.
Q. Did you ever deal with the Red Lion?
A. I am dealing with them a little bit now.
Q. Were you dealing with them in 1947?
A. I don't recall. I don't believe so.
Q. In 1948?
A. I don't believe so.
Q. When did you start dealing with them?

A. Oh, a couple of years ago, something like that, I believe.

Mr. Russo: That is all.

Mr. Batter: Thank you, Mr. Schick.

(Witness excused.)

2215 JOHN STADLER, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:.

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?

A. John Stadler.

Q. And your address?

A. 682 Summit Street, Elgin, Illinois.

Q. What is your business, Mr. Stadler?

A. At the present time I am a truck driver now.

Q. Would you speak up a little bit so the jury may all hear you.

A. At the present time I am driving a truck now.

Q. How long have you been doing that work?

A. For two years.

Q. What did you do before then?

A. Police officer, City of Elgin, for twenty-three and a half years.

Q. What was the occasion of your leaving the Police Department?

A. Well, my health.

Q. You are retired?

A. That is right.

2216 Q. In 1946 were you a police officer in the City of Elgin?

A. Yes, sir.

Q. Do you know of a company called the Highland Motor Sales Company?

A. I do.

Q. In what city are they located?

A. Elgin, Illinois.

Q. Directing your attention to on or about May 2, 1946, did you have a transaction with the Highland Motor Sales Company?

A. I did.

Q. With whom did you deal?
A. Mr. Sam Achilli.
Q. What was the nature of your transaction?
A. Buying an automobile.
Q. What was that?
A. Buying an automobile.
Q. Will you speak up a little, please.
What kind of a car did you buy?
A. I bought a four-door Chrysler Windsor.
Q. Was that a new car?
A. Yes, sir.
Q. How much did you pay for it?
2217 A. I paid $1595 or $1596 and a few cents.
Q. How did you make that payment?
A. Cash.
Q. At the time that you purchased that car, did you get a bill of sale for it?
A. I am pretty sure I did.
Mr. Russo: I can't hear you sir. Will you keep your voice up.
The Witness: I am pretty sure I did.
By Mr. Batter:
Q. Do you have it now?
A. No, I haven't.
Q. Do you know what may have become of it?
A. No, I probably have it at home some place, but, see, I moved. I used to live on Duncan Avenue, and I still have the basement full of stuff that I probably won't get through it in a year.
Q. At the time that you purchased this 1946 Chrysler Windsor four-door sedan, were you asked to pay any kind of a premium for that car?
A. No, sir, I was not. I did not.
Mr. Batter: You may cross examine.

2218 *Cross Examination by Mr. Russo.*

Q. Mr. Stadler, do you know whether that transaction is reflected on the Highland Motor Sales books and records?
A. Was it reflected? No, I don't.
Mr. Russo: That is all.
Mr. Batter: You may step down. Thank you.
(Witness excused.)

MILTON A. GROW called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q Will you state your name and address, please?
A. Milton A. Grow 359 Wabash Street, Elgin, Illinois.
Q. What is your business, Mr. Grow?
A. Civil engineer with the State of Illinois.
Q. And what was your business in 1948?
2219 A. I was with the State of Illinois.
Q. In the same business?
A. Yes, sir.
Q. Mr. Grow do you know of a company by the name of Highland Motor Sales Company?
A. I do.
Q. In what city are they located
A. Elgin, Illinois.
Q. Directing your attention to on or about July 29, 1948, did you have a transaction with the Highland Motor Sales Company?
A. I did.
Q. With whom did you deal at that time?
A. Mr. Achilli.
Q. And what was the nature of the transaction that you had?
A. I bought a four-door Chrysler sedan.
Q. A new car?
A. Yes, sir.
Q. How much did you pay for it?
A. $2,423.76.
Q. How did you pay for it?
A. I was allowed $1,312.00 for the old car and the balance was financed.
2220 Q. The balance was financed?
A. Yes, sir.
Q. At the time that you made that purchase, were you asked to pay a premium?
A. No, sir.
Mr. Batter: You may cross examine.

Cross Examination by Mr. Russo.

Q. Isn't it a fact, Mr. Grow, that at the time you made that purchase, Mr. Achilli showed you the list price of that car?

A. I don't recall seeing a list price.

Q. Did you ever see a list price?

A. I don't recall seeing a list price.

Q. Do you know what the list price of that car was?

A. I couldn't definitely state what the list price was.

Q. Then you don't whether you paid a bonus or premium for that car or not, do you?

A. I don't believe I did.

Q. You don't know whether you did or not, do you?

A. No, no.

Mr. Russo: That is all.

2221 Mr. Batter: Thank you, Mr. Grow. That will be all.

(Witness excused.)

Mr. Batter: If you Honor please, we have now exhausted our witnesses.

The Court: All right.

Ladies and gentlemen of the jury, we will now recess until next Monday morning at 10:00 o'clock. You will return back here at that time, please.

The Bailiff would like to see you in the jury room before you leave, please.

(Whereupon the trial of the above-entitled cause was adjourned to the hour of 10:00 o'clock a.m. on Monday, May 9, 1955.

228a And afterwards on, to wit, the 5th day of May, 1955, came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment Of Acquittal in words and figures following, to wit:

229a

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 53 CR 154) • •

MOTION FOR JUDGMENT OF ACQUITTAL

And Now Comes the defendant Sam Achilli and moves that the Court will order a verdict of not guilty as to him:

(a) On the first count of the indictment;

(b) On the second count of the indictment;

(c) On the third count of the indictment upon the grounds that:

(1) There is not sufficient evidence to warrant his conviction;

(2) The Government has failed to prove facts sufficient to constitue a prima facie case;

(3) The Government has failed to prove any willful intent on the part of the defendant to evade taxes;

(4) The Government has failed to prove that the method of accounting employed by the taxpayer
230a does not clearly reflect the income;

(5) The Government has failed to prov that the Commissioner did determine that the Net Worth and Expenditure method does clearly reflect the income;

(6) The Government has failed to prove that the Commissioner in determining the taxable net income of the defendant in the statutory deficiency letters dated June 27, 1951, March 9, 1951 and January 31, 1952 without resort to the Net Worth and Expenditure method acted contrary to law;

(7) The Government has failed to prove the necessity of resort to the Net Worth and Expenditure method in adducing its proof against the defendant;

(8) The Government in adducing proof of the contents of the defendant's books and records did

violate the defendant's rights under the Fourth and Fifth Amendments to the Constitution which guarantee to the defendant the right to be secure in his papers and not be compelled to give testimony against himself;

(9) The Government has failed to establish a
231a likely source of the alleged increase in net worth as currently taxable net income;

(10) The Net Worth computation adduced by the Government is composed of acquisitions made by check and bank transactions; and, none of the acquisitions have been traced to the cash allegedly unreported;

(11) The Government, if it has proven anything, has proven that the defendant was an embezzler from the partnership of which he was a member, and has not shown that such embezzlements were condoned or forgiven; therefore, under the rule of Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, 66 S. Ct. 546, decided February 25, 1946, such embezzlements are not taxable income to the defendant;

(12) The Net Worth and Expenditure Method proof adduced by the Government lacks probative value because it does not establish with reasonable certainty an opening net worth to serve as a starting point from which to calculate future increases; reflects acquisitions in the ordinary usual manner of check payments and borrowings; and contains no ac-
232a quisitions from the alleged unreported cash.

Wherefore, it is prayed that the Court will hear Counsel on this Motion and grant the relief applied for.

C. B. Batter
Attorney for Defendant.

233a And on the same day, to wit, on the 5th day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before he Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

234a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and at the close of the Government's case the defendant by his counsel moves for a directed verdict of not guilty and the Court having heard the arguments of counsel and being fully advised it is

Ordered that said motion be and the same is hereby denied the trial proceeds and during the hearing of evidence on behalf of the defendant the hour of adjournment having arrived it is

Further Ordered that the Jury and Alternate Jurors be permitted to separate and that this cause be and the same is hereby adjourned to May 9, 1955.

2223 * * *

Monday, May 9, 1955,
10:00 o'clock a.m.

2224-2234 * * *

* * *

2235 * * * ASHLEY ARNOLD, called as a witness on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Batter.

Q. Will you state your name and address, please?
A. My name is Ashley Arnold. I live at 811 Brook Street, Elgin, Illinois.
Q. What is your business, Mr. Arnold?
A. The banking business.
Q. What bank are you connected with?
A. Union National Bank and Trust Company of Elgin.
Q. What is your title there?
A. Vice President.
Q. Are you the same Mr. Arnold who testified
2236 heretofore in this cause?
A. Yes, sir.
Q. Mr. Arnold, are you in any way connected with the bank at Gibson?

A. Yes, I am.
Q. What is your title with that bank?
A. I am a director at that bank.
Q. What is the correct name of that bank?
A. First National Bank in Gibson City.
Q. The First National Bank in Gibson City, and you are a director?
A. Yes, sir.
Q. Directing your attenion to Government Exhibit No. 95, which is a cashier's check in the amount of $35,000 to the order of Sam Achilli and Ruth Achilli and Theodore Gordon, drawn by the Union National Bank and Trust Company of Elgin, Illinois, can you tell me from your records the manner in which the bank issued that check?
A. Our bank issued this check—
Q. By "our bank" you are referring to which bank?
A. Union National Bank.
Mr. Russo: You are speaking of personal knowledge now, Mr. Arnold, are you?
2237 The Witness: Yes, I am.
Mr. Russo: All right.
By the Witness:
A. Our bank issued this check, this is, the Union National Bank of Elgin issued this check as proceeds of a loan made by our bank and also by the First National Bank in Gibson City.
By Mr. Batter:
Q. How much of the loan participation did the Union National Bank take?
A. $23,000.
Q. $23,000, and that loan was made to whom?
A. To Sam Achilli, Ruth Achilli and Theodore Gordon.
Q. How much of that participation did the First National Bank of Gibson take?
A. $12,000.
Q. Who were the borrowers on that $12,000?
A. The three people mentioned, Sam Achilli, Ruth Achilli and Theodore Gordon.
Mr. Batter: You may cross examine.

2238 *Cross Examination by Mr. Russo.*

Q. Does your record show, Mr. Arnold, who the prime obligors on that note were?

Mr. Russo: Don't look at him. Look at me.
By the Witness:
A. Well, would you—
By Mr. Russo:
Q. Do your records show that?
A. Certainly our records show that.
Q. Who are the prime obligors on that loan?
A. Sam Achilli, Ruth Achilli and Theodore Gordon.
Q. Was Theodore Gordon a prime obligor or a secondary obligor?
A. I would have to look at the note.
Q. Have you got it?
A. No, I don't have the note.
Mr. Russo: Do you have it, Mr. Batter?
Mr. Batter: No, I don't have it.
Mr. Russo: No further questions.
Mr. Batter: Thank you, Mr. Arnold.
(The witness stepped down from the witness stand.)
Mr. Russo: Your records don't show? The rec-
2239 ords that you have there don't show?
Mr. Batter: Let the witness take the stand if you want to ask him questions.
Mr. Russo: All right.
Mr. Batter: Do you want to recall him?
Mr. Russo: Just one more question.
(The witness thereupon resumed the witness stand.)
By Mr. Russo:
Q. The records that you have there don't show?
A. These records do not show.
Mr. Russo: That is all.
Mr. Batter: Thank you, Mr. Arnold.
(Witness excused.)

* * *

2240 (Whereupon the following further proceedings were had in chambers, outside of the presence and hearing of the jury, to-wit:)
Mr. Batter: If your Honor please, at this time I renew my motion for a judgment of acquittal.
In discussing it, I do not propose to discuss the matters I have previously gone over. I will not take up the time of the Court for that. I intend to address myself particularly to the Net Worth Statement and show wherein it fails to make out a prima facie case, and for that

purpose and with that in mind I am going through some of the details of it.

I wonder whether Government counsel would be good enough to give the Judge a copy of that schedule?

The Court: Yes. We had better have one.

(A copy of the document referred to was furnished to the Court.)

Mr. Batter: Addressing myself first to the net worth at December 31st, 1945, I direct the attention of the
2241 Court to Government Exhibit No. 1 which shows in Schedule D, a brick residence sold in 1946 and purchased in December, 1945, at a cost of $11,000.

That item does not appear in this net worth statement—

Mr. Russo: Where is this? What are you talking about?

Mr. Batter: The item of $11,000, cost of brick building, appearing in Schedule D of Exhibit 1.

That would increase the net worth at the beginning by $11,000. If I can have that Exhibit 1—

Mr. Weber: I just sent for it.

Mr. Batter: —I will show it to you.

Exhibit 1, when it is brought here, will also show that the brick building was sold in 1946 for $13,500. Therefore it does not affect the net worth statement at the end of 1946, and it does increase the net worth at the beginning of 1946 by $11,000.

Here is Government Exhibit 1, the return for 1946,
2242 and I make reference to the very first item appearing on Schedule D there. Now, continuing from there—

The Court: I think maybe we had better let Government counsel answer this step by step.

Mr. Batter: Each item as we go along?

The Court: Yes. It may clarify the thing a little more.

Mr. Batter: All right.

Mr. Russo: Your Honor will recall the testimony of two witnesses in that connection. The property he refers to has been identified as 167 Liberty Street.

Mrs. Wagner testified to the purchase of that property. Mr. Gromer's records and his testimony showed that that property went out of Achilli's possession in 1946, that amount was paid in 1946, and it was no longer in the net worth schedule.

Mr. Weber: It was paid in 1947. This amount (indicating) was what was paid from the thirteen-five.

Mr. Russo: The $10,800 is the amount due from
2243 the $13,500 that Mrs. Wagner testified she purchased it for, and that amount was the amount that was due to Achilli at 12-31-46 and was paid to him in 1947.

Mr. Batter: That is correct, your Honor. My objection is that it has not been included in the schedule at December 31st, 1945. It increases his net worth at the beginning of this net worth period.

Here we have an asset that is being sold and we have no inclusion of it in any prior period, whereas Government Exhibit No. 1 definitely shows the property was acquired in 1945 and there is no controverting evidence.

Mr. Russo: Yes, there is. Mr. Weber testified that the contract of sale was entered into in 1945. That was not one of his assets in 1945.

Mr. Weber testified it was purchased in 1946. There was some variance between Mrs. Wagner's testimony as to date, but Mr. Weber testified from his investigation that that was purchased in 1946, not in 1945, and
2244 was not one of his assets in 1945.

Mr. Batter: Mr. Weber produced nothing to support that testimony.

Mr. Russo: That is a question for the jury.

Mr. Batter: There is no testimony to that effect.

Mr. Russo: Well, the record will refute that statement.

Mr. Batter: Will you—

Mr. Russo: You go ahead and make your argument. I will get to the record in time.

Mr. Batter: We are meeting each item as we go along, his Honor stated.

Mr. Russo: What was your testimony, Ralph?

Mr. Weber: That the property was purchased in 1946, not 1945.

Mr. Batter: Turning to page 1914 of the record, the testimony of Mr. Weber reads as follows:

"167 Liberty Street, contract of sale, Josephine Wagner testified that she purchased the property during
2245 the year 1946, and Earl Gromer further testified as to the transaction. They presented Exhibit 207. They testified at December 31, 1946, Mrs. Wagner owed Mr. Achilli $10,800."

That all deals with the sale by Mr. Achilli in 1946, and does not bear at all upon his purchase in 1945.

2246 Mr. Russo: Well, even if that were error—we can't find it just now apparently, Judge, and I don't want to tie you up longer than I have to—but even if that were error, the effect of it would only be to decrease the amount of net worth from $33,000. The increase in net worth reflected here is $40,000 in 1946. If you deducted the $11,000, the increase in net worth would be $29,000.

Adding the deductions and subtracting the non-deductible items, there would still be a substantial additional income unreported at the end of 1946.

So although it might be—unless we find what Mr. Weber thinks is in the record here—it would still have no ultimate effect on the additional income in 1946.

Mr. Batter: May I answer that, your Honor, with this statement: Turning to the second page of Exhibit 280, your Honor will find under the year 1946, the third figure from the bottom, $21,281.65.

Now, of course, proceeding on the net worth basis that would take $11,000 off that figure, which would bring

2247 it down to $10,281.65. If we deduct from that what the Government concedes to be a liability to Earl Gromer, it brings the figure for 1946 down to $2,803.94.

On the other hand, if we set up the entire liability to the partnership, as our understanding of the law requires, it shows a decrease of net worth for the year 1946 of $4,673.45.

Therefore, on the basis of complete liability for the alleged withholdings, the decrease in net worth is $4,673.45. Therefore there is no deficiency and no basis for any tax due or any prosecution.

On the other hand, if the Court adopts the theory of the Government that only half of that is liability, it results in an increase in net worth in 1946 of $2,803.94.

We submit, your Honor, that with the frailties and weaknesses inherent in the net worth system, any sum such as $2,803.94 is too insignificant to be the basis of a prosecution.

Although we do not concede that the Government is right in that. We maintain that there is actually a

2248 decrease in net worth of $4,673.45 based upon the statement of net worth at the beginning of this period by $11,000.

Mr. Russo: In respect to that, if your Honor please, there is no evidence in this case at all put on by the defendant to establish his theory. He has been arguing here all the time embezzlement. It is on that theory that he is making this argument, but there is no proof in the record, put in by the defendant, of any embezzlement.

We are giving the defendant credit for the half of the money that equitably is Gromer's share of the receipts of Highland Motor Sales. As a matter of law, he is not entitled to anything because the cases here, if your Honor please—there is an Illinois Supreme Court case. I would like to read your Honor extracts from that on the law, and I say that there is no evidence here adduced by the defendant to support any theory of embezzlement.

The Court says in 116 N.E. Reporter, page 205, at page 208:

2249 "This court has held that under the statute of embezzlement, in order to constitute that crime, the fraudulent conversion must be a property belonging exclusively to a person other than the one charged.

"If the money in question was in fact in part the property of plaintiff in error, this conviction cannot be sustained. Counsel for the state relies on State *vs.* Kusnick," and other cases holding otherwise.

That case was referred to in McElroy *vs.* People, supra, and the Court declined to follow that, saying our statute was different. There were other decisions to the same effect as the Kusnick case, but the decisions in other States were founded on statutes unlike ours.

Further:

"We think that under the reasoning of the decisions of this court, there can be no escape from the conclusion that the conviction cannot be sustained because it most be held that the property which plaintiff in error is charged with embezzling was property in which he had an in-
2250 terest. To hold otherwise would be to overrule the repeated decisions of this court.

"Mere proof of the receipt of funds and failure to account therefor does not in itself show embezzlement by agent or servant. There must be other evidence of conversion."

This was a case, if your Honor please, where a bank was organized as a co-partnership, and one of the partners embezzled bank funds, and the Court held that a part-

ner cannot embezzle from a partnership. He can't embezzle from himself, and there are other cases.

So his theory on that is all shot. Let's see here. People *v.* Dettering, 278 Ill. 580, 116 N.E. 205; People *v.* Ehle, 273 Ill. 424, 112 N.E. 970. People *v.* O'Farrell, 247 Ill. 44, 93 N.E. 136; and McElroy *v.* People, 202, Ill. 473, 66 N.E. 1058.

These cases stand for the proposition that it is a fundamental principle of the common law that one can-
2251 not steal his own property. The general rule, therefore, is that the ownership of the property alleged to be embezzled must not be in the accused either in whole or in part. It it appears that the accused had any interest in the property jointly with another, he cannot be convicted of embezzlement in respect to such property.

In People *v.* Goodright, 251 Ill. 558, 564, 96 N.E. 542, and McElroy *v.* People, is authority for that proposition.

In 20 Corpus Juris, under the title, "Embezzlement," page 445, there appears this statement:

"As has already been shown one cannot embezzle property of which he is part owner. Hence, partners cannot embezzle partnership funds which came into their possession, because of their joint interest or ownership therein." Citing People *v.* Dettmering, this case.

The principle stated there is repeated verbatim in 29 Corpus Juris Secundum, 693, paragraph 16.

I have a quotation here, if I can only find it in the
2252 book. Oh, I did, and I read it, your Honor.

The Court overruled the conviction because there was no proof that the plaintiff in error owned any of that money. There was embezzlement there because the chap that did the embezzling was not one of the partners.
2253 So No. 1, there is no proof in the record of any embezzlement on the part of the Defendant, and No. 2, even if there were in law he would not be on sound ground because a man cannot embezzle from himself; and a man can no more embezzle from himself than he can sue himself. A partnership is not a legal entity.

Mr. Batter: If your Honor please, on that score we have cited to you the Statute of Illinois in our previous argument wherein it was held that a partner is a fiduciary and that a partner cannot be held to account as an agent of the partnership for any funds or any such thing until the end of the accounting period.

Here we have annual risks and we have annual determination of property losses. If these moneys in fact did reach the hands of Mr. Achilli and were unaccounted for at the end of 1946 or 1945—1946, then they are merely funds for which he is liable under the Illinois law. We have cited all of that to you.

2254 The common law is not controlling here, because in Illinois we have a statute which controls this partnership situation.

However, in furtherance of 1946, I point this out, which I have stated to the Court, that on the Government's theory there was an understatement of $2,803.94. When I use that figure I am referring to income; I am not referring to tax. That is the alleged understatement of income.

On the other hand, if our theory is followed with respect to these partnership funds, assuming they ever reached the hands of Mr. Achilli instead of being lost by the wayside, there is an actual decrease of net worth of $4,673.45, not income. In neither case do I refer to tax.

I respectfully submit, your Honor, that regarding the year 1946 the motion for a judgment of acquittal should be granted.

The Court: Well, I think it is still a question for the jury. I will deny the motion for a judgment of acquittal with respect to the year 1946. What is the next

2255 matter, sir?

Mr. Batter: With reference to the year 1947, there I revert in part to the year 1946 because the figures carry forward.

Your Honor heard testimony this morning that the MacGregor Oil Company deal was made in 1942 and 1943. During the year 1947 the taxpayer, the Defendant, took a deduction on his tax return, Exhibit No. 2, of $5,000 for his investment in the MacGregor Oil Company enterprise.

That item does not appear in the opening balance sheet or net worth statement of December 31st, 1945 or 1946. It drops out in 1947, of course, because of the worthlessness.

Now, the Government for the year 1947—for the moment I am excluding items that carry forward from year to year—therefore has overstated the net worth by that figure of $5,000. The figure they have used, the third

figure from the bottom on Exhibit 280, is $55,024.40. Deducting from that figure $5,000 brings it down to $50,024.10.

2256 The Government deducts from that figure $18,065.77, on the Government's theory of the case that only half of that sum of the supposed embezzlements—and while we are on that subject I would like to say that whereas counsel says that the defense has produced nothing with respect to those embezzlements, let me say that the defense is not required to produce anything.

Let me further say that it has been the position of the prosecution that these are funds that were taken by Mr. Achilli and were not funds that were taken by Mr. Achilli and Mr. Gromer together.

The prosecution produced Mr. Gromer and Mr. Gromer denied any knowledge of any wrongdoing at the time of the preparation of these returns. He denied receiving any of these sums of money, and the defense introduced Defendant's Exhibit 5 wherein it definitely shows Mr. Gromer sued for these moneys upon his discovery afterwards that they had been appropriated, as he alleged, by Mr. Achilli, so that all of the elements of the

2257 embezzlement are there, if there is one.

The Government by allowing half then would increase its net worth in 1947 by $31,958.63 instead of $36,958.43. On the other hand, if we take off that total item of which the $18,000 is half, the increase in net worth for the year 1947 is $13,892.55.

That, we contend, your Honor, requires a judgment of acquittal for this reason: The United States Supreme Court in Holland *v.* U. S. has said that whereas the Government cannot with accuracy always allocate the alleged understatement of income to a particular year, it is sufficient if the Government shows that over-all increase.

I ask your Honor to withhold your ruling on 1947, to hold it in abeyance for a moment, because as we go through 1948 we are going to demonstrate that there actually is a decrease in net worth in the over-all period of December 31st, 1945, compared to December 31st,

2258 1948, so unless counsel for the prosecution has something to say on 1947, I will pass on to 1948.

Mr. Russo: I will have the same argument, if your Honor please. It is a question for the jury.

Mr. Batter: These are not questions for the jury, your Honor. These are questions that the United States Supreme Court in Holland *v.* U. S. said that if the Government fails to investigate these lands which are very clearly set forth in the tax returns, then your Honor does have the prerogative and the privilege of taking the case from the jury and assuming these facts to be true.

Obviously as to the $11,000, there has been no demonstration it was not paid when the taxpayer said it was in 1945. There has been evidence that he did acquire this investment in this oil property in 1942 and 1943 and that it was written off in 1947, when obviously it should have been in 1945 and 1946.

Mr. Russo: Let me answer that by saying this:
2259 The defense put on a couple of men here who were testifying about some trips they made to some oil fields. There was no evidence introduced about any investment by Mr. Achilli in any of those years.

Mr. Batter: It is not incumbent upon us to do so. The Supreme Court says, "There's the lead right in the tax return", and the Supreme Court says that when the Government does not pursue these leads—

Mr. Russo: We followed every lead.

Mr. Batter: (Continuing)—that the Government can take them as true—or rather, that the Court can take them as true.

Mr. Russo: We have got them right in Government Exhibit 280, "Investment in Oil: McCummings Oil Company, Marvin Affeld." We have put in everything that the Government can find. They have not put in any evidence controverting this sort of thing.

The Defendant supplied no leads. He gave the Government no information.

Mr. Batter: It is right on the tax return there,
2260 your Honor, $5,000, Fairfield, Illinois, McGregor Oil Company, taken as a deduction as an abandoned well.

Mr. Russo: The evidence of Mr. Weber that he investigated that is this:

"Q. In that same bracket there is an item 'Investment on. Oil Well found worthless and abandoned, MacGregor Oil Company, Fairfield, Illinois, $5,000.'"

Mr. Batter: What page is that?

Mr. Russo: Page 2092.

"When was that asset acquired?

"A. 1947.

"Q. What record do you have of that asset being acquired in 1947? Do you have your work papers here?

"A. No, I do not.

"Q. Are you able to establish in any way in the form of documents the acquisition of that asset in 1947?

"A. No, sir."

Mr. Batter: Do we need more? Do we need more?

Mr. Russo: (Reading)

2261 "Q. Mr. Weber, I direct your attention to Government Exhibit No. 2, Mr. Achilli's individual tax return for the year 1947, and to miscellaneous deductions appearing on page 3.

"A. Yes.

"Q. Is there an item there, 'Development expense on oil well paid Lichlyter Oil Company, Evansville, Indiana, $4,113.40'?

"A. There is.

"Q. Have you made an investigation to find out when that asset was acquired?

"A. I did.

"Q. When was it acquired?

"A. The development expenses were paid during the years 1947."

Mr. Batter: That is a different item. I am not questioning that one.

Mr. Russo: Which one are you questioning?

Mr. Batter: There are two of them on there. I am questioning the $5,000 item.

Mr. Russo: (Reading):

"Q. In that same bracket there is an item, 'In-
2262 vestment on oil well found worthless and abandoned, MacGregor Oil Company, Fairfield, Illinois, $5,000.'

"When was that asset acquired?

"A. 1947."

Mr. Batter: And he has no working papers or nothing to support it but his own memory.

Mr. Russo: His investigation. You asked him about his investigation.

Mr. Batter: I asked him about his work papers, too.

Mr. Russo: It only proves that Achilli was a liar when he made this. That is a question for the jury to determine.

Mr. Batter: I think the evidence is clear, your Honor; that—

The Court: Let's proceed. I will hold my ruling in abeyance.

Mr. Batter: With reference to the year 1948, there is an item in there of $7,500. That is that very famous item where they set up an asset and no liability because a man made a construction loan, none of which had been
2263 expended. In other words, what he got was credit.

Actually, that testimony has been stricken from the record and the Exhibits have not been admitted, so that item of $7,500 clearly drops out.

We also had, at the end of 1948, the item of $35,000, the second item appearing under the 1948 column on the first page there, and the testimony is that a $23,000 offsetting liability appears on the first item on page 2.

We have had testimony this morning that there was a $12,000 loan through the Gibson Bank, and therefore there should be another liability set up or Mr. Achilli's asset value reduced. That takes $12,000 out of the net worth statement.

Your Honor will recall that Mr. Gordon testified about that, and he said he put up his guarantees. What happened there was that a $35,000 check was drawn late in December of 1948, and within a month the check was returned and cancelled and the loans extinguished,
2264 but in the net worth statement the Government here has set up an asset of $35,000 and a liability of $23,000.

Mr. Arnold testified this morning that that $12,000 was also covered by loans.

Now, then, we have this item of $15,000 marked on page 1 here as, "Theodore Gordon, Martin Seybold, Cashier's Check No. 132224, Exhibit 172", and there is no corresponding liability appearing for the issuance of that check on December 28th, 1948, and Mr. Seybold testified this morning that that check was not issued to Mr. Achilli, that he was not the purchaser of that check, but that the purchaser of that check was Mr. Gromer. That $15,000 does not belong in the asets under those circumstances. That makes $34,500 that would be added at the end of 1948 up to that point.

Now, there is an additional item. Reference to the 1948 return shows that the Defendant sold during 1948 some stock in Red Lion, Inc. I think by this time the Court is satisfied that there is such a corporation. Part of
2265 the minutes of that corporation have been introduced in evidence by the prosecution.

We have shown that the taxpayer acquired that asset in November, 1945, before the beginning of this net worth period.

In so far as net worth is concerned, we are only concerned, of course, with the half he sold, so with respect to the figures of $4,673.18, that item should appear as an asset all the way through and should appear as an asset not double that amount at the beginning of the period, so the Government net worth statement is again askew by that figure.

These four items I have mentioned amount to $39,173.18 that the net statement is off at the end of the period.

We could stop right there, for all practical purposes as far as the year 1948 is concerned, because the Government only alleges an understatement of income of $20,623.18, and we exclude the Earl Gromer participation of $31,157.18.

Now, actually, the supposed withholdings by this De-
fendant amounted to $21,068, according to the
2266 Government testimony, so that what we do have for the year 1948 is an understatement of the net worth statement as supplied by the Government of $29,084.60 instead of an increase of $20,623.

If you follow the Government's theory of applying half of the Gromer item, it is that. If you do not, if you follow our theory, it is the $29,000, so that if we take the three years together, the increases omitted from 1946 and the inclusions in 1948 which in fact do not belong there, we have these figures:

For the year 1946, a decrease in the net worth instead of an increase, of $4,673.45; for 1947, an increase in net worth of $13,892.55; and for 1948, a decrease in net worth of $29,084.

Combining the three results in a decrease of net worth at the end of 1948 as compared to the beginning of 1946 of $19,864.90.

Now, since the over-all net worth shows a de-

2267 crease and because of the inherent difficulties of perhaps placing in a particular year a particular expenditure, we get to the point where over all we have a decrease in net worth of $19,864.90 for the over-all period, a specific decrease in net worth on our basis of $29,084, and on the Government's basis of applying only half of the funds to Gromer, of $18,550, and under those circumstances we feel, your Honor, it is not only in hand for the Court to grant the motion of a judgment of acquittal for the year 1948, but for each of the years because of the over-all picture.

Mr. Russo: The answer to that is very simple.

Mr. Batter: Can your Honor follow these figures?

The Court: I have them pretty well in mind.

Mr. Russo: The answer to that is very simple, if your Honor please. Each count of the indictment is a

2268 separate offense. The jury can find the Defendant guilty as to all counts or only as to one count, depending on how they look at the evidence.

The over-all picture as described by Mr. Batter really has no bearing, but I would like to call your attention to this: The Red Lion property, including the corporation, was acquired by Mr. Achilli in 1945. He acquired the real estate and the corporation and the chattels on a cost basis of $18,400.

In the year 1946 he took a fire loss of $16,000 and he said that the remaining value of that property was $2,000.00.

2269 Therefore by his own calculation he had a cost basis in the corporate stock of only $400.

In his 1948 return, he took a cost basis of $4,617.18 for half of the corporate stock. That is what the testimony of Gromer and Brady showed, that $4,617.18 represented half of the corporate stock. So there is fraud on the face of that return in 1948.

Mr. Batter: If your Honor please, there isn't fraud on the face of it. Assuming that what counsel says were true, it might be a mistake, but not fraud.

But the facts have shown differently. Mr. Weber sat on that witness stand half an hour trying to wiggle out of this situation, which showed that the contract, Government Exhibit No. 84, did not include Red Lion, Incorporated stock.

The evidence is clear. We have got the minute book,

excerpts from it. We have got Mr. Achilli buying the stock in 1945, and the purchase of that stock has nothing to do with the fire loss. After all, Red Lion, Inc. was an operating company.

2270 The Government introduced the lease, what they leased from the owner of the land and the buildings and the equipment, but the operating provision was a separate one, and it was purchased separately and was purchased before the beginning of the period here involved, and should be taken into account in 1948.

Even if we do eliminate that item, it would simply reduce the $39,173.18 of over-statement by $4,673.18, which still gives an overstatement of $34,500.00, whereas the Government doesn't maintain that there is anything more than $20,000.00 of unreported income for the year 1948.

The picture for 1948 is just so clear I see no alternative but to grant a motion for acquittal, your Honor.

In addition on the overall picture, the Supreme Court clearly spoke on that. We have here the decrease in overall, and the motion should be granted not only for the year 1948 but for all years.

Mr. Russo: I would like you to point out in Holland where the Supreme Court said that. Here is the

2271 Holland opinion.

Mr. Batter: I have the Holland opinion right here.

I see one quotation here, while I am at it that I would like to bring before the Court, because I have mentioned it.

Page 135 of the Advance Sheets, Volume 75 Supreme Court Reporter:

> "Where the Government fails to show an investigation into the validity of such leads, the trial judge may consider them as true and the Government's case insufficient to go to the jury. This should aid in forestalling unjust prosecutions, and have the practical advantage of eliminating the dilemma, especially serious in this type of case, of the accused's being forced by the risk of an adverse verdict to come forward to substantiate leads which he had previously furnished the Government."

These were not only furnished more forcefully than they would be if they had been advanced orally. They

were actually advanced in the income tax returns.

The Court: Is that all, gentlemen?

2272 Mr. Batter: No. I am looking for this one quotation that he just asked for.

The Court: Oh, pardon me.

Mr. Batter: On page 132 of the Holland case, the Court states:

> "The statute defines the offense here involved by individual years. While the Government may be able to prove with reasonable accuracy an increase in net worth over a period of years, it often has great difficulty in relating that income sufficiently to any specific prosecution year. While a steadily increasing net worth may justify an inference of additional earnings, unless that increase can be reasonably allocated to the appropriate t.. year the taxpayer may be convicted on counts of which he is innocent."

In the companion case of United States *v.* Calderon, 75 Supreme Court, page 186, the Court states at page 190:

> "While the evidence as a whole must show a deficiency for each of the prosecution years, the corroborative evidence suffices if it shows a substantial
2273 deficiency for the overall prosecution period."

That is the paragraph I had in mind when I spoke about the overall period.

> "* * * corroborative evidence suffices if it shows a substantial deficiency for the overall prosecution period."

We don't have that here, your Honor, with the inflation of the 1948 statement and the deflation of the 1946 statement.

Mr. Russo: What he fails to point out, if your Honor please, is that in that case the Government was following leads supplied by the taxpayer that the Government had to corroborate, which isn't the case here at all.

Mr. Batter: They are right in the tax returns.

The Court: Is that all, gentlemen?

Mr. Russo: Yes, your Honor.

Mr. Batter: That is all on that, your Honor.

The Court: The motions for verdict of acquittal will be denied.

* * *

235a And afterwards, to wit, on the 9th day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

236a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant in his own proper person and by his counsel and the Jury and Alternate Jurors heretofore elected, empaneled and sworn herein for the trial of this cause also come and trial of this cause proceeds and at the close of all the evidence the defendant by his counsel moves for a directed verdicted of not guilty and the Court having heard the arguments of counsel and being fully advised in the premises it is

Ordered that said motion be and the same is hereby denied and the hour of adjournment having arrived it is

Further Ordered that this cause be and the same is hereby adjourned until May 10, 1955 at 9 A. M.

2274 * * *

Mr. Batter: There is a definite objection to instruction No. 9 and its definition of reasonable doubt.

I have prepared an instruction on reasonable doubt, instruction No. NN. That is taken from the Holland case, your Honor.

Mr. Russo: Only the first sentence, if your Honor please.

Mr. Batter: Yes, the first sentence.

Mr. Russo: The rest of it is not good law. It is an invitation for a hung jury.

Mr. Batter: I don't think it is.

2275 The Court: What is wrong with instruction No. 2 specifically?

Mr. Batter: "Reasonable doubt means just what the words themselves imply—a doubt founded on reason and which must arise from the evidence, not a possible or mere fanciful doubt. It is not merely such a doubt as may be conjured up in the mind of one desirous of escaping the responsibility of decision, or such as may be engendered by pity or sympathy for the defendant. It is an actual doubt of which you are conscious after going over in your minds the entire case and after giving consideration to all the testimony and every part thereof. If you then feel uncertain and are not fully convinced that the defendant is guilty, and if you believe that a reasonable man, in any matter of like importance, would hesitate to act because of such a doubt as you are conscious of having, that would be a reasonable doubt of which the defendant is entitled to have the benefit."

That is all, to my mind, just a mess of words, parts taken from different decisions undoubtedly, but the most recent expression by the Supreme Court is very concise and very definite.

Mr. Russo: That is included in here.

Mr. Batter: I say "reasonable doubt is the kind
2276 of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act."

That sentence is directly from the Holland case.

Mr. Russo: Well, considering your requested charge as a whole, the whole thing is no good. If only a part of it is good, part of it is no good, then the whole thing is no good.

The Court: All right. We will proceed with the next one.

* * *

2277-2279 * * *
2280 * * *

Mr. Batter: There is objection to No. 11 in that it doesn't go far enough. I think we have a situation here where the individual signed his tax returns, but the partnership returns were not signed by the defendant.

Mr. Russo: We are not concerned with the partnership.

Mr. Batter: He didn't file the partnership returns. They are in evidence here, and we don't want to confuse the jury.

Mr. Russo: There is no confusion. The only issue here is, did he attempt to evade and defeat his taxes.

The Court: I will give instruction No 11.

2281 * * *

Mr. Batter: With respect to 13, in the second paragraph, or rather the third paragraph, it says:

> "There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability."

Again there is nothing about the question of partnership returns. That ought to be noted.

Mr. Russo: He is not being prosecuted for evading partnership taxes. He is being charged with an attempt to evade and defeat his individual taxes.

The Court: In the second paragraph there are two "to's" in the second line. I am going to delete one.

Mr. Russo: That is a typographiical error, Judge.

The Judge: I will give No. 13, and the objection may be noted.

Mr. Batter: No objection to 14.

2282 * * *

Mr. Batter: I think 19 is entirely immaterial.

The Court: I am going to give that one.

Mr. Batter: May the record note my objection and exception.

The Court: It may be noted.

Mr. Batter: With respect to 20, I again direct attention to the fact that the Defendant did not sign the partnership returns.

Mr. Russo: This relates only to his individual returns.

Mr. Batter: The partnership returns were introduced in evidence and supported.

Mr. Russo: The partnership returns were introduced to show—

The Court: I will give 20.

2283 Mr. Batter: May the record note my objection and exception?

The Court: The objection may be noted.

Mr. Batter: 21 does not apply to the partnership returns.

The Court: I will give 21.

Mr. Batter: Let the record show my objection and exception.

The Court: It may be noted.

Mr. Batter: No objection to 22.

I think 23 is duplicated and contains a number of examples that have no application here at all, your Honor.

The Court: This is quoted verbatim from the Spies case?

Mr. Russo: Yes, your Honor.

The Court: I will give that subject to the objection.

* * *

2284 * * *

2285 * * *

Mr. Batter: 29 is expressly objectionable by its language because of the Wilcox case.

Mr. Russo: There has been no proof of any Wilcox situation here by the Defendant. I know that you do not have to take the stand, but the Supreme Court 2286 in Holland *vs.* U. S. says you fail to do so at your peril.

Mr. Batter: The case is resolved on the entire proof, not what the Defendant puts in.

The Court: I am going to give that subject to the objection.

Mr. Batter: Let the record note my objection.

* * *

2287 * * *

The Court: I am going to give that one, instruction No. 31.

Mr. Batter: Exception.

The Court: The exception may be noted.

Instruction No. 32.

Mr. Batter: The objection to instruction 32 is in the last sentence of the first paragraph—

Mr. Russo: Page 2?

Mr. Batter: No, page 1. There should be included there the proceeds of embezzlement.

The Court: What is the objection to that?

Mr. Batter: There should be included in these examples the proceeds of embezzlement. "These funds

include gifts, inheritances, loans, the proceeds of life insurance policies and certain other miscellaneous items."

We have a bigger issue here than other miscellaneous items.

Mr. Russo: There is no proof before the jury that there was any embezzlement.

Mr. Batter: I think we have it.

The Court: That is my understanding that there is no proof, so it will not be included and we will
2288 approve instruction No. 32.

Mr. Batter: Exception.

The Court: Exception noted.

Instruction No. 33.

Mr. Batter: I think the first sentence on the second page, the second paragraph, is contrary to the facts. The $11,000 item is an express example of it.

Mr. Russo: You are talking about the sentence that reads: "The evidence introduced by the Government * * *"?

Mr. Batter: No, "In this case the Government has endeavored to prove that the defendant did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by tracing the financial and income tax return filing history of the defendant."

The 1946 return itself discloses an asset not taken in by the Government.

Mr. Russo: It also discloses on its face fraud. That is only a statement of what the Government endeavored to prove.

Mr. Batter: It does not show fraud.

Mr. Russo: That is exactly what we endeavored to prove.

2289 Mr. Batter: The second sentence on the third page, "If you are satisfied that all such reasonable leads and explanations have been exhausted or refuted, this would be persuasive evidence which you could consider in determining whether the starting point net worth included all of the defendant's assets."

That is contrary to the facts.

Mr. Russo: That is a fact that the jury can determine. The Court is not telling the jury that it must.

Mr. Batter: The jury looks upon the statements of

the Court with great solemnity, and to have that statement in there is definitely harmful.

Mr. Russo: Taken in its context, it can't do him any harm. It is as fair an instruction as can be written.

Mr. Batter: I don't know whether it can or not.

Mr. Russo: You don't find any objection to the last sentence, "If you should find that the Government's investigation has failed to refute * * *"?

Mr. Batter: I haven't reached that yet.

On the fourth page of that instruction, the language is definitely objectionable: "And if you are also convinced beyond a reasonable doubt that the funds reflected
2290 in increased net worth and expenditures during such year are substantially in excess of the income reported on the defendant's tax return you will proceed to inquire whether the Government has established that those funds represented taxable income on which the defendant wilfully attempted to evade or defeat the tax."

I think there we ought to have a definite instruction on this situation.

The Court: I am going to give instruction No. 33.

Mr. Batter: Exception.

The Court: Exception may be noted.

* * *

2291 * * *

Mr. Batter: I think the second to the last sentence which begins: "But you are reminded that it is the books, records and documents which are the evidence," is objectionable because we have no books in evidence here, your Honor.

Mr. Russo: We have got all sorts of books and records in evidence here. We don't have any defendant's books and records because he didn't have any, but we have testimony on his.

The Court: I will give instruction 33.

Mr. Batter: Exception.

The Court: Exception may be noted.

* * *

2292-2363 * * *

2364 Defendant's Refused Instruction

REQUESTED CHARGE NO. A

The defendant has entered a plea of not guilty to each count of this indictment. Each count comprises a

separate year and charges a separate offense, the first 1946, the second 1947 and the third 1948. Each Count charges a separate offense and you must consider each Count or year separately. You cannot compromise by offsetting one year with another. You must by considering each year separately determine his innocence, or guilt for that year. The effect of that plea of not guilty to each count is to deny every material allegation of the indictment and put on the Government the burden of proving for each count each material allegation of the indictment beyond and to the exclusion of every reasonable doubt. The Government must do that before you would be justified in convicting the defendant of any one of the offenses of which he is charged. If the Government has failed to prove his guilt by competent and believable testimony beyond and to the exclusion of a reasonable doubt for each of the years then you should acquit the defendant for such year.

2365 Defendant's Refused Instruction

REQUESTED CHARGE NO. B-1.

Ladies and Gentlemen of the Jury, you are to perform your duty without bias or prejudice as to either party. The law does not permit the jury to be governed by sympathy, prejudices or public opinion. A defendant is presumed to be innocent of any crime. This presumption of innocence continues throughout the trial and has the weight and effect of evidence in the defendant's behalf. You are instructed that the defendant is presumed to be innocent and he is not required to prove himself innocent nor to produce any evidence on the trial. The defendant was clothed with this presumption of innocence at the outset of the trial and that presumption abides with him through the trial and until the evidence convinces you to the contrary beyond a reasonable doubt. This presumption of innocence of a defendant is no mere idle theory to be cast aside by the jury through mere caprice or prejudice but is a substantial part of the law of the land and follows the defendant throughout the entire case and must not be lost sight of by the jury until it has been overcome by evi-
2366 dence which establishes the defendant's guilt beyond all reasonable doubt. The burden of overcoming the

presumption of innocence by proof of guilt beyond a reasonable doubt rests upon the prosecution. The defendant has entered a plea of not guilty. This means that he denies every material allegation of the indictment for each year and places upon the prosecution the burden of producing evidence to establish the allegations of the indictment beyond a reasonable doubt for each year.

2367 Defendant's Refused Instruction

REQUESTED CHARGE NO. B-2.

The defendant in this case, as is true in all criminal cases under our system of government, comes in the court presumed to be innocent. This presumption of innocence accompanies and abides with him through every stage of the trial as to every material allegation of the indictment, and until your minds are convinced by the evidence beyond and to the exclusion of every reasonable doubt that he is guilty of the offense charged against him, but, when your minds are so convinced of the guilt of the accused beyond and to the exclusion of a reasonable doubt, then that presumption of innocence ceases.

2368 Defendant's Refused Instruction

REQUESTED CHARGE NO. D
(In form submitted)

The jury is instructed that the burden of proof never shifts in a criminal case. It is incumbent upon the Government to prove beyond exclusion of every reasonable doubt that the defendant knowingly and wilfully attempted to evade his lawful taxable income due for the particular year charged in the indictment that you are considering.

2369 Defendant's Refused Instruction

REQUESTED CHARGE NO. E

It is necessary before you would be authorized to find the defendant guilty upon any count of this indictment, that it be made to appear that the defendant actually owes income tax to the United States of America which he wilfully failed to pay and with intent to evade such tax, but in that connection you are further instructed that in no sense can this proceeding be used to enforce the payment of any tax liability against the defendant. The sole investigation that can be made in this proceeding is to

determine whether or not the defendant is guilty of the offense as charged and he cannot be found guilty simply because it may be made to appear that the defendant does owe to the Government of the United States tax that has not been paid, no matter what the amount may be.

In order to find the defendant guilty of any count you must find beyond a reasonable doubt that he owes a tax for such year, and that he wilfully by making a false return sought to evade such tax.

In this connection I charge you that avoiding a tax is not a crime, evading one is.

2370 Defendant's Refused Instruction

REQUESTED CHARGE NO. G

The jury is instructed that the outcome of this case in no wise affects the Government's right to proceed against the defendant in civil proceedings, if it believes that any additional taxes are due it by defendant. If you acquit him, it does not excuse him from payment of taxes, if any be found to be due in some other proceeding.

2371 Defendant's Refused Instruction

REQUESTED CHARGE NO. I

Before you can find the defendant guilty, it is necessary that the evidence shows beyond a reasonable doubt—or excludes every other hypothesis that this money may not have come from sources other than taxable income—that this was taxable income. The Government must show beyond a reasonable doubt that it was taxable income in the particular year charged in the indictment. The evidence must show more than a failure to report this income, that is not a crime. Congress has not said that it is criminal to fail to report all you receive. It has made the taxpayer civilly liable for the difference and for large penalties, but it has not said it is a crime. Congress has said it becomes a crime only when you wilfully, that is intentionally, with an evil motive with purpose to evade, that you become guilty of the crime.

2372 Defendant's Refused Instruction

REQUESTED CHARGE NO. J

(In form submitted)

The defendant in this case cannot be found guilty simply because he may have failed to include in his income

tax returns items of income or sources of income that should have been included, he can only be found guilty in the event that he wilfully and knowingly undertook to evade the tax for such year charged in this indictment.

2373 Defendant's Refused Instruction

REQUESTED CHARGE NO. K

The jury is instructed that the law requires that the income of the defendant be computed in accordance with the method of accounting regularly employed in keeping his books. This the Government has not done. In order to establish income by any other method—here the Government used the net worth method—the Government must first establish that the defendant employed no regular method of accounting, or that the method he employed does not clearly reflect the income. Only then may the Government use another method. Unless you are satisfied beyond a reasonable doubt that the defendant employed no regular method of accounting in maintaining his books or that such method does not clearly reflect the income you will find the defendant not guilty. By clearly reflecting the income I do not mean accurately reflecting the income. The method may inaccurately reflect the income and still clearly reflect the income.

2374 Defendant's Refused Instruction

REQUESTED CHARGE NO. L

The jury is further instructed that here no books were introduced in evidence but you have heard testimony of what is reflected on such books. The Government must show that the method of accounting so employed in such books does not clearly reflect the income as distinguished from accurately otherwise you will reject the accounting by the Government and find the defendant not guilty on all counts.

2375 Defendant's Refused Instruction

REQUESTED CHARGE NO. M

If you find that the method of accounting regularly employed by the defendant does not clearly reflect the income, you must then decide whether the method employed by the Government does clearly reflect the income of the defendant; and, unless you decide that the method em-

ployed by the Government does clearly reflect the income you will return a verdict of not guilty on each count.

2376 Defendant's Refused Instruction

REQUESTED CHARGE NO. N

In order for the method of accounting employed by the Government to clearly reflect income it is necessary that the net worth at the beginning and at the end of questioned period can reasonably be accepted as accurate. This is also true regarding the end of each intervening year.

Net Worth means the aggregate of a person's assets less his liabilities. The figure so arrived at is adjusted by items of non-taxable income and non-deductible losses. Also by receipts and expenditures that are not income or deductions, such as gifts, bequests, living expenses and income taxes paid.

It is not a precise method of proof—but it must be a reasonably accurate statement, otherwise it lacks probative value. It is a method fraught with great dangers—you must realize the difficulties of endeavoring to prepare a net worth compilation a number of years after the date that governs it. You must realize that such a statement used as a basis for a charge of a crime must be extremely convincing, otherwise you would be con-
2377 victing the defendant on evidence that is based on a reasonable doubt. That you cannot do.

The difference between the income ascertained by the net worth method as you finally determine it and the income reported must be substantial. Substantial to the extent that the variance is so great, that the defendant must have known he was not reporting all his income.

You will observe that the Government has conceded that half of what it contends was unreported income represented an obligation to the defendant's partner. Such is not the law.

I charge you that if you find that the defendant did appropriate to his own use, monies that would be income to the partnership if disclosed by him; then you must acquit him because embezzled funds are not income to him.

2378 Defendant's Refused Instruction

REQUESTED CHARGE NO. O

If you find that the method of accounting regularly employed by the defendant does not clearly reflect income;

and further decide that the method employed by the Government does clearly reflect the net income of the defendant; you will find the defendant not guilty unless you further decide that defendant in failing to employ a method of accounting that clearly reflects his income, did so, knowingly and wilfully with the intention of making a false and fraudulent return and evading the tax. However, if you find the defendant did employ a method of accounting that does not clearly reflect the income, and further find that the method employed by the Government does clearly reflect the income, and further find that the defendant did employ such improper method, knowingly and wilfully with intent to make a false return and evade tax, then you will find the defendant guilty.

2379 Defendant's Refused Instruction

REQUESTED CHARGE NO. P

If you find that the method of accounting regularly employed by the defendant did not clearly reflect the income; but that such method was employed for some reason other than with intent to knowingly and wilfully make a false return with intent to evade tax you will find the defendant not guilty.

2380 Defendant's Refused Instruction

REQUESTED CHARGE NO. R

The jury is instructed that 'Wilfully' means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud the Government. It is not enough if all that is shown is that the defendant was careless, negligent, or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books or if he has failed to examine or check books or if he has failed to examine or check books kept for him by employees. He is not wilfully evading a tax if the alleged income was embezzled from the partnership, either by employees or the taxpayer, because embezzled funds are not income.

2381 Defendant's Refused Instruction

REQUESTED CHARGE NO. S

The jury is instructed that the word "wilfully" often denotes intentional, knowing, or voluntary, as distinguished from accidental act, and is also employed to char-

acterize thing done without ground for believing it lawful or conduct marked by careless disregard of whether one has right so to act, but, when used in criminal statute, generally means act done with bad purpose, without justifiable excuse, stubbornly, obstinately, or perversely; and, here, when I say "without ground for believing it lawful" I am referring to the tax return and not a crime other than tax evasion.

2382 Defendant's Refused Instruction

REQUESTED CHARGE NO. U

Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation.

2383 Defendant's Refused Instruction

REQUESTED CHARGE NO. V

The government has attempted to show sources of the alleged income. If it is mere speculation it may not be used as a substitute for the clear proof required of the government under the indictment. It must be a likely source of income and, I charge you embezzled funds are not income.

2384 Defendant's Refused Instruction

REQUESTED CHARGE NO. W

The jury is instructed that the offense of wilfully filing false income tax returns to evade or defeat the tax due is not committed unless the taxpayer has an actual knowledge of the existence of the obligation, and has a wrongful intent to evade the obligation. The commission of the crime involves two (2) elements. First, the actual knowledge of the existence of the obligation, and, second, a wrongful intent to evade the obligation. Both elements must be proven beyond a reasonable doubt before you would be authorized to render a verdict of guilty. By actual knowledge is meant that the defendant knew and understood what was required of him and realized what he was supposed to do. Wrongful intent means an evil motive calculated to defeat or defraud the government. If you do not find from the evidence such a wrong intent you should find the defendant not guilty.

2385 Defendant's Refused Instruction

REQUESTED CHARGE NO. Y

Unless the evidence establishes beyond a reasonable doubt, the existence of a deficiency in income taxes for each of the years 1946, 1947, and 1948 and, unless you are satisfied beyond a reasonable doubt that such deficiency arose from the malicious and evil acts of the defendant used for this purpose you must find the defendant not guilty. In this respect, you are further instructed that, as a matter of law, the filing of an incorrect income tax return upon which additional taxes might be due, is not, without additional proof evidence, in and of itself, sufficient to justify a conviction.

2386 Defendant's Refused Instruction

REQUESTED CHARGE NO. CC
(First two Paragraphs only)

There are two kinds of evidence—direct and circumstantial. Direct evidence is that sort of evidence by which a fact is proved directly and without inference from other facts and is usually given by witnesses who saw, heard or otherwise observed some particular fact or occurrence. Circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. It is that sort of evidence by which an inference of an unproved fact is drawn from the existence of proven facts.

In this case the Government has attempted to prove the defendant's guilt beyond a reasonable doubt by relying wholly on circumstantial evidence.

* * *

2387 Defendant's Refused Instruction

REQUESTED CHARGE NO. DD

The word hypothesis in the sense that it is used here means "supposition" or "theory" and if you can take the facts proven by circumstantial evidence in this case and reconcile them with any reasonable hypothesis, supposition or theory consistent with defendant's innocence, then you must find the defendant not guilty.

2388 Defendant's Refused Instruction

REQUESTED CHARGE NO. EE

The jury is instructed that now the defendant contends that he did not sign the partnership returns. They were prepared by a partner of the defendant's law partner and the defendant's partner was a lawyer who understands, is familiar with, and mantained some supervision over the books of the partnership. That partner denies any knowledge of fraud in the return he signed, and subsequent to the years here involved brought a legal action to dissolve the partnership and in such action charged the defendant with defrauding him. Now, if this be true, he would not be guilty of the charges contained in this indictment. The defendant does not have the burden of proving the truth of this contention, if the evidence along that line when considered in connection with all the other evidence in the case be sufficient to generate a doubt as to his guilt, it would be your duty to give him the benefit of that doubt and acquit him.

2389 Defendant's Refused Instruction

REQUESTED CHARGE NO. FF

The jury is instructed that the defendant contends that the government has failed to show that the defendant had any income in excess of that reported and certainly that the circumstances are not sufficient to show in view of all the proof that the defendant actually could commit this offense without the participation of his partner. The Government does not contend that the partner participated in the making of a false return with intent to evade tax. If you find this to be so, you should acquit the defendant on all counts.

2390 Defendant's Refused Instruction

REQUESTED CHARGE NO. GG

The Court charged you that if any witnesses for the government in this case, has shown bias or prejudice against this defendant, and satisfies you that he has not testified truthfully in this case, you may disregard his testimony altogether, and if the guilt of this defendant depends on such testimony, then you should find the defendant not guilty on all counts.

2391 Defendant's Refused Instruction

REQUESTED CHARGE NO. JJ

Counsel have made their opening statements and arguments in the case. Opening statements and arguments of counsel are not evidence in the case. Statements of counsel in the form of questions propounded, to which objection has been made and sustained, shall be entirely disregarded by the jury, and constitute no evidence in the case.

2392 Defendant's Refused Instruction

REQUESTED CHARGE NO. KK

The Court charges the jury that if after a consideration of all the evidence in this case, the charge of the Court, and full discussion with fellow jurors, a single juror has a reasonable doubt as to the defendant's guilt arising out of any part of the evidence, then the jury cannot convict the defendant for that year.

Again I charge you that if a single juror has a reasonable doubt respecting one year; and another juror has reasonble doubt respecting another year; you cannot trade off such reasonable doubts and acquit the defendant as to one year and convict him as to the other. You must reach a unanimous verdict for each year without regard to any other year.

2393 Defendant's Refused Instruction

REQUESTED CHARGE NO. MM

In this case, testimony has been introduced before you of expert witnesses, expressing opinions upon various questions. This class of testimony is proper and competent concerning matters involving knowledge, skill or experience in some subject which is not within the realm of ordinary experience of mankind and which requires special training, research or study to understand. The law allows those skilled in that special field to express opinions and, upon a hypothetical state of facts given them, to say whether or not, according to their experience and research, a fact may or may not exist. Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the testimony

of experts, and the testimony of such experts is to be canvassed and weighed as that of any other witness. Just so far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called an expert, and gives opinions upon a particular point, does not necessarily obligate the jury to accept his opinions as to what the facts are.

2394 Defendant's Refused Instruction

REQUESTED CHARGE NO. NN
(In Form submitted—Second Paragraph only)

Therefore, if after full discussion with fellow jurors, any one of you would hesitate to convict you should acquit and each of you must decide upon your own opinion of the evidence and upon your own judgment. You cannot find the defendant guilty if a single juror has a reasonable doubt.

2395 Defendant's Refused Instruction

REQUESTED CHARGE NO. OO

If, after you have retired, there arises a disagreement between you as to any part of the testimony, or if you desire to be informed of a point of law arising in the case, you must ask to be brought back into court, and the information will then be given to you.

2396 Defendant's Requested Special Verdict Refused

REQUESTED SPECIAL VERDICT

The Court is requested by the defendant, to require the jury to ballot on and return a verdict on three of the possible six propositions set forth below.

For the year 1946:

> "We, the jury, unanimously do find that the net worth of the defendant on December 31, 1945 and December 31, 1946 so appearing in the evidence and summarized in Exhibit 280 as we revise it Does Not include either as cash, acquired asset, or liquidated liability, the cash or money tabulated in Exhibit 279 for the year 1946."

The same ballot as above, including the word Not in capital letters.

For the year 1947:

The same ballots as above, with all the dates advanced one year.

For the year 1948:

The same ballots as above, with all the dates advanced two years.

2397 The Court: We will see you at 8:45 tomorrow morning.

(Whereupon the further hearing in the trial of the above-entitled cause was adjourned until 8:45 o'clock a.m. of the following day, Tuesday, May 10th, 1955.)

2398-2404 • • •

2405 OPENING ARGUMENT TO THE JURY ON BEHALF OF THE GOVERNMENT

By Mr. Russo:

Mr. Russo: May it please the Court, counsel, ladies and gentlemen of the Jury: On last night while I was mulling over what to talk to you about this morning, I was reminded of a portion of Lewis Carroll's Alice in Wonderland. You are all familiar with it.

"The time has come, the Walrus said, to talk of many things,

"Of shoes and ships and sealing wax, and cabbages and kings."

We have many things to talk about this morning. First, on behalf of the Government I want to thank you for the deep interest and close attention that you have paid to the evidence as it has been adduced before you here during the trial in this case.

You will recall that when this case started Government counsel made an opening statement and in that open-
2406 ing statement I told you and explained to you the charges that had been filed against Sam Achilli, the Defendant in this case.

I explained those charges to you and pointed out that each of them, each of the three counts of the indictment, divides itself into three essential elements: An attempt to evade and defeat taxes, wilfulness, and an additional tax owing. The word "attempt" will be defined for you by the Court.

However, if you find that any of the three income tax returns that are in evidence here before you in this case are false and fraudulent, then you will find that an attempt to evade and defeat taxes was made, because a false and fraudulent return filed with the Collector of Internal Revenue is itself an attempt to evade and defeat taxes.

The other two elements are wilfulness and additional tax owing. I will discuss those in just a moment.

Then I also told you the manner in which we expect to prove those charges. I told you that that proof
2407 would divide itself into two parts.

The first part was that we had to prove that those returns were filed as the indictment charged they were filed; that is, that they were filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois; and that the income reflected on those returns was stated over Sam Achilli's signature, and in that connection I told you that it was not required of the Government to put witnesses on the stand who could testify that they saw Sam Achilli actually sign those returns.

I told you that the law was, and I told you that I believed the Court will instruct you that the law is that an individual's name signed to a filed return constituted prima facie evidence for all purposes that those returns were actually signed by him.

Now, have we proven that? I will direct your attention, ladies and gentlemen, to the testimony of Miss Helen Mines, the Controller from the Office of the Collector of Internal Revenue here at Chicago, and to the testi-
2408 mony of William Brady.

William Brady told you that he prepared those returns at Sam Achilli's request. Miss Mines identified those returns for you. She testified that they had been filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, and that they were filed on or about the dates appearing on the date stamps they bore.

I submit, then, ladies and gentlemen of the jury, that we have proven all the matters of fact that we are required to prove in so far as the filing of those returns is concerned.

I told you that the second part of the proof required

the Government to show that at the time the returns were filed Sam Achilli knew he had understated his income and he knew that he had understated the taxes due on that income and that he had filed those returns with the intent and for the purpose of evading and defeating the taxes that he owed the Government, and I explained to you
2409 the manner in which we expected to make that proof.

I stood before you with a pack of cards and told you that the evidence would show that Highland Motor Sales was a partnership comprised of Earl Gromer and Sam Achilli doing business as Highland Motor Sales at Elgin, Illinois, and that Sam Achilli was the operating partner, and that in the conduct of the business of that partnership Highland Motor Sales kept and maintained a set of books and records. That certainly we have proved.

I told you what those books and records would purport to reflect, the sale of each and every new and used car sold by Highland Motor Sales, by Sam Achilli and by his employees, the exact amount of money paid by each and every purchaser of those automobiles, the receipt of every used car that was taken in trade by Highland Motor Sales and the exact amount of money that was allowed or credited to the purchaser towards the purchase price of that car.

Those books and records I told you purported to
2410 reflect all the expenses of the partnership doing business in each year, the profits and losses of the partnership in each year, and the distributive share of each partner in the partnership profits for each year.

I told you that we would prove for the years 1946, 1947 and 1948, that the figures of the partnership sales and income and expenses and profits, as reflected on Highland Motor Sales' books and records, were the figures that were used in causing to be filed the individual income tax returns of Sam Achilli; that those books and records and those partnership returns, the partnership returns of Earl Gromer and Sam Achilli doing business as Highland Motor Sales, reflected the amount paid to Sam Achilli as his share of the distributive profits of Highland Motor Sales.

2411 His distributive share of those profits as they were reflected by the books and records of Highland Motor Sales and by the partnership books and records was the amount used by Sam Achilli in the preparation

and filing of his individual tax returns for each of the years that you have under consideration.

I told you that we would furnish proof that although the figures of the total sales and total receipts as they were reflected on those partnership books and records were used in the computation of the partnership returns of income, that Sam Achilli had a great volume of sales that are nowhere reflected on those books and records, and to that extent those books and records were false, fraudulent and deceptive.

I told you also that we would prove that Sam Achilli and Highland Motor Sales had a large amount of income from sales which is no where recorded in the books and nowhere accounted for in the books, not only sales but income, and to that extent the partnership books and records of Highland Motor Sales are false, fraudulent and deceptive.

2412 I told you how we would prove that those books were false, fraudulent and deceptive. I told you we would put witnesses on the stand and they would testify that Sam Achilli demanded of them bonuses before they could purchase those cars, under-the-table payments, black market payments.

I told you that we would put witnesses on the stand who would testify they purchased cars from Highland Motor Sales and Sam Achilli, who would testify as to the make, the year model, the date the purchase was made, the amount that was paid down, the amount that was financed.

I told you that their testimony would show that they were not properly recorded on those books and records, and that some of the income from those sales was suppressed from those books and records.

I told you that finally we would put a Special Agent on the stand who had examined those books and records and made summaries and transcripts of them, and would show you just exactly the amount of the difference between what the witnesses testified they paid and what the books and records recorded as having been received.

2413 I told you that we would prove that Sam Achilli in the year 1946 was engaged in the gambling business, and that he had income from that source that he suppressed from his 1946 income tax return.

I told you that since, obviously, it was impossible for the Government to put on every purchaser of an automobile from Highland Motor Sales—had we attempted to do that we would be trying this case for the next six months—I told you that we would then show you the amount of the suppressed income by a method of proof known as the increase in net worth method.

That, ladies and gentlemen, was the reason for that terrific parade of witnesses on the stand, to show you every asset and every liability of Sam Achilli from the year 1945 through the year 1948.

In doing that we started, as I told you, with a starting point, and that starting point is December 31, 1945. All of his assets at that point less all of his liabilities reflect Sam Achilli's net worth at December 31, 1945.

Then taking all of his assets for 1946 and 1947 and
2414 1948, and subtracting his liabilities for each of those years, you get for each of those years his net worth at the end of each of those years. Then if you subtract the starting point net worth, his net worth at December 31, 1945, from his net worth at December 31, 1946, you have the increase in net worth at December 31, 1946; and if that increase in net worth is more than the amount of income reported, then Mr. Achilli has been guilty of tax evasion. We will go into that a little more fully later on.

I have told you too that those increases in net worth were not attributable to gifts. There has been no evidence adduced here before you that Sam Achilli ever received any gifts.

I told you that those increases in net worth would not be attributable to loans, and the Government has produced on the stand through testimony and documents every loan that Sam Achilli made or participated in. All of those loans, and they are not taxable, are reflected in the net worth summary which you held in your hand as Government Exhibit No. 280.

I told you that none of those increases in net
2415 worth would be attributable to inheritances, and the Government put on the stand some two or three witnesses and show you that in 1940, I believe, Sam Achilli's father died, and that all the estate he left was an insurance policy of something less than $1,000 and a lot of debts. Sam Achilli's brother got on that stand and testified that he helped to pay off those debts. There wasn't anything to inherit.

Then there was evidence that in 1942 or 1943—1942, I believe—Edith Bohlin, the mother of Mrs. Achilli, died, and that evidence showed that her inheritance from her mother's estate was something a little over $500 and a little less than $600.

Then there was the testimony relating to an inheritance from a Mrs. Walbaum, the Walbaum estate. If my memory serves me correctly that estate totaled something like $3300 or $3400.

We say to you that none of that is responsible for the tremendous increases in net worth for the years 1946, 1947 and 1948.

I told you further we would show that none of those increases would be attributable to prior accumulated
2416 funds, and I will discuss that with you a little bit more fully in a little while.

Now as each witness took the stand and testified and produced documents, for a moment he became an artist. This whole thing, I believe, can be graphically described for you so that you may more clearly understand it, if you will take all this mass of evidence and consider it as a panoramic canvas.

As each witness took the stand, he painted with the brush of truth some paint on this canvas. Some painted a little. Some painted much. Some painted only in one space. Some painted in various places all over that canvas.

At the outset the picture was hazy. It was unclear. No one understood, not even myself, what the picture would be. But as witness after witness took that stand and testified, that painting began to take on form and color and depth. The paint took on shades and nuances.

All the facets of that investigation are reflected on that canvas, and finally it was given shape and form and color and completion by the testimony of Special
2417 Agent Weber, who put it all together for you, and by the technical adviser, Bill Ruggaber, who computed for you the income taxes that Sam Achilli still owed the Government.

2418 Now, let's take a look at that canvas in its completed form. As you look at it, beginning with the left side, you see the year 1930. That is the first thing that appears on there. The paint there is a little bit dull and drab. All you see is the year 1930.

At that time Sam Achilli was a boy around sixteen or

seventeen years old. Remember that 1930 was one of the years of the terrible depression that we had beginning with the stock market crash in 1929.

Exhibit No. 7 shows that he filed no income tax return, and that is not at all remarkable under the circumstances. He had no income. The next year is 1931. Sam Achilli is a year older but the situation is no different. He is still a young boy, still no income to report. Certainly he filed no income tax return, and the same is true for the years 1932, 1933, 1934, 1935 and in 1936 for the first time Sam Achilli steps into that picture.

We see him in Elgin, Illinois with his sister and
2419 brother-in-law, Alice and Henry Santurro. Henry Santurro was operating a filling station, and in the latter part of 1936 Sam Achilli goes to live with him and Henry Santurro gives him a job at that filling station and pays him $15.00 a week. That is the first time we see any income in Sam Achilli's hands.

That lasted some two or three or four months. Then we see Sam Achilli in 1937—in 1936, remember, he filed no income tax return, and he filed none in 1937, but we see him in January, 1937, going to the Post Office Garage and applying for a job and getting one, and his employer securing for him a Social Security Number.

The first week his income was $13.00, and every week thereafter to and including the last week in May of 1937 he is earning $15.00 a week.

Then he leaves the Post Office Garage and we next see him with his brother-in-law, Henry Santurro, going to a parking lot—or a used car lot, rather, operated by Harold Money, and Henry Santurro says to Harold
2420 Money, "I have a likely boy here that I'd like to get in this racket and I think you can use him."

Harold Money says, "Yes, I can use him. I'll take him on, on a commission basis", so Sam Achilli goes to work for Harold Money as a salesman, a car salesman, on a commission basis.

Then the next thing we see on that canvas is that some time in 1938, or 1937, between 1937 and 1938, Sam Achilli owns a 1932 Ford, I believe it was described as a convertible, and Sam Achilli sells that convertible for $250.00, turns it over to Harold Money and for two hundred and fifty bucks he becomes a half owner of a used car lot. That is all it took him to get started in that business.

So he works along and in 1938 Harold Money decides that Sam knows too much for him, so he says to Sam, "Look: Either you buy me out or I'll buy you out", and Sam says, "Fine; I'll buy you out", so he goes to Mr. Muntz.

2421 Mr. Muntz was on the stand here. He is the famous Mr. Muntz who makes Muntz TVs, and at that time he was engaged in the finance business, so he finances Sam Achilli's equity in the used cars that they had on that lot, and Harold Money told you that the check that he got was eight hundred bucks, $800.00 that Sam Achilli paid Harold Money, and Sam Achilli got that money by financing his equity in the cars that were on that lot, so he became the owner of all those cars and Sam was in business for himself.

That is the same used car lot, you will remember, that Mr. Gallina testified he owned for which he was charging $25.00 a month.

Mr. Achilli operated that lot for a while and then Mr. Gallina decided $25.00 a month was not enough and says, "Look, Sam, I need $35.00 a month for that lot", and Sam says, "I can't afford it."

Gallina says, "Give me back the lot." Sam moves and gets himself a lot nearby. In 1938, no income tax return.

2422 He is in business in 1939 in this nearby lot doing business but making not enough money to warrant the filing of an income tax return, so he files none in 1939.

Then comes the year 1940, and there was an income tax return filed by Sam Achilli; a modest one, it is true, but he filed one. He had enough income to warrant the reporting of income.

In 1941 he is still in business. Then came December 7th, 1941, the sneak attack on Pearl Harbor, and business begins to pick up. We see Sam in business still in 1942 and he is reporting income. In 1943 he is reporting income.

Then in 1944 we begin to see the Ponzi-like operations of Mr. Achilli. In December, 1944, he goes to Earl Gromer and says, "Look: I've got $6,000. That's all I've got. I can get the Chrysler-Plymouth franchise and there's a garage that's for sale by Mr. Hubbe for $30,000. Do you have anybody that will put up the money with me and

go into partnership so we can get that franchise?"
2423 Earl Gromer says, "Well, I don't know anybody, but I'll put up $6,000 to match your $6,000 and we'll finance the garage." "O.K."

So that is exactly what they did. Earl Gromer put up his $6,000 and Sam Achilli put up his $6,000 and they marched over to the bank and arranged to borrow $18,000. That is the $18,000 that was paid to Mr. Hubbe for the garage at 192 Wellington where Highland Motor Sales began doing business and where today it is still doing business.

Now, at the time that this partnership was set up Mr. Achilli did not know anything about books, so Earl Gromer, who is a lawyer and had business experience, set up a set of books that was recommended by the Chrysler-Plymouth people, and they had them all, the whole list of them, the sales accounts, journal and all of them. You know what they are; I don't. I don't know a thing about them.

Earl Gromer, knowing that Sam Achilli did not have any knowledge at that time of books, for the first
2424 year kept a pretty close supervision of the business transactions of Highland Motor Sales. He brought in Carlson, the bookkeeper, and showed him how he wanted those books kept and trained him in the method of keeping them.

In 1945 everything was fine. The partnership filed a return and made a profit.

In 1946, things change. Earl Gromer thinks things are pretty well under control now, that he has a bookkeeper who knows how to take care of the books and Sam is managing this partnership and he has other interests, so he leaves it up to the bookkeeper and Sam Achilli to take care of the books.

Now, Carlson told you, you will remember, that in so far as he knew every transaction that was made with Highland Motor Sales to his knowledge was recorded on the books and records, every sale and every dime of income, yet the testimony of the witnesses on the stand shows that purchasers came in and purchased cars, and despite the fact that Carlson was a pretty attentive bookkeeper, sales were not reflected on those books, sales were
2425 suppressed, and the income from those sales was suppressed; and in the year 1946 there was a differ-

ence of $14,955.10 between the amount that was recorded on Highland Motor Sales' books as transactions for those years, and the amounts that the witnesses testified they paid for those cars.

The same is true for 1947 and 1948. The testimony of the witnesses and the analyses by Mr. Weber for you disclose that in 1947 the total amount that was suppressed was $36,131.55 and in 1948, $21,068.

There are other facets in this picture as you go along and examine it. You will recall the testimony of Mr. Turpin, who testified that he sold to Sam Achilli, I believe it was in 1944, that piece of property which you have come to know as the Red Lion.

There was real estate with a building on it, that is, a lot with a building on it. There was also a corporation known as the Red Lion, and there were also some chattels, whiskey, equipment, and so forth.

Sam Achilli acquired the physical assets of the real estate and he also acquired the corporate stock for
2426 $18,400, and beginning in 1946 after the place burned down, Sam Achilli began spending money.

You will recall the testimony of the witnesses, who testified concerning that rebuilding that Sam Achilli spent in 1946, 1947 and 1948 something like $99,000 in reconstructing that building, and remember that the corporation does not own the physical property. All the corporation owns is the right to conduct a tavern, a restaurant business on the premises.

Now, you will remember, too, that there was some testimony here—first let me say this: I have discussed with you two sources from which the increase in net worth could have possibly come. It could have come from the suppressed income from Highland Motor Sales. In the year 1946 there was additional possible income from the gambling business that he was in, Barney's Snooker Hall, and there was also some testimony about a loan business that Mr. Achilli was in in 1947. He and Mr. Gromer were making loans.

2427 I believe it was Mr. Silagy, who testified that he borrowed $7,000 and he gave a note for $8,500. There was a profit to Gromer and Achilli of $1,500. Half of that, or $750.00, belonged to Sam Achilli, and was not reported on any income tax return for the years 1946, 1947 and 1948.

Mr. Affeld testified he borrowed $7,500 and signed a note for $8,250, a profit of $750.00. Half of that belonged to Gromer and $375.00 of it belonged to Sam Achilli, and it is nowhere reflected on his returns.

Then there was Mr. Heckman who borrowed $4,000 and signed a note and paid back $4,600, a profit of $600 on that loan. $300 belonged to Earl Gromer, and $300 belonged to Sam Achilli, and that $300.00 is nowhere reflected on any return.

Source? There are three of them for your consideration, the loan business, the automobile business and the gambling business, and none of it reflected on the returns.

The starting point, December 31st, 1945, and the
2428 witnesses supported by the testimony of Weber indicates that every asset and every liability that could possibly be discovered by Mr. Weber and those who were helping him, are included. There is nothing missing from his assets and liabilities at December 31st, 1945.

2429 That starting point, ladies and gentlemen, stands there. It is just as firm and solid as the Rock of Gibraltar and there has been no attack on it, and it hasn't been disturbed, and it can't be. It can't be because all the evidence is there.

There is another thing I would like to call to your attention.

You remember the testimony of Mr. Weber. When he undertook this investigation, he told you, he said, "I took some ten or fifteen names from the Highland Motor Sales books and records, and I personally canvassed them. Five of these people told me that they had paid considerably more than I had found reflected on those records. So I went back to see Sam and told him what these people had told me, and asked him for an explanation."

Sam said, "Oh, there is nothing wrong with my books. I will bet you there is nothing wrong with my books. I am so sure that I will bet you a Chrysler convertible that was ridden in by President Truman during the Shriners Parade if there is anything wrong with my books. Here are the keys."

Weber said, "I don't care anything about the keys.
2430-2431 I am not here for the purpose of betting. Show me on the books."

And Sam calls for them, the general ledger, the sales records, the accounts receivable, all the books. Sam knows

those books now because he knows what to call for. He traces them and he finds that Weber is right, and he knows all the time that he is wrong.

So he says, "You win, here are the keys. Take it."

Sam Achilli doesn't know his man. He didn't know at that time that Weber had been a bomber pilot in the United States Air Force; that he had flown missions over the European Theatre of Operations; that he had been shot down and wounded and that he had bled for the very flag that Sam Achilli and his then lawyer wouldn't even pay the respect of waving.

We have proved, ladies and gentlemen of the jury, every element of the offenses charged in this indictment.

Wilfulness—the picture is filled with it. Let me tell you about some of them.

Fifty-three witnesses took that stand to testify
2432 about those cars. Those witnesses' testimony relates to 132 automobiles, reflected on Government Exhibit No. 279. Suppression of information from inventory cards. That is an affirmative act of wilfulness.

Suppression of income from the sales of those trade-ins —affirmative acts of wilfulness.

I could go on here for another fifteen minutes pointing out affirmative acts of wilfulness. We have proved to you, I hope, ladies and gentlemen, beyond a reasonable doubt that there was an attempt to evade and defeat taxes: that the attempt was wilful; and that there is additional tax owing: and that upon a full consideration of all the evidence before you, ladies and gentlemen of the jury, I will ask you to return a verdict for the Government.

2433-2461 * * *

2462 CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT

By Mr. Russo:

Mr. Batter says that I forgot to mention Horatio Alger. I think that some of you who are as old as I am recall some of those Horatio Alger stories, but I don't think you can recall reading in any of them that his hero got rich by defrauding Uncle Sam.

I am going to take his argument as he gave it and answer it, each one of those things as he discussed it with you.

At the outset, he discussed the franchise. Under that franchise Sam Achilli was not permitted to sell new cars to used car dealers.

You remember the testimony of Papandrea and of
2463 Cardella. Papandrea and Cardella were used car dealers; but they were buying new cars from Sam Achilli at a bonus of six hundred bucks per car. Don't forget it—black market.

In order to protect himself so that his franchise wouldn't be endangered, he had Cardella and Papandrea indicate on his books and records that the cars were sold, not to Cardella and Papandrea, but to names that were supplied at Achilli's request by Papandrea and Cardella.

He talks about Papandrea making $15 profit, $85 profit, $139 profit.

In the first place, what they sold those cars for has no bearing on the issues here. The issue here is, did Sam Achilli evade and defeat his taxes? Sam Achilli is the one on trial, not Papandrea.

Papandrea and Cardella could have given those cars away, bought them and destroyed them, sold them for nothing. They didn't have to make a profit. They are not required to make a profit. There is no law that compels them to make a profit. Sam Achilli is the one that must answer to you in this trial, not Papandrea.

2464 Then he talks about the Government witnesses who took the stand. Some of them produced documents showing that they had purchased cars and the amounts that were reflected on there. Some of them reflected trade-ins, but he says you can't believe those people, that that happened back in 1946, 1947, and 1948, but he forgot to remind you that the investigation got started in 1949 when those documents were available and these people did know and did remember what they paid for those cars.

Remember Mr. Christianson on the stand, the man with an accent? He was trying to pin him down. "How do you remember that you bought this car on April 4, 1946?" He says, "I remember."

"Well, what happened in that year that makes you remember that?" and he says, "I went to Sweden and when I came back on April 1st I remember I bought that car on April 4th."

There wasn't a single Government witness who by cross examination was discredited, not one. They were

2465 either supported by some event that fixed that transaction in their minds or they were supported by the documents that they produced here.

He says that his witnesses came here without hesitation, these fine people from Elgin, and they are all fine people. He did not tell you that they came here in response to subpoenas. They didn't came here of their own free will at their own expense, but he subpoenaed them here, and that is the reason they were here,

Mr. Batter: I object to that. There is nothing in the record to that effect.

Mr. Russo: It is a fair argument, if your Honor please.

Mr. Batter: As it turns out, half of those witnesses were not subpoenaed, or more than half; at least seventeen of the twenty weren't.

The Court: That may be stricken.

Mr. Russo: Then he hands you Government Exhibit 3, I believe, or No. 1, the income tax return for 1946,

2466 and he says that shows that the business was sold in 1946. We proved it was sold in 1946. He says there is rental income that he reported. We do not say that he did not report rental income; we say he did not report the profits from his gambling business, from his lottery, from his cigars and sundries and everything else he had on there.

That is what he did not report, and the witnesses Weaver and Jacobs testified that there was a profit. Weaver told you that he got his 20 per cent. His income was based on the income from the business, and every week he told you he got $40 to $60.

Jacobs told you that those books and records reflected profits. Certainly he shows on his income tax return rent and the sale of the equipment, but that equipment belonged to Achilli.

He reports the sale of it, but he does not report the income from the operation of his gambling business, from his pool tables and all of the other things.

Then he turns to Government Exhibit 280, and

2467 he's quite a fast men with a piece of chalk, believe me. If you believe that last figure of $100,000 he had on that blackboard, what I should do, I should go back to Washington and say, "Uncle Sam, we have perpetrated an unfairness on Mr. Achilli; We owe him a refund."

Now, do we? Mr. Weber testified on that stand as a result of his investigation every asset that he could discover as belonging to Sam Achilli in the year 1945 was in the 1945 column.

Mr. Batter says, "Here, let's subtract $12,000, $11,000", and he subtracts very easily, much faster than I can. He must have gone to a pretty good school.

He makes the figures talk pretty well. He says, "Well, this was not proved, so we will subtract this and we will subtract that, and subtract the other." Now, let's see if it deserves subtracting first before we subtract.

That property at 167 Liberty Street was testified to by Mr. Weber. He said it came in to Sam Achilli in
2468 1946, not in 1945, and Achilli sold it in 1946, so it is in and out the same year, and it is in the proper column.

Then he talked about the Red Lion, and said that we haven't been able to show he spent any cash other than the $25,000 that was disbursed by the First National Bank of Elgin. Mr. Seybold took the stand and said the bank loaned him $25,000, that it disbursed it for him and that at the end there was about $2.48 and that they credited that to his account. That is the only money that he has accounted for, $25,000 from the bank.

He spent $99,000 in the construction of the building. Where did the rest of it come from? He says that we have not shown that there was anything paid by Sam Achilli. Well, your recollection, I am sure, is much better than Mr. Batter's, because those witnesses, as I recall their testimony, all those contractors—we put them on the stand and they produced their books and records
2469 and said, "We received payment from Sam Achilli." Every one of them did.

You don't think he has a fairy godfather that would pay that money for him, as Mr. Batter would have you believe. That money came from Sam Achilli and from Highland Motor Sales, the suppressed income on those car transactions that the witnesses on the stand described for you. That is where it came from.

Then he talks about this $3,500 check. He put a witness on the stand from the bank, and let's talk about that testimony a little bit.

He went to the Union National Bank with his wife and with Gordon, as I recall the testimony, and they purchased

a check but before doing so they borrowed $23,000 from the bank, so with that $23,000 that was borrowed and $12,000 that was put up by Sam Achilli, they purchased a $35,000 check.

Now, he says we put the man on the stand and on
2470 the net worth thing we are not giving him credit for the proper thing, but my recollection of the testimony on cross examination of Mr. Arnold, I believe his name was, if I recall it correctly, was this: The question was asked him by Mr. Batter:

"How much of that loan participation did the Union National Bank take?"

And the answer was:

"$23,000."

Then he asked him:

"How much of that participation, how much of that $23,000 did the First National Bank in Gibson take?"

And the answer was:

"$12,000."

But Mr. Batter would have you believe that the liability was $35,000, which is contrary to the testimony of his own witness. There was one $23,000 loan and that is the loan that is reflected on Exhibit 280, and he has not destroyed it or challenged it or changed it one iota.

Then he handed you, or showed you—he did not hand it to you—a $15,000 cashier's check, Government Ex-
2471 hibit No. 172, and I would like for you to take a look at it.

Mr. Gromer testified that he purchased that check from the First National Bank. Mr. Batter recalled Mr. Seybold and put him on the stand and said, "Who bought that check?" And Mr. Seybold said the same thing Mr. Gromer said, "Earl Gromer bought it", but take a look at the back of it.

Gromer told you that he got the money from Achilli. Gromer buys a check, takes it and endorses it over to Sam Achilli. Whose hands is it in? It is in Sam Achilli's hands. That is the check he uses to make a loan of $15,000 from Mr. Gordon, so let's add back some of these things Mr. Batter so hastily says "Poof, let's subtract." It does not require subtraction.

Now, then, at the outset of this trial if my memory serves me correctly, we were talking about the Red Lion, and Mr. Batter tried to create the impression in your

mind that all the money that was spent in the rebuilding of the Red Lion was expended by the Red Lion Cor-
2472 poration. Well, you found out from the witnesses on the stand that the Red Lion Corporation was just a corporation organized to do business. Let's take a look at the facts.

Mr. Achilli purchased the Red Lion property, including stock of the corporation and the right to do business, for $18,400. That was testified to by Mr. Turpin. That consideration meant the property, building, the chattels, all liquors and the corporate stock.

Now, in 1946, on Government Exhibit No. 1, Sam Achilli took a fire loss. The building burned down, and if you will examine that—

Mr. Batter: If your Honor please, I object to counsel stating things that are absolutely not in the record. On this Turpin deal we have an Exhibit there of just what it covers, and just as I defied Mr. Weber to show any purchase of the capital stock in that Exhibit I defy counsel to show it, and I do not think counsel ought to be
2473 permitted to make these misstatements.

Mr. Russo: I am not making a misstatement, if your Honor please.

The Court: Proceed.

Mr. Russo: It is supported by every document in evidence here.

The Court: Proceed.

Mr. Russo: Now, going to Government Exhibit No. 1, when you refer to it, will show that he took a fire loss in 1946 of $16,000, and in the same Exhibit he stated that the remaining value of the real estate was $2,000. Take a look at Exhibit No. 1.

Therefore, he had only a cost basis in the corporate stock of $400.00.

Then take a look at the 1948 return where he took a cost basis, and Mr. Batter put it on the board, of $4,673.80 and then recall the testimony of Gromer and Brady who said that that represents half of the corporate stock, and if you take those two Exhibits together, Exhibit 1 and Exhibit 3, you have fraud on the face of the returns.
2474 Let's put a few figures on the board ourselves and see just how fast an operator Mr. Batter is with the chalk. I am not as good at writing as Bishop Sheen, whom many of you probably know and have seen, who writes

a beautiful legible handwriting and who has, too, the assistance of an angel who erases his blackboard for him, but inasmuch as I cannot write as well as that and inasmuch as the angel I propose to use is Mr. Weber, I just ask your indulgence for a moment and I will let him write the figures on the board.

Mr. Batter: I object to that, your Honor. This is the closing argument for counsel. Counsel should do it, whatever he is going to do, himself.

The Court: I think so, too, yes.

Mr. Russo: All right. I'll do it myself. Net income reported per return, $11,753.96.

2475 He borrowed from Earl Gromer—may it please the Court, I would like to move this up. I do not write very big and I would like to the jury to see these figures.

The Court: All right.

Mr. Batter: May I sit over there where I can see them?

The Court: Yes; surely.

Mr. Russo: When you take into consideration the testimony of all the witnesses who took the stand and the corroborating testimony of the Agent, Mr. Weber, there was unreported income from at least two sources, gambling and Highland Motor Sales, of $14,955.10. so that at that time Mr. Achilli had available to him $35,709.06.

Let's consider some of the expenses. He invested in the Red Lion in 1946, based upon the testimony of Mortimer Hawkins, the architect, and some of the other witnesses who followed him, $9,417.22.

Proceeds from the sale of the property at 167 Liberty Street, $10,800. Investment in oil well—

Mr. Batter: Your Honor, are we going to permit
2476 such misstatements? The $10,800 is not proceeds. That is still outstanding as a receivable. If you are going to make a presentation like that, be a little bit honest about it. Exhibit 280 clearly shows the $10,800 as a receivable, not as proceeds.

Mr. Russo: It shows it as an asset, if your Honor please.

The Court: Proceed.

Mr. Russo: I want to go back to this just for a minute. Investment in oil. $2500. He paid to Earl Gromer, if you will recollect Earl Gromer's testimony—loaned to Earl Gromer, $5,426.87.

2477 Mr. Abelmann, the real estate broker, received from him $3500. Then he was in joint ventures with Mr. Gromer, purchasing real estate. In that year he invested $13,625.61, a total of $45,269.70.

This is what he had available. That is what he spent. (Indicating figures on blackboard.)

Where did it come from?

Highland Motor Sales suppressed income.

He says we haven't put the money in Achilli's hands. Where do you think Achilli got the money?

He made some remark about having witnesses on the stand who testified that in 1942 they went down to see some oil wells. There were two witnesses—"Did you see Sam Achilli?"

"Yes, I saw him there."

Well, I went to the ball game Saturday, but can you infer from that that I played ball or that I bought stock in Comiskey Park?

That is 1946. Let's take a look at 1947. Net income reported, $16,785.52 income tax return. Borrowed from the bank, $25,000.00. He received from the destruction of the original Red Lion building insurance pro-
2478 ceeds, $5,000.00.

We say in Government Exhibit No. 279 that he had unreported income from Highland Motor Sales of $36,131.55, a total of $82,917.07.

The witnesses who took the stand and testified about the work, labor and materials they supplied to Sam Achilli in the construction of the Red Lion in 1947 say that they received from Sam Achilli—not from his fairy godfather but from Sam Achilli—$85,106.97.

Take a look at those figures, and ask yourself where that $36,000 came from. It came from where those witnesses testified it came from—Highland Motor Sales, suppressed sales, suppressed income. Have we put the money in Sam Achilli's hands? He spends it. He spent it.

Now let us take a look at the year 1948. This is 1947, and this will be 1948.

Net reported income, Exhibit No. 3, $34,053.12. Let's let that stand alone for a moment, and talk about his expenditures, as has been testified to by the witnesses.

He invested in the Red Lion that year $11,483.85. He

bought a cashier's check for $12,000.00. He made
2479 an investment in 75 Grove Avenue of $5,000.00.
He loaned Gordon $15,000.00. He paid back to the bank on that $25,000.00 loan, $6,296.48.

Now you understand why I was so particular to draw from the witnesses on the stand amounts and dates. We were fixing them for this purpose so that you could understand them.

He invested in 18-20 Douglas another $5500.00. There was a total investment in 1948 of $55,280.33.

He reports $34,000.00. That leaves $21,068.00, and we show in Government Exhibit No. 280 where that $21,000.00 came from. The difference between $34,000 some odd and $55,000 some odd, a difference of $21,000, came from sales that were suppressed by Sam Achilli and from income of those suppressed sales.

Mr. Batter also made the argument, Well, I had Weber on the stand and he was squirming because I asked him a question and he couldn't answer it.

That question was, "What proof do you have that Highland Motor Sales was the owner of those cars?"
2480 The answer is that when those cars were traded in, they were suppressed from the inventory cards. There was no record of their coming into Highland Motor Sales, and consequently all that Weber could say is they weren't on those records.

They were sold by Highland Motor Sales. If Highland Motor Sales sold them, then Highland Motor Sales owned them, and that is the answer.

If Sam Achilli had been just as honest with his Government as he was with his partner, he wouldn't be here today. If ever an income tax evasion case has been proved to the hilt, ladies and gentlemen of the jury, this is it.

Thank you.

* * *

2481 * * *

Mr. Batter: If the Court please, the statement of counsel in his closing argument this morning is so at variance with the truth and so at variance with the record, and bearing in mind that I am left in the position where I am unable to answer him before the jury, I would like an instruction from the Court to the jury

to the effect that the regular procedure is for Government counsel to open and close, and that I have no opportunity to speak again.

I don't think in justice the record should be left in the position where counsel takes net income as reported on the individual return, and tries to work from that with his deductions, ignoring the partnership returns as they were returned, taking items of $10,800, which is a receivable, and treating it as a disbursable item, and all the other items he went through, without letting the jury know that I am precluded from saying anything more.

I would like an instruction to the jury that I do not have a second opportunity to talk to them.

2482 The Court: Well, I will instruct the jury accordingly then.

Mr. Batter: Thank you.

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2483-2484 * * *

2485 Instructions

Before adverting at all to the indictment in this case, I desire to call your attention to one or two general and fundamental rules of law which are applicable to all cases where a brother man is tried for the commission of a criminal offense:

1. Under the law of our land, every person accused of crime is presumed to be innocent and I instruct you that this presumption of innocence abides with the defendant at every stage of the trial and can be overcome only by evidence which is presented before you. In order to overcome this legal presumption of innocence, the evidence must be clear and sufficiently strong to convince the jury beyond a reasonable doubt that the defendant is guilty.

2486 Instructions

Reasonable doubt is the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act.

2487 Instructions

The burden of proof is on the government to satisfy your minds, by legal and competent evidence, beyond a reasonable doubt, of the guilt of the defendant upon one or more of the offenses charged in the

indictment. Reasonable doubt means just what the words themselves imply—a doubt founded on reason and which must arise from the evidence, not a possible or mere fanciful doubt. It is not merely such a doubt as may be conjured up in the mind of one desirous of escaping the responsibility of decision, or such as may be engendered by pity or sympathy for the defendant. It is an actual doubt of which you are conscious after going over in your minds the entire case and after giving consideration to all the testimony and every part thereof. If you then feel uncertain and are not fully convinced that the defendant is guilty, and if you believe that a reasonable man, in any matter of like importance, would hesitate to act because of such a doubt as you are conscious of having, that would be a reasonable doubt of which
2488 the defendant is entitled to have the benefit. But if, after a fair and impartial consideration of all the facts and circumstances in the case as shown by the evidence, you have an abiding conviction of the guilt of the defendant to a moral certainty, of course you could then have no reasonable doubt as to his guilt.

2489 Instructions

dence—the one direct and positive, the other circumstantial. Crimes are not ordinarily committed in the open. They are sought to be concealed and, therefore, the law wisely determines that society shall not be at the mercy of criminals who conceal their purpose in perpetrating their crimes or in attempting their criminal acts. Convictions can be based, and in many cases must necessarily be based, upon purely circumstantial evidence. However, when the prosecution relies upon circumstantial evidence, the circumstances presented must refute any reasonable presumption of innocence. The circumstances must be taken link by link and form such a chain, such a complete chain, as to bring conviction to the minds of the jury to which the evidence is presented beyond a reasonable doubt. Of course, the evidence in many cases may be both direct and circumstantial, as in the case here, but after considering all the evidence, both circumstantial and direct, if you are satisfied beyond a reasonable doubt that the defendant is guilty of one or
2490 more of the offenses with which he is charged in this indictment, then it is your duty to render your verdict accordingly.

2491 Instructions

You are instructed that where a conviction for a criminal offense is sought upon circumstantial evidence the prosecution must not only show by evidence beyond a reasonable doubt that the alleged facts and circumstances are true but it must appear that such facts and circumstances are incompatible with any reasonable hypothesis other than that of the guilt of the accused. Unless there is substantial evidence of facts which excluded every reasonable hypothesis but that of guilt, the defendant must be acquitted. Evidence of facts that are as consistent with innocence as they are with guilt is unsufficient to warrant a conviction. In order to warrant a conviction on circumstantial evidence, all the circumstances must be consistent with each other, consistent with the hypothesis that the accused is guilty and inconsistent with the hypothesis that he is innocent. Where the conclusion from the circumstances proven leads as rationally to the conclusion of innocence as of guilt, there is no proof of guilt. If you find, upon an

2492 impartial consideration of all the evidence in the case, that there are two reasonable theories, and that one of such theories is consistent with the guilt of the defendant, and that the other of such theories is consistent with the innocence of that defendant, then the law makes it your duty to adopt that theory which is consistent with the innocence of said defendant and to find that defendant not guilty.

2493 Instructions.

Now, ladies and gentlemen of the jury, the present case came into this court by reason of an indictment returned by the grand jury against this defendant. He has entered his plea of not guilty to the indictment and to each count thereof. His plea has put in question, and at issue, every material part and element of the indictment and the burden of proof is upon the Government. If you should find the defendant not guilty, it is then the duty of the Court to discharge and dismiss the defendant, but if you should find the defendant guilty, it is the duty of the Court to determine and pass sentence upon the defendant as the law provides. You are not concerned with any sentence that might be imposed in the event you are convinced beyond a reasonable doubt

of the guilt of the defendant since the determination of the sentence and the terms thereof are beyond the scope of your duty.

2494 Instructions

The fact that an indictment was filed against the defendant does not raise the presumption of guilt against him and is not to be considered as evidence against him. The indictment was returned based upon the testimony of witnesses who were called before the Grand Jury, out of the presence of the defendant and without any opportunity to him or his counsel to cross-examine those witnesses. Your only duty in this case is to arrive at a determination of the facts and to consider and interpret the facts in the light of, and in conformity with, the instructions given you by the Court and based on the evidence produced before you.

I charge you that the fact that the Government has accused the defendant in writing by the indictment of the alleged offenses does not overcome or impede the prima facie presumption of innocence of the defendant. The indictment itself is a mere formal accusation, and you are not to consider it as evidence, and you shall not suffer yourselves to be influenced by the fact that the indictment was returned against the defendant.

2495 Instructions

The jury is instructed that the burden of proof never shifts in a criminal case. It is incumbent upon the Government to prove beyond a reasonable doubt that the defendant knowingly and wilfully attempted to evade and defeat his income taxes for each of the years charged in the inidctment that you are considering.

2496 Instructions

The law specifically places the burden of proving fraud on the Government. Fraud is not presumed. Fraud in the meaning of the statute means actual, intentional wrongdoing, and the intent required is the specific purpose to evade a tax believed to be owing and mere negligence, whether slight or great, is not sufficient. Fraud cannot be lightly inferred, but must be established by clear and convincing proof.

2497 Instructions

The burden of proof is not upon the defendant to prove that he did believe that the way in which he computed and returned his income was correct, but the burden of proof is upon the prosecution to prove beyond a reasonable doubt that the defendant intended to commit a crime and intended wilfully to defraud the Government. If you have a reasonable doubt arising from the evidence as to whether or not in computing and returning his income for the year involved here, the defendant acted in good faith according to the best of his knowledge and understanding, even though his methods might have been entirely wrong, it is your duty to find him not guilty.

2498 Instructions

In determining the facts, you must of necessity depend upon the testimony of the witnesses who have appeared before you. Therefore, the law has made you also the judges of the weight and credibility to be attached to the evidence given by every witness. In considering the testimony of a witness, you may consider, among other things: his or her demeanor on the witness stand; the way in which he or she testified; his or her possible interest, if any, in the subject matter or the outcome of the case; his or her apparent candor and fairness, or lack thereof; the consistency or inconsistency of his or her statements; his or her bias or prejudice, if such is apparent; his or her intelligence; his or her opportunity of knowing the facts; whether or not his or her testimony is supported or contradicted by other witnesses; the reasonableness or unreasonableness of the story told by the witness; and, finally, all the facts and circumstances which may reasonably aid you in judging the truth or falsity of the testimony of the witnesses.

2499 Instructions

In considering any conflicting statements of the different witnesses, it is your duty to reconcile them in so far as that may reasonably be done. You do not have the right to reject, arbitrarily and without reason, any part of the testimony. If you believe that any person testifying in this case has testified falsely, you may believe

such parts of the testimony of that witness as you believe to be true and reject such parts as you believe to be false. For it is a matter for you to determine, from all the testimony and from all the circumstances surrounding the case, which witnesses have testified truthfully and which ones, if any, have testified falsely.

2500 Instructions

In considering the evidence before you, your attention is directed to the fact that not all matters properly coming to your attention in this trial can be considered by you as evidence. For instance, the indictment, the opening statements of counsel, the arguments of counsel, the remarks of counsel during the course of the trial, and the remarks of the Court during the trial are not evidence and they are not to be considered by you as such in determining the facts of the case. This applies also to any evidence or statements which may have been ordered stricken out or which you may have been instructed to disregard.

2501 Instructions

Your verdict in this case must be reached from a consideration of all the evidence in the case, but if any evidence was admitted and was later stricken out, you must wholly disregard such evidence as was stricken.

2502 Instructions

During a trial it often becomes the duty of counsel for the parties to object to questions or to evidence. It is the right of counsel to object to the introduction of or move to strike out evidence he deems improper. You must not be prejudiced against either party to this case because counsel have made such objections or motions or offers regardless of the Court's ruling thereon. I instruct you that you shall not take into consideration against such party either such objections or the number of them, nor permit yourselves to be in any way influenced by such objections.

2503 Instructions

The exhibits which have been introduced and admitted in evidence are a part of it, and you are to consider them in the same manner as other evidence in the case. However, exhibits offered as evidence and not admitted by the Court are not to be considered by you at all.

2504 Instructions

The laws of the United States as contained in Title 26, Section 145(b) of the United States Code provide as follows:

> "Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony, upon conviction thereof",

and shall be punished. The indictment contains three separate charges against this defendant, each count charging him with a violation of the Internal Revenue Law which has been called to your attention.

2505 Instructions

There is a distinction between the civil liability of a defendant and the criminal liability. This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case.

2506 Instructions

This proceeding involves the question of whether or not the defendant committed a felony in filing income tax returns and if you acquit the defendant, it does not excuse him from the payment of taxes if any be found to be due.

2507 Instructions

You are instructed that as a matter of law, the filing of an incorrect income tax return upon which additional taxes might be due, is not, without additional proof, evidence, in and of itself, sufficient to justify a conviction respecting that return.

2508 Instructions

The failure of the defendant to testify, or to bring his books into court cannot create any presumption against him and cannot be a factor in your deciding his innocence or guilt. He need not prove his innocence. It is for the Government to prove his guilt.

2509 Instructions

Each count of the indictment charges that the alleged violation occurred in the Northern District of

Illinois, Eastern Division, and that the offense was committed by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, a false and fraudulent income tax return. Therefore, it is incumbent upon the Government to prove beyond a reasonable doubt that the violations of law, if any, were committed by the defendant in the Northern District of Illinois, Eastern Division.

2510 Instructions

It is not necessary for the Government to prove that the acts were committed on the exact dates named in the indictment. It is sufficient if it be established that they were committed on or about those dates. Nor is it necessary that the Government establish that the amounts of income received and of taxes owing were exactly the amounts alleged in the various counts of the indictment. It will be sufficient if the Government proves beyond a reasonable doubt that there was a wilful and knowing attempt to evade a substantial part of the income tax due as alleged in any of the separate counts of the indictment. The gift of the offense charged in the indictment, and in each of the three counts, is a wilful attempt on the part of this defendant to evade and defeat the tax imposed by the Income Tax Law.

2511 Instructions

The Government is not required to prove the exact amount of the income tax as alleged in the indictment, however, before returning a verdict of guilty, you must find beyond a reasonable doubt that the defendant received some substantial amount of taxable net income over and above the amount reported, and that he wilfully attempted to evade and defeat the tax on such additional taxable net income.

2512 Instructions

To establish its case the Government must prove beyond a reasonable doubt both of the following two elements: (1) That substantial income tax was due and owing from the defendant in addition to that declared in his income tax returns; and (2) that the defendant wilfully attempted to evade and defeat such tax.

The gist of the offense charged in the indictment is a

wilful attempt on the part of the taxpayer to evade or defeat the tax imposed by the income-tax law. The word "attempt," as used in this law, involves two things: (1) An intent to evade or defeat the tax, and (2) some act done in furtherance of such intent. The word "attempt" contemplates that the defendant had knowledge and understanding that during the calendar years 1946, 1947 and 1948, he had an income in each of such years which was taxable, and which he was required by law to report, and that he attempted to evade or defeat the tax thereon, or a portion thereof, by purposely failing to report all the income which he knew he had during each of such calendar years and which he knew it was his duty to state in his returns for each of such years.

2513 Instructions

There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax.

2514 Instructions

The defendant in this case cannot be found guilty simply because he failed to keep proper records, although the failure to keep proper records, if done wilfully and knowingly do constitute an offense, that offense is not here involved, and you would not be authorized to find the defendant guilty simply because it may be made to appear that he did not keep proper records.

2515 Instructions

The Court charges you that grounds of suspicion, guess or conjecture that the offense was committed and that the defendant might be guilty is not of itself sufficient to warrant his conviction of the charge.

2516 Instructions

The defendant in this case cannot be found guilty simply because he may have failed to include in his income tax returns items of income that should have been included, he can only be found guilty in the event that he wilfully and knowingly attempted to evade the tax for such year charged in this indictment.

2517 Instructions

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be), in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as, in the opinion of the Commissioner, does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in Section 48, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

2518 Instructions

The attempt to evade and defeat the tax must be a wilful attempt, that is to say it must be made with the intent to keep from the Government a tax imposed by the income-tax laws which it was the duty of the defendant to pay to the Government. The attempt must be wilful, that is, intentionally done with the intent that the Government should be defrauded of the income tax due from the defendant.

2519 Instructions

You are instructed that an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. The indictment in this case, therefore, charges three separate offenses: the first two counts charge the defendant, Sam Achilli with wilful attempts to evade and defeat his individual income taxes, and the third count charges him with the wilful attempt to evade and defeat the joint income taxes of himself and his wife, Ruth Achilli.

2520 Instructions

Each year is a unit by itself and you must find separately for each of the years that the defendant filed a false and fraudulent return knowingly and wilfully with intent to evade tax; otherwise you will return a verdict of not guilty for such years as fail to show the offense.

2521 Instructions

If you find that a fraudulent return was filed with intent to defeat a part or all of the tax, and that this was done wilfully, the crime is complete as soon as the filing takes place.

2522 Instructions

The question of intent is a matter for you, as jurors, to determine and, as intent is a state of mind and it is not possible to look into a man's mind to see what went on, the only way you have of arriving at the intent of the defendant in this case is for you to take into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all such facts and circumstances what the intent of the defendant was at the time in question. Thus, direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be inferred from acts and such inferences may arise from a combination of acts, although each act standing by itself may seem unimportant. These are questions of fact to be determined from all the circumstances.

2523 Instructions

You are instructed that a man may not shut his eyes to obvious facts and say he does not know. He may not close his observation and knowledge to things that are put out in the open and are obvious to him and say, "I have no knowledge of those facts". If the evidence shows that he intended to conceal tax liabilities from the government, or that he acted without reasonable ground for belief that this conduct was lawful, then he was not acting in good faith.

2524 Instructions

Ladies and gentlemen of the jury, if you believe this defendant acted in good faith in making his tax returns, believing that they truly reflected his income for the years mentioned in the first three counts in the indictment, then he was not guilty of a crime, nor would negligence or carelessness unaccompanied by bad faith render him guilty. But the duty to file the tax return is personal and it cannot be delegated, although he may procure assistance in the preparation of his returns. Bona fide mistakes should not be treated as false or fraudulent, but

no man who is able to read and write and who signs a tax return is able to escape the responsibility of at least good faith and ordinary diligence as to the correctness of the statement which he signs, whether prepared by him or somebody else.

2525 Instructions

The fact that an individual's name is signed to a filed return shall be prima-facie evidence for all purposes that the return was actually signed by him.

2526 Instructions

The word "wilful", as used in this statute means with knowledge of one's obligation to pay the tax due, and with intent to defraud the Government of that tax.

2527 Instructions

On the question of intent to evade income taxes there are certain matters which you may consider as pointing to such intent, if you find that they exist in this case. These are general instructions: Keeping a double set of books, making false entries in the books, altering invoices, destruction of books, concealment of assets, covering up sources of income, handling one's affairs to avoid the making of usual records, and any conduct the likelihood of which would be to mislead or conceal. I give you these instances simply to illustrate the type of conduct from which you may infer intent to evade taxes. And if the tax-evasion motive plays any part in such conduct, the offense may be made out even though the conduct I have mentioned might also serve some other purpose.

2528 Instructions

Ladies and gentlemen of the jury, if you find that the government has failed to prove beyond a reasonable doubt that the defendant attempted to defeat or evade the tax due and owing the United States in connection with any count or counts of this indictment, then your verdict must be for the defendant as to such count or counts.

2529 Instructions

On the other hand, if you find that the government has proved beyond a reasonable doubt that this defendant attempted to defeat or evade a tax due and owing

the United States, in connection with one or more counts in this indictment, then you must next consider whether the government has proven beyond a reasonable doubt the other essential elements of a violatoin of the Federal Statutes heretofore given. Any such attempt to defeat or evade the tax must be proved to the satisfaction of the jury beyond a reasonable doubt that such attempt was wilful. In this connection, the Court instructs you that the word "wilful" means not only intentional or knowing, but done with a bad purpose, without justifiable excuse, and stubbornly, obstinately and perversely.

2530 Instructions

You are further instructed that if the government has failed to prove beyond a reasonable doubt both an attempt to evade income tax due and owing to the United States and that such attempted evasion, if any, was wilful, then your verdict must be for the defendant as to each count in which both of these essential elements have not been proved beyond a reasonable doubt.

2531 Instructions

In the count or counts, if any, in which the government has proved, beyond a reasonable doubt, attempted tax evasion and that such attempted evasion was wilful, then you must next consider whether or not the government has proved beyond a reasonable doubt that there was an additional tax owing to the United States Government over and above the tax that was paid by the defendant at the time he filed his return.

2532 Instructions

If you find that there were any gains, profits, or income received by the defendant which were not reported, it makes no difference as far as the question of taxability is concerned whether such income was lawfully received or unlawfully received, inasmuch as both were taxable and should have been reported.

2533 Instructions

To establish the first of the two elements of the offense which I have previously defined for you, that is, the understatement of the tax, the Government relies upon proof by the so-called net worth method. I should explain that a man's "net worth" is the difference between his

assets and his liabilities at any given date. It is the difference between what he owns and what he owes at that time. If he has more assets at the end of the year than he had at the beginning, and if his liabilities remain the same, his net worth has obviously increased. However, only the cost price of the assets is to be considered. More increases in market value, which have not been realized, must not be taken into account.

The theory of the net worth method of proof is that if the Government proves beyond a reasonable doubt that the defendant's net worth, as I have just defined it, has increased during the taxable year, it may be inferred that the defendant has had receipts of either money or property during the year and if the Government satisfies you beyond a reasonable doubt that he had a source
2534 of taxable income and that the receipts did not come from non-taxable sources, you may find that the receipts constituted taxable income to the defendant. If, in addition to proving an increase in the defendant's net worth, the Government also proves that the defendant spent money on items which did not add to his net worth at the end of the year—items such as living expenses and taxes—it may be inferred that those expenditures also came from funds received during the year. Consequently, such expenditures may also be taken into account in determining the amount of the defendant's net income for the year, provided they were not expenditures which the defendant was entitled to claim as deductions in computing taxable income on his return.

In this case the Government has undertaken to prove what the defendant was worth at the beginning of each year involved and what he was worth at the end of that year, so as to show that his net worth increased during the year. The Government has also introduced other
2535 evidence, which if you believe it, would tend to establish money paid out by the defendant for such non-deductible items as federal income taxes, living expenses, and other personal expenditures. The Government claims that the sum of the defendant's net worth increases and his non-deductible expenditures for each year as shown by the Government's evidence, represents the defendant's correct net income for that year. The resulting figures are alleged by the Government to be a reasonable approximation of what the defendant should have reported on his income tax return.

As I have already told you, an attempt to evade income tax for one year is a separate offense from an attempt to evade the tax for a different year. So you must consider the evidence as to each year separately in arriving at your verdict.

2536 Instructions

The burden is on the Government to establish beyond a reasonable doubt that the funds reflected in the defendant's increased net worth and non-deductible expenditures arose from taxable, rather than non-taxable sources. In this connection, I charge you that the federal income tax is levied on gains, profits, and income derived from salaries, wages, or compensation for personal services, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. The law states, however, that certain kinds of funds do not constitute income to him who received them. Since no income tax is levied on such funds they need not and should not be reported as income. There funds include gifts, inheritances, loans, the proceeds of life insurance policies and certain other miscellaneous items which are not pertinent here.

As I have previously stated, the burden rests upon
2537 the Government to prove beyond a reasonable doubt that the funds reflected in increased net worth and expenditures arose from a taxable source or sources. In other words, net worth increases and expenditures do not establish the receipt of taxable income unless the evidence also shows a likely source of income from which you believe they sprang.

If the defendant offers to the Treasury Agents explanations of the source of his funds which are reasonably susceptible of being checked, the Government may not disregard them; and you may take into consideration any failure by the Government to run down such explanations, if any were made, or the results of any investigation made by the Government into the truth of the explanation. On the other hand, where relevant leads are not forthcoming, the Government is not required to negate every conceiv-

able source of non-taxable funds, and if the defendant failed to supply information to the agents in that regard,

you may take such failure into account. He is not
2538 required, however, to prove the source of his net worth, for, as I have said, the burden is on the Government to prove that the increase arose from taxable sources.

2539 Instructions.

Now, I want to point out to you that, because the net worth method of proving unreported income involves a comparison of the beginning and ending net worth of the defendant in each prosecution year, the result cannot be correct unless the beginning point, or the starting net worth, is reasonably accurate. You will readily appreciate that if the defendant actually owned substantial assets at the beginning point which the Government has failed to include in its computations, apparent increases in net worth during the indictment years may be no more than the disclosure of money previously saved, or the result of a change in the form of other assets which the defendant owned at the beginning of the year and which the Government did not take into account. For example, a taxpayer might have had a substantial amount of cash on hand which he had saved up in prior years and which he used to make purchases or other expenditures during a prosecution year. In that case an apparent increase in his net worth during the year might be only the result of a

conversion of cash into tangible property. You must,
2540 therefore, in order to convict be satisfied that the Government's evidence establishes the starting point net worth with reasonable certainty as of the beginning of the year.

On the other hand, the Government is not required to refute all possible speculation that the defendant might have had assets at the beginning of the year which the investigation failed to disclose; nor is it necessary for the Government to prove the exact cost of the assets owned by the defendant at the starting point, or the precise amount of his undeposited cash on hand. It is enough if the Government, although unable to determine the exact cost of his assets as of that point, can show beyond a reasonable doubt that they were insufficient to account for the subsequent increases in his net worth. The burden

rests originally upon the Government, and the burden remains upon the Government, to establish a fixed starting point. But what this means is that the Government must prove beyond a reasonable doubt that the defendant's assets at the beginning of the year, when added to his reported income for the year, were not sufficient
2541 to account for the increases in his net worth plus his non-deductible expenditures.

In this case the Government has endeavored to prove that the defendant did not have any assets at the beginning of the year other than those disclosed as a result of its investigation by tracing the financial and income tax return filing history of the defendant. The evidence introduced by the Government of the defendant's income tax returns and financial history in years prior to those named in the indictment may be considered by you only for such light as it may shed on the innocence or guilt of the defendant during the years named in the indictment. The question of his innocense or guilt in prior years is not to be considered.

In determining whether or not the starting point net worth is reasonably accurate, you may consider whether the Government has run down all reasonable "leads" suggested to the agents, tending to establish his innocense, and has explored all explanations, if any, advanced by the defendant or his representatives during the investigation. If you are satisfied that all such reasonable
2542 leads and explanations have been exhausted or refuted, this would be persuasive evidence which you could consider in determining whether the starting point net worth included all of the defendant's assets. Obviously improbable explanations would not be entitled to as much weight as plausible and reasonable explanations. If you should find that the Government's investigation has failed to refute what seem to you plausible explanations, such failure may be considered by you in determining the validity of the starting point.

If you find that the Government has not established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, you will return a verdict of not guilty as to such count of the indictment. If you find as to any year that the funds reflected in increased net worth and expenditures are not

substantially in excess of the income reported by the defendant on his return for that year, or if you have a reasonable doubt as to whether such funds are substantially in excess of the reported income, you will return a
2543 verdict of not guilty as to such count or counts of the indictment. If you find, on the other hand, that the Government has established the net worth of the defendant to a reasonable certainty as of the beginning of any year named in the indictment, and if you are also convinced beyond a reasonable doubt that the funds reflected in increased net worth and expenditures during such year are substantially in excess of the income reported on the defendant's tax return, you will proceed to inquire whether the Government has established that those funds represented taxable income on which the defendant wilfully attempted to evade or defeat the tax.

2544 Instructions

In this case, testimony has been introduced before you of expert witnesses, expressing opinions upon various questions. This class of testimony is proper and competent concerning matters involving knowledge, skill or experience in some subject which is not within the realm of ordinary experience of mankind and which requires special training, research or study to understand. The law allows those skilled in that special field to express opinions and, upon a hypothetical state of facts given them, to say whether or not, according to their experience and research, a fact may or may not exist. Nevertheless, while such opinions are allowed to be given, it is entirely within the province of the jury to say what weight shall be given to them. Jurors are not bound by the testimony of experts, and the testimony of such experts is to be canvassed and weighed as that of any other witness. Just so far as their testimony appeals to your judgment, convincing you of its truth, you should adopt it, but the mere fact that a witness is called an expert, and gives opinions upon a particular point, does not necessarily obligate the jury to accept his opinions as to what the facts are.

2545 Instructions

I charge you that Exhibit 280, which summarizes what the Government alleges to be the defendant's net

worth on January 1, 1946, December 31, 1946, December 31, 1947 and December 31, 1948, and all the evidence which it purports to summarize, will not of and by itself, standing alone, support a verdict of guilty for any one or all of the years 1946, 1947 and 1948.

If Exhibit 279, and all the evidence it purports to summarize together with all other evidence before you, in your judgment, does not reflect a likely source of income from which the alleged net worth increase could spring; then you must return a verdict of not guilty for the year or years you so determine.

2546 Instructions

I charge you that Exhibit No. 279 which purports to summarize what the Government alleges to be taxable income unrecorded and unreported on the books of Highland Motor Sales, and all the evidence which it purports to summarize, will not of and by itself, support a verdict of guilty.

Exhibit 279 and the evidence it purports to summarize as a matter of law serves only one purpose, and that is to show a likely source of income from which the increase in net worth alleged to be summarized in Exhibit 280 came from.

2547 Instructions

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries. Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose, you are entitled to consider them.

2548 Instructions

You may find evidence of an intent to commit the crime of attempting to evade and defeat the payment of a

tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his receipt of moneys from his partner, Earl H. Gromer, you may also find in addition to such motive the existence of an intent to defraud the United States of moneys due as income taxes and to attempt to defeat or evade such taxes.

2549 The Court: Now, ladies and gentlemen of the jury—

Mr. Batter: If your Honor please, I think you were going to give one other instruction.

The Court: Yes. Ladies and gentlemen of the Jury, I also wish to instruction the Jury that the proper procedure in closing arguments in criminal cases is that the Government first argues its side of the case, then the Defendant replies and argues its side of the case, and then the Government has a second opportunity to answer the argument of the Defendant, but the Defendant has no further opportunity to answer the final closing argument of the Government.

2550-2566 * * *

2567

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53-CR-154) * *

CERTIFICATE

I hereby Certify that the proceedings had, testimony taken and evidence offered at the trial of the above-entitled cause were reported in shorthand by me and under my direct personal supervision, and that the foregoing, consisting of typewritten pages numbered 1 to 2566, both inclusive, constitute a true, correct and complete transcript of the proceedings had in the trial of the above-entitled cause on April 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28, and May 2, 3, 4, 5, 9 and 10, and 11, 1955.

Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.

235a And afterwards on, to wit, the 11th day of May, 1955 there was filed in the Clerk's office of said Court a certain Verdict in words and figures following, to wit:

236a

UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

VERDICT

We, the Jury, find the defendant Sam Achilli, guilty as charged in the indictment.

/s/ Chris J. Davis
Foreman
/s/ F. B. Ford
/s/ Julia A. Calabrese
/s/ Elsie M. Stewart
/s/ Florence A. Conrath
/s/ Helen Cardaras
/s/ Florence Zwart
/s/ Carl H. Ehrhard
/s/ Mary J. Nemmero
/s/ E. N. Thomas
/s/ Steven F. Ochaba
/s/ Meyer Goldstein

237a-241a * * *

242a And on the same day, to wit, on the 11th day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch District Judge, appears the following entry, to wit:

243a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

This being the day to which this cause was continued for further trial again comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the Jury heretofore elected, empaneled and sworn herein for the trial of this cause also come and render their verdict and upon their oath do say:

"We, the Jury, find the defendant Sam Achilli, guilty as charged in the Indictment."

and on the defendant's motion that the Jury be polled the Clerk inquires of each and every Juror: "Is this your verdict?" to which inquiry each and every Juror replies in the affirmative and on motion of the defendant it is

Ordered that leave be and is hereby given to file motions on or before May 25, 1955 and that hearing on said motions be and the same is hereby set for May 27, 1955 and on motion of the Government by the United States Attorney it is

Further Ordered that bond of the defendant be and the same is hereby increased to the sum of Seven Thousand Five Hundred Dollars ($7,500).

244a And afterwards on, to wit, the 25th day of May, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Motion For Judgment Of Acquittal Or In The Alternative Motion For A New Trial in words and figures following, to wit:

245a

IN THE UNITED STATES DISTRICT COURT

(Caption—No. 53 CR 154)

MOTION FOR JUDGMENT OF ACQUITTAL
or in the alternative
MOTION FOR A NEW TRIAL

Comes now, the defendant, Sam Achilli, by his counsel Carl J. Batter and moves the Court to:

Enter a Judgment of Acquittal on all three Counts of the indictment; or, in the alternative to grant a New Trial; and

Gives as reasons therefore:

The grounds heretofore advanced in the Motions for Dismissal, Motions for Suppression of Evidence, Motion for Judgment of Acquittal made when the Government rested, Motion for Judgment of Acquittal made at the close of all the evidence; and further grounds as follows:

(a) That the United States Attorney in his closing argument to the Jury, and particularly in the closing sec-
246a tion of his closing argument, overstepped the bounds of that propriety and fairness which should characterize his conduct in the prosecution of a criminal offense.

In his summation to the Jury he was guilty of misstating the evidence; of stating as evidence matters that do not appear in the evidence; interjecting as an issue the loyalty of the defendant to the United States; interjecting the use of "angels" before the Jury; and other matters specifically set forth in Appendixes A and B attached hereto; thereby arousing the passions and prejudice of the Jury in a manner that the cumulative effect of such misconduct was to deny the defendant a fair trial and result in a verdict by the Jury unsupported by the evidence.

We attach hereto Appendix "A" wherein we set forth the specific instances of misconduct, such instances referenced in the left hand margin to the page of the transcript where such incident is recorded; and, Appendix "B", cross-referenced to Exhibit "A", setting forth the grounds upon which we rely.

(b) That the Court erred in failing to instruct the Jury to return a special verdict as requested by the Defense. In a Net Worth case it is the very gravemen of the foundation for the use of the Net Worth Method. The requested instruction appears in Appendix "C" and should have been required in addition to the verdict of guilty or not guilty.

(c) That the Court erred in failing to instruct the Jury on the impact of embezzlement (Commissioner of In-
247a ternal Revenue *v.* Wilcox, et al, 327 U. S. 404; 66 S. Ct. 546, and the Statutes of the State of Illinois) in considering intent. Such instructions, requested by the Defense are set forth in Appendix "C" attached hereto. The instruction given by the Court (Tr. 2548), also set forth in Appendix "C" excuses the intent to defraud the United States if the Jury does so find; but does not instruct that if the Jury should find that the intent was to conceal his receipt of money from his partner, Earl H. Groner, that such concealment constituted embezzlement and did not result in taxable net income.

(d) That the Court erred in quashing the subpoena duces tecum served upon the Government witness Ralph A. Weber, and denying the defense the right to show thereby that the Defendant's Constitutional rights had been invaded.

Wherefore, it is prayed that this motion be granted.

Carl J. Batter,
Carl J. Batter
Counsel for Defendant.

Copy of this Motion and Appendices thereto delivered to:

Vincent Russo, Esq., Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

Hon. Robert Tieken, United States Attorney for the Northern District of Illinois, Eastern Division, Post Office Building, Clark & Adams St., Chicago, Ill.

on the 25 day of May, 1955.

C. J. Batter.

248a • • •

249a

APPENDIX "A"

EXCERPTS FROM TRANSCRIPT

Tr. Page

2419/20 "Then he leaves the Post Office Garage and we next see him with his brother-in-law, Henry Santurro, going to a parking lot—or a used car lot, rather, operated by Harold Money, and Henry Santurro says to Harold Money, 'I have a likely boy here that I'd like to get in this racket and I think you can use him.'" (Underscoring supplied)

2422 "Then in 1944 we begin to see the Ponzi-like operations of Mr. Achilli."

2422 "In December, 1944, he goes to Earl Gromer and says, Look: I've got $6,000. That's all I've got. I can get the Chrysler-Plymouth franchise and there's a garage that's for sale by Mr. Hubbe for $30,000. Do you have anybody that will put up the money with me and go into partnership so we can get that franchise?'" (Underscoring supplied)

2425/6 "Sam Achilli acquired the physical assets of the real estate and he also acquired the corporate stock for $18,400, and beginning in 1946 after the place burned down, Sam Achilli began spending money." (Underscoring supplied)

2427 "I believe it was Mr. Silagy, who testified that he borrowed $7,000. and he gave a note for $8,500. There was a profit to Gromer and Achilli of $1,500. Half of that, or $750.00, belonged to Sam Achilli, and was not reported on any income tax return for the years 1946, 1947 and 1948.

250a

2427 Mr. Affeld testified he borrowed $7,500 and signed a note for $8,250, a profit of $750.00. Half of that belonged to Gromer and $375.00 of it belonged to Sam Achilli, and it is nowhere reflected on his returns.

Then there was Mr. Heckman who borrowed $4,000 and signed a note and paid back $4,600, a profit of $600 on that loan. $300 belonged to Earl Gromer, and $300 belonged to Sam Achilli, and that $300.00 is nowhere reflected on any return.

Source? There are three of them for your consideration, the loan business, the automobile business and the gambling business, and none of it reflected on the returns."

2429 "That starting point, ladies and gentlemen, stands there. It is just as firm and solid as the Rock of Gibraltar and there has been no attack on it, and it hasn't been disturbed, and it can't be. It can't be because all the evidence is there."

2430/1 "And Sam calls for them, the general ledger, the sales records, the accounts receivable, all the books. Sam knows those books now because he knows what to call for. He traces them and he finds that Weber is right, and he knows all the time that he is wrong.

So he says, 'You win, here are the keys. Take it'.

Sam Achilli doesn't know his man. He didn't know at that time that Weber had been a bomber-

251a

pilot in the United States Air Force; that he had flown missions over the European Theatre of Operations; that he had been shot down and wounded and that he had bled for the very flag that Sam Achilli and his then lawyer wouldn't even pay the respect of waiving."

2430/2 "Wilfulness—the picture is filled with it. Let me tell you about some of them:

Fifty-three witnesses took that stand to testify about those cars. Those witnesses' testimony relates to 132 automobiles, reflected on Government Exhibit No. 279. Suppression of information from inventory cards. That is an affirmative act of wilfulness."

2452 "Suppression of income from the sales of those tradeins—affirmative acts of wilfulness."

2462 "At the outset, he (Batter) discussed the franchise. Under that franchise Sam Achilli was not permitted to sell new cars to used car dealers."

2465 "He (Batter) says that his witnesses came here without hesitation, these fine people from Elgin, and they are all fine people. He did not tell you that they came here in response to subpoenas. They didn't come here of their own free will at their own expense, but he subpoenaed them here, and that is the reason they were here."

Mr. Batter: "I object to that. There is nothing in the record to that effect."

252a

2465 Mr. Russo: "It is a fair argument, if your Honor please."

Mr. Batter: "As it turns out, half of those witnesses were not subpoenaed, or more than half; at least seventeen of the twenty weren't."

The Court: "That may be stricken."

2467 "That property at 167 Liberty Street was testified to by Mr. Weber. He said it came in to Sam Achilli in 1946, not in 1945, and Achilli sold it in 1946, so it is in and out the same year, and it is in the proper column."

2469 Discussing the rebuilding of the Red Lion, and where the money came from, Mr. Russo said:

"You don't think he has a fairy godfather that would pay that money for him, as Mr. Batter would have you believe. That money came from Sam Achilli and from Highland Motor Sales, the suppressed income on those car transactions that the witnesses on the stand described for you. That is where it came from."

2469/70 "Then he talks about this $35,000 check. He put a witness on the stand from the bank, and let's talk about that testimony a little bit.

He went to the Union National Bank with his wife and with Gordon, as I recall the testimony, and they purchased a check but before doing so they borrowed $23,000 from the bank, so with that $23,000 that was borrowed and $12,000 that was put up by

253a

Sam Achilli, they purchased a $35,000 check.

Now, he says we put the man on the stand and on the net worth thing we are not giving him credit for the proper thing, but my recollection of the testimony on cross examination of Mr. Arnold, I believe his name was, if I recall it correctly, was this: The question was asked him by Mr. Batter: 'How much of that loan participation did the Union National Bank take?'

And the answer was:

'$23,000.'

Then he asked him:

'How much of that participation, how much of that $23,000 did the First National Bank in Gibson take?'

And the answer was:

'$12,000.'

But Mr. Batter would have you believe that the liability was $35,000, which is contrary to the testimony of his own witness. There was one $23,000 loan and that is the loan that is reflected on Exhibit 280, and he has not destroyed it or challenged it or changed it one iota."

254a

2470/1 "Then he handed you, or showed you—he did not hand it to you—a $15,000 cashier's check, Government Exhibit No. 172 and I would like for you to take a look at it.

Mr. Gromer testified that he purchased that check from the First National Bank. Mr. Batter recalled Mr. Seybold and put him on the stand and said, 'Who bought that check?' And Mr. Seybold said the same thing Mr. Gromer said, 'Earl Gromer bought it', but take a look at the back of it.

Gromer told you that he got the money from Achilli. Gromer buys a check, takes it and endorses it over to Sam Achilli. Whose hands is it in? It is in Sam Achilli's hands. That is the check he uses to make a loan of $15,000 from Mr. Gordon, so let's add back some of these things Mr. Batter so hastily says 'Poof, let's subtract.' It does not require subtraction."

2471/3 "Now, then, at the outset of this trial if my memory serves me correctly, we were talking about the Red Lion, and Mr. Batter tried to create the impression in your mind that all the money that was spent in the rebuilding of the Red Lion was expended by the Red Lion Corporation. Well, you found out from the witnesses on the stand that the Red Lion Corporation was just a corporation

255a

organized to do business. Let's take a look at the facts.

Mr. Achilli purchased the Red Lion property, including stock of the corporation and the right to do business, for $18,400. That was testified to by Mr. Turpin. That consideration meant the property, building, the chattels, all liquors and the corporate stock.

Now, in 1946, on Government Exhibit No. 1, Sam Achilli took a fire loss. The building burned down, and if you will examine that—"

Mr. Batter: "If your Honor please, I object to counsel stating things that are absolutely not in the record. On this Turpin deal we have an Exhibit there of just what it covers, and just as I defied Mr. Weber to show any purchase of the capital stock in that Exhibit I defy counsel to show it, and I do not think counsel ought to be permitted to make these misstatements."

Mr. Russo: "I am not making a misstatement, if your Honor please."

The Court: "Proceed."

Mr. Russo: "It is supported by every document in evidence here."

The Court: "Proceed."

256a

Mr. Russo: "Now, going to Government Exhibit No. 1, when you refer to it, will show that he took a fire loss in 1946 of $16,000, and in the same Exhibit he stated that the remaining value of the real estate was $2,000. Take a look at Exhibit No. 1.

Therefore, he had only a cost basis in the corporate stock of $400.00.

Then take a look at the 1948 return where he took a cost basis, and Mr. Batter put it on the board, of $4,673.80 and then recall the testimony of Gromer and Brady who said that that represents half of the corporate stock, and if you take those two Exhibits together, Exhibit 1 and Exhibit 3, you have fraud on the face of the returns."

2474/79 After references to angel in the form of Government expert Ralph A. Weber, Bishop Sheen and his angel, and an objection by Defense Counsel, the United States Attorney used a blackboard and developed the following figures:

1946

2474	Net Income reported per return	$11,753.96
2475	Unreported Income, gambling and Highland Motor Sales	14,955.06
2475	Borrowed from Earl Gromer	9,000.00
2475	Available to the defendant	$35,709.06
257a	Invested in Red Lion, testimony of the architect, Mortimer Hawkins and others	$ 9,417.22
2475	Proceeds from sale of 167 Liberty Street	10,800.00
2475/6	Objection by Defense Counsel—Court directed Government Counsel to proceed	
2476	Investment in Oil	2,500.00
2476	Loaned to Earl Gromer	5,426.87
2477	Abelmann, real estate broker received	3,500.00
2477	Joint Ventures, Earl Gromer, purchasing real estate	13,625.61
2477	a total of	$45,269.70

Then the following statement: (p. 2477)

"This is what he had available [$35,709.06]. That is what he spent [$45,269.70] (Indicating figures on blackboard.) Where did it come from? Highland Motor Sales suppressed income. He says we haven't put the money in Achilli's hands. Where do you

think Achilli got the money? He made some remark about having witnesses on the stand who testified that in 1942 they went down to see some oil wells. There were two witnesses—"Did you see Sam Achilli?"

"Yes, I saw him there."

Well, I went to the ball game Saturday, but can you infer from that that I played ball or that I bought stock in Comiskey Park?"

258a

1947

2477	Net Income reported	$16,785.52
2477	Borrowed from Bank	25,000.00
2478	Red Lion Insurance Proceeds	5,000.00
2478	Unreported income from Highland Motor Sales	36,131.55
	A total of	$82,917.07

2478 "The witness who took the stand and testified about the work, labor and materials they supplied to Sam Achilli in the construction of the Red Lion in 1947 say that they received from Sam Achilli—not from his fairy godfather but from Sam Achilli—$85,106.97.

Take a look at those figures, and ask yourself where that $36,000 came from. It came from where those witnesses testified it came from—Highland Motor Sales, suppressed sales, suppressed income. Have we put the money in Sam Achilli's hands? He spends it. He spent it."

1948

2478	Net reported income, Exhibit No. 3	$34,053.12
	Invested in Red Lion that year	11,483.85
	Bought a cashier's check for	12,000.00
2479	Investment—75 Grove Avenue	5,000.00
	Loaned Gordon	15,000.00
	Paid back to bank on $25,000 loan	6,296.48

259a

"Now you understand why I was so particular to draw from the witnesses on the stand amounts

and dates. We were fixing them for this purpose so that you could understand them."

Invested in 18-20 Douglas St.	5,500.00
Total Investment in 1948	$55,280.33
"He reports	34,000.00"
That leaves	$21,068.00

and we show in Government Exhibit No. 280 where that $21,000 came from. The difference between $34,000 some odd and $55,000 some odd, a difference of $21,000, came from sales that were suppressed by Sam Achilli and from income of those suppressed sales.

"Mr. Batter also made the argument, Well, I had Weber on the stand and he was squirming because I asked him a question and he couldn't answer it. That question was, "What proof do you have that Highland Motor Sales was the owner of those cars?"

2480 The answer is that when those cars were traded in, they were suppressed from the inventory cards. There was no record of their coming into Highland Motor Sales, and consequently all that Weber could say is they weren't on those records.

They were sold by Highland Motor Sales. If Highland Motor Sales sold them, then Highland Motor Sales owned them, and that is the answer.

260a

"If Sam Achilli had been just as honest with his Government as he was with his partner, he wouldn't be here today. If ever an income tax evasion case has been proved to the hilt, ladies and gentlemen of the jury, this is it. Thank you."

2480/2 Thereupon Counsel for the Defense requested the Court to meet in Chambers, and the proceedings set forth below were had. It will be noted that the United States Attorney did not take issue with the charges made.

"Mr. Batter: If the Court please, the statement of counsel in his closing argument this morning is so at variance with the truth and so at variance with the record, and bearing in mind that I am left in the position where I am unable to answer him

before the jury; I would like an instruction from the Court to the jury to the effect that the regular procedure is for Government counsel to open and close, and that I have no opportunity to speak again.

I don't think in justice the record should be left in the position where counsel takes net income as reported on the individual return, and tries to work from that with his deductions, ignoring the partnership returns as they were returned, taking items of $10,800, which is a receivable, and treating it as a disbursable item, and all the other items

261a he went through, without letting the jury know that I am precluded from saying anything more.

I would like an instruction to the jury that I do not have a second opportunity to talk to them.

The Court: Well, I will instruct the jury accordingly then.

Mr. Batter: Thank you."

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263a APPENDIX "B"

COMMENTS RE ITEMS

SET FORTH IN APPENDIX "A"

2419/20 Henry (Harry) Santurro's testimony appears on pages 1468 to 1487 of the transcript. It contains no reference whatsoever to the defendant's engaging in the used car business, its characterization as a "racket", or to the defendant being a "likely boy". The quotation of the United States Attorney is a complete fabrication, inflammatory, passionate and prejudicial.

2422 There is nothing in the transcript of the testimony of any witness, nor in any of the Exhibits to support a characterization of "Ponzi-like operations". Ponzi was an Italian, prosecuted some years ago for defrauding investors out of millions of dollars, promising large returns on investments, and paying such investors large returns from the receipts from new investors instead of from earnings until the enterprise collapsed. It was a very

famous case, attracting national attention, and the type of fraud became popularly known as the Ponzi scheme. The characterization was a complete fabrication, inflammatory, passionate and prejudicial.

2422 The testimony of Mr. Gromer respecting the partnership and the investment of $6,000 appears on pages 1602-1604 of the transcript and reads as follows:

"Q. Will you tell the Court and Jury, please, how the formation of that partnership came about?

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"A. Mr. Achilli came to my office, stated that he had an opportunity to buy the Chrysler Garage from Mr. Hoppe, who was the owner, and who had been the Chrysler dealer.

He stated that he could procure the Chrysler franchise and wanted to arrange financing of it. He had a limited amount of money and wanted to know if I knew how he could finance it. After working out some details, we went over to the Union National Bank, where we arranged to finance the purchase of the building.

Q. How much money did he tell you he had at that time?

A. Six thousand dollars.

Q. And what was the discussion, if any, with respect to the amount of money that you were to invest in that partnership?

A. An equal amount.

Q. By that do you mean $6,000?

A. Yes, sir.

Q. After you had agreed to match his $6,000, I believe you testified you went to the bank to make some loan arrangements?

A. We did.

Q. To purchase the Hoppe garage?

A. Yes, sir.

Q. Where is that garage located?

A. 192 Wellington Avenue, Elgin.

Q. Is that the same garage in which Highland Motor Sales began doing business with you as a partner?

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"A. Yes.

Q. Now what arrangements did you make to finance the partnership and the purchase of that garage?

A. The bank agreed to loan $18,000 to go with the $12,000 the two of us had, to make $30,000, the purchase price.

Q. Was that deal consummated?

A. It was.

Q. Did you arrange then for the purchase of the Hoppe garage?

A. I did."

The testimony clearly shows that the defendant approached Mr. Gromer as a client, and sought a method of financing the purchase of the garage; that the visit to the bank preceded the determination of the amount of $6,000 that each was to invest; that the defendant did not go to Mr. Gromer to have him find the defendant a partner; but that a partnership with Mr. Gromer resulted. The quotation 'Look, I've got $6,000. That's all I've got.' The quotation of the United States Attorney is false and prejudicial.

2425/6 This statement of the prosecutor pertains to the Red Lion enterprise. The witness, William A. Turpin, testified (Tr. 1018-1022) to the extent pertinent hereto, as follows: Tr. 1018:

"Q. Now, Mr. Turpin, what was the consideration for the conveyance of the Red Lion property to Sam Achilli?

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Tr. 1019:

"A. $18,400.

Q. Directing your attention again to Government Exhibit No. 84, I will ask you whether it correctly recites the consideration that moved to you from the defendant Sam Achilli.

A. Yes, it does.

Q. Does Government Exhibit No. 84 correctly describe the property that you conveyed to Sam Achilli?

A. Yes, it does."

Tr. 1022:

"Q. Does Government Exhibit No. 85 for identification correctly describe the property that you transferred to Mr. Achilli under that conveyance?

A. It does."

Exhibits 84 and 85 were then received in evidence without objection (Tr. 1022) Exhibit 84 is the contract and Exhibit 85 is the "guarantee title or warrantee deed" (Tr. 1021) and neither document makes any reference whatsoever to the corporate stock of Red Lion, Inc. as part of the property conveyed.

It will also be observed that Sam and Ruth Achilli appear as registered owners of the corporate stock, at a stockholder's meeting held on November 15, 1945 (Tr. 2095) whereas, the real estate, etc. was not conveyed until 1947 when final pay-

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ment was made. (Tr. 1020)

The statement by the United States Attorney that the $18,400 purchase included the corporate stock is a misstatement of the evidence, unsupported by the evidence, and was prejudicial.

2427 Re: Silagy: The testimony of Mr. Silagy (Tr. 1559-1569-A) is that on October 16, 1947, he borrowed $7,000. (Tr. 1561): that he received a check for $5,000. drawn by Highland Motor Sales (Tr. 1563); a check of Earl Gromer for $1,250., Exhibit 222 (Tr. 1563); and about $750. in cash (Tr. 1563); that he did not pay the note when due (Tr. 1564); that a judgment was rendered against him which he paid on February 20, 1948 and April 22, 1948 (Tr. 1565-6).

The statement of the United States Attorney that "Half of that, or $750.00, belonged to Sam Achilli, and was not reported on any income tax return for the years 1946, 1947 and 1948" is a misstatement of the evidence and not supported by the evidence. The years 1946 and 1947 are not involved; and, for the year 1948 Highland Motor Sales did report $1,899.30 of "Miscellaneous Income" (page 1 of statement attached to Gov. Exh. 6) whereas in 1947 "Miscellaneous Income" (page 1 of statement attached to Gov. Exh. 5) amounted to $11.80.

The statement of the United States Attorney is prejudicial and false for the reason that it has not been shown that the year 1946 was involved;

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the evidence indicates no interest paid in 1947; and there is no showing that the Cash of $750. was that of the defendant.

Re: Affeld: The testimony of Marvin E. Affeld (Tr. 1528-1536) respecting this transaction begins as follows: (Tr. 1530)

"Q. Let me refresh your recollection. That is not the transaction I am referring to.

Did you borrow any money from Sam Achilli at or about that time?

A. Yes, I did—not from Sam Achilli; I wouldn't say I borrowed money from Sam Achilli.

Q. All right, sir. Just tell us what the transaction was with respect to borrowing money at or about that time.

A. Well, at that time I was building my home and I needed $7,500 to complete it so I talked to Mr. Achilli about it. He said he would talk to a man by the name of Mr. Gromer and I should stop down and see Mr. Gromer the next morning; I did, and Mr. Gromer arranged for the money.

Q. How much was that loan that you arranged for at that time?

A. $7,500."

He also testified that the time was about November, 1948 (Tr. 1529) and further (Tr. 1532-3).

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"Q. What was the amount of money that you received upon the execution of that note?

A. I did not receive the money. They agreed I should finish my home and turn the bills into them in the amount of $7,500.

Q. Where was that money placed, if you know.

A. That I don't know, because Mr. Gromer wrote the check. I don't know.

Q. Was it credited to your account in Mr. Gromer's office?

A. Yes.

Q. And as expenses were made and bills were rendered to you, what did you do with those bills?

A. I turned them over to Mr. Grome and he wrote the checks.

Q. And paid the bills?

A. Right.

Q. Now referring to Government Exhibit No. 217 for identification [Trust deed dated November 15th, 1948 (Tr. 1531)], will you state, please, whether or not that obligation was outstanding at December 31, 1948?

A. When was it paid? Yes, it was.

Q. And when was that note paid?

A. 11/28/49."

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The statement of the United States Attorney that of the "profit of $750.00", "Half of that belonged to Gromer and $375.00 of it belonged to Sam Achilli, and it is nowhere reflected on his returns.", is false and prejudicial. The testimony shows that the note was paid on November 28, 1949 (Tr. 1533); therefore it has no place in the 1946, 1947 or 1948 returns; furthermore, Mr. Affeld testified that the money was borrowed from Mr. Gromer and not the defendant (Tr. 1520).

Re: Heckman: The testimony of Mr. Heckman (Tr. 1154-1164) is that he purchased a car from Highland Motors in August, 1948 (Tr. 1155), which he financed in part through Elgin Acceptance Finance (Tr. 1156); that on May 1, 1947 he borrowed $4,000. (Gov. Exh. 118) from the defendant and his partner, Mr. Gromer (Tr. 1159); after first talking to the defendant and then to Mr. Gromer (Tr. 1159); that the note for $4,600. was left with Mr. Gromer (Tr. 1160); that he paid the note in monthly instalments at Mr. Gromer's office (Tr. 1161); that he received a release of chattel mortgage, but that Mr. Achilli was not in the office at the time (Tr. 1162); said release being dated May 3, 1948 (Tr. 1164).

The statement of the United States Attorney that there was a profit of $600, of which "$300 belonged to Sam Achilli, and that $300.00 is nowhere reflected on any return" is a pure conclusion and un-

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supported by an evidence. There is no evidence to controvert the fact that this transaction being a partnership transaction, was not reflected on the books of the partnership of Highland Motor Sales, which return for 1948 reported "Miscellaneous income of $1,899.30" (page 1 of statement attached to Gov. Exh. 6). The partnership books is the natural place for this item to appear, and the prosecution has placed none of this money in the defendant's hands.

2427 Government Counsel then states "Source? There was three of them for your consideration, the loan business, the automobile business and the gambling business, and none of it reflected on the returns."

This statement is extremely prejudicial because it is relied upon as one of the three "likely" sources of income; the statements regarding the loan business set forth above, are pure fiction, the gambling business, so-called, is reflected on the 1946 return (Gov. Exh. 1) in the form of sale of the pool hall and rental income of $1,000 (Schedule B of Gov. Exh. 1) offset in part by a full year's depreciation on the equipment of the pool hall, that is $200 on a valuation of $2,000. at a rate of 10% (Schedule F of Gov. Exh. 1); and the automobile business income unreported, if such there be, has not been placed in the defendant's hands.

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2429 The statement regarding the starting point of the Net Worth is a complete untruth. It was attacked, successfully in several respects; that is:

The corporate stock of Red Lion, Inc. was not included in the Government figures (Gov. Exh. 280) testimony of William A. Turpin (Tr. 1018-1022; Gov. Exh. 84 and 85); and the Government expert Ralph A. Weber did not, despite his labored effort, place the corporate stock in the assets included in Gov. Exh. 84 and 85 (Tr. 2095-2098).

The omission of investment in Oil Wells "McGregor Oil Co., Fairfield, Ill., $5,000" (appearing in Miscellaneous deductions on page 3 of the 1947 individual return (Gov. Exh. 2) was attacked; and it was shown by two witnesses, Clifford Smith (Tr.

2224-2229) and Frank Oehler (Tr. 2229-2233), that the defendant did on more than one occasion visit such oil fields in 1942 or 1943.

The omission of the ownership of the Brick residence (Sched. D of Gov. Exh. 1) shown to have been acquired in December 1945 was omitted from the starting net worth and the Government has failed to prove its ownership in 1945.

The opening net worth is of the utmost importance in establishing the probative value of the Net Worth method. Its characterization, and its alleged immunity from attack, are extremely preju-

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dicial and a misstatement of the evidence.

2430/1 At this point the United States Attorney was pounding the rail before the Jury box with his fists and snarling. His statement, which in part reads:

> "bled for the very flag that Sam Achilli and his then lawyer wouldn't even pay the respect of waving"

is inflammatory and designed to arouse the passion of the jury. It was a studied malicious statement—the reference to "his then lawyer", now deceased, shows that it was a studied statement carefully worded to exclude trial counsel.

There is no support in the record for the statement by Government Counsel. Such testimony as there is, is to the contrary. The witness Ben Gallina (Tr. 953-966) called by the Government testified as follows: (Tr. 659-660)

"Q. After he moved his cars from your lot where if any place else did he begin doing business?

A. Well, at that time I didn't know, when he pulled the cars off the lot, that he pulled them on account of the raise in rent, but instead he was called in Service, and as I understand he came to Chicago for an examination and was turned down and later on he came again, thirty days later, and he was turned down, and after that he started another used car lot on South Grove Avenue, Elgin."

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2430/1 Certainly, rejection by the Draft Board is not an act of disloyalty—it is part of our democratic methods. No reference whatsoever, to the flag of the United States appears in Gallina's testimony or any other witness's testimony.

Weber testified (Tr. 1846)—and his testimony was completely uncorroborated—even though there were several witnesses present, as follows: (Tr. 1846)

> "I dismissed the stenographer and we were bidding adieu when I asked Mr. Parrillo if he had considered the signing of the consent extending the statute for the civil tax purposes, known as a waiver, and he said no, they weren't going to waive anything, not even the flag."

On such a statement by a dead man, uncorroborated, the United States Attorney grounds a charge of disloyalty. Even if true, it was not a statement by the defendant, nor can the circumstances under which it was made be evidence of disloyalty—at best it was only a play on words. Obviously the United States Attorney intended and did arouse the passions of the jury.

2430/2 Wilfulness: The statement of the United States Attorney while discussing "wilfulness" that:

> "Suppression of information from inventory cards. That is an affirmative act of wilfulness."

is a misstatement, prejudicial, and assuming something not in evidence. The witness Ralph A. Weber,

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the Special Agent produced as an expert by the Government testified as follows: (Tr. 1836)

"Q. What if anything did you then do next in the investigation of the case?

A. After that we were at the office of Highland Motor Sales on several occasions, at which times we examined the various books and records of Highland Motor Sales:

We examined the general ledger, the general journal, the cash disbursements register, the cash receipts register, the sales register, the invoice register, the accounts receivable ledger, the inventory cards of new and used cars, the cancelled checks,

the bank statements, the sales slips, the invoices—that is all I can recall at the moment." (Underscoring supplied)

Again Weber testified (Tr. 1837-8):

"Q. After you made the determination that the partnership returns correctly reflected the returns of Highland Motor Sales for the years 1946, '47 and '48, what did you do, if anything?

A. After we had abstracted the sales register, we prepared, we checked that abstract to the used car and new car inventory cards. * * *." (Underscoring supplied)

Then Weber testified (Tr. 1840)

"So at that time he [Defendant] called for the sales register. He called for the new car and used car inventory cards. He called for the sales slips. He called for the invoices of those cars. He called for the cash receipts journal." (Underscoring supplied)

The inventory cards were not suppressed—the Government investigators had complete access to them. There is not a scintilla of evidence anywhere in the record of suppression of cards. This is one of the two acts of alleged wilfulness that the Government relies upon. Under the circumstances the above statement is extremely prejudicial.

There is no evidence whatsoever of "suppression of information from inventory cards", nor any proof that the "cards" were a link in the alleged chain from which wilfulness can be adduced.

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2432 The other act of "wilfulness" stated by the United States Attorney is the suppression from sales of "trade-ins".

The evidence with respect to such "trade-ins" is that proof of ownership in the Highland Motor Sales has not been adduced—in fact Weber, the Government expert, a special agent, testified he was unable to show when and where Highland Motor Sales acquired the alleged trade-ins. Such proof, was readily available from the State of Illinois Motor Vehicle records but was not adduced. Weber a number of times testified he was unable to place

ownership of trade-ins in Highland Motor Sales (Tr. 2025, 2027, 2028, 2029) and specifically page 2032-2033 records the following question and answer respecting a total of $13,595 to be unreported income:

"Q. Do you have anything in this Court Room showing your investigation of the books of Highland Motor Sales that will disclose any ownership on the part of Highland Motor Sales in the particular cars that comprise this list of $13,595?

A. No, sir."

Typical of the testimony respecting the sale of trade-ins alleged to have been sold by Highland Motor Sales is the following series of questions and answers appearing in the testimony of Weber as appearing on pages 2033-2036:

"Q. Directing your attention to the 1942 Plymouth, the second item or transaction in January, 1947, [Gov. Exh. 279, sheet 2] the testimony shows $1100 as the price and nothing appears on Highland Motor Sales' books.

Did your investigation of the books of Highland Motor Sales Company disclose that at that time they owned and sold to Magnuson the 1942 Plymouth?

A. No, sir. The books and records of Highland Motor Sales did not disclose the sale of that automobile.

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"Q. Do they disclose the ownership of one that could have been sold?

A. No, sir.

Q. Do they show the ownership of a 1941 Buick that could have been sold in January, 1847?

A. May I see Government Exhibit 33, please?

Q. Yes.

A. The 1942 Plymouth was identified by Serial Number and was not disclosed on the books of Highland Motor Sales. The 1941 Buick was not identified by Serial Number and there was no sale on or about that date.

Q. Now, which one had the Serial Number?

A. The 1942 Plymouth.

Q. The Serial Number on the 1942 Plymouth

appearing on Government Exhibit No. 33—does that establish that that car was owned by Highland Motor Sales?

A. No, sir.

Q. Now, dropping down three lines to the 1940 Plymouth, the testimony shows a price of $700 and nothing on Highland Motor Sales.

Let me ask you with respect to that item: Is there anything in the books and records of Highland Motor Sales that will disclose the ownership of that car at that time that could have been sold to Magnuson?

A. No, sir.

Q. So that with respect to Magnuson, there is $3,000 reflected in those three cars that you have included in 1947 unreported profits about which there is no ownership established in Highland Motor Sales, is there?

A. According to the books and records of Highland Motor Sales, no, sir.

Q. Is there any place excepting the records of Magnuson, whose books are missing, by which it can be established definitely that Highland Motor Sales was the owner of those cars.

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A. No, sir.

Q. Is the same thing true with respect to the 1940 Olds—no—the 1939 Chevrolet appearing in the amount of $650 in the 1948 column?

A. Yes, sir.

We submit that failing to establish ownership of the trade-ins in Highland Motor Sales the evidence does not denote wilfulness. The statement that:

"Suppression of income from the sales of those trade-ins—affirmative acts of wilfulness."

is prejudicial and unsupported by evidence.

2462

The franchise from Chrysler is not in evidence, no one testified to the contents of such document, and the statement by the United States Attorney that under that franchise the defendant was not permitted to sell new cars to used car dealers is extremely prejudicial and unsupported by the evidence.

65 The statement by the United States Attorney that it is a fair argument that the defense witnesses did not come of their own free will, but were subpoenaed, is highly prejudicial and entirely unsupported by the evidence.

67 The statement of the United States Attorney regarding the property at 167 Liberty Street is a complete misstatement of the evidence. The entire evidence that we can find in the transcript is the following:

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Tr. p. 1914. On direct examination Weber was testifying with respect to Gov. Exh. 280 and stated:

"167 Liberty Street, contract of sale, Josephine Wagner testified that she purchased the property during the year 1946, and Earl Gromer further testified as to the transaction. They presented Exhibit 207. They testified at December 31, 1946, Mrs. Wagner owed Mr. Achilli $10,800."

The foregoing testimony and the testimony of Mrs. Wagner and Earl Gromer relate only to the sale of the property—not its acquisition.

Tr. p. 2091-2092:

"Q. Now, Mr. Weber, I direct your attention to Government's Exhibit No. 1, the individual tax return of Mr. Achilli for the year 1946. Directing your attention to Schedule D thereof under the heading 'Long Term Capital Gains and Losses' does that Exhibit contain an item, "Brick residence purchased in December, 1945, sold in December, 1946, cost $11,000", amongst other things?

A. It does.

Q. Where does that asset of $11,000 appear in your net worth exhibit?

A. I believe that is the property located at 167 Liberty Street.

Q. You show that item under a contract of sale on December 31st, 1946. Exhibit D to which I again draw your attention shows that it was owned by the Defendant on December, 1945.

Do you show that in your net worth statement for December, 1945?

A. No, sir."

This is all the testimony we can find in the tran-
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script of Mr. Weber's testimony respecting this property. The statement of the United States Attorney is a complete misstatement of the testimony of Mr. Weber designed to support the beginning Net Worth; therefore of paramount importance in its effect on the jury.

2469 This statement by the United States Attorney is whimsical and specious. It is not sufficient for the Jury to think where the money came from—the Government must prove the guilt of the defendant. There was no proof at all that the alleged suppressed income found its way into the net worth statement. The proof is to the contrary. Every acquisition and every expenditure was clearly shown to have been handled in a regular way. There was no proof at all of expenditures of cash from hidden reserves of cash into items reflected in the net worth. Furthermore, the Government expert Weber testified that his search of the Defendants safe deposit box disclosed no cash at all (Tr. 1847). The statement disregards the fact that there was a corporation named Red Lion, Inc. (Gov. Exh. 273) and that $17,598.48 of expenditures included in the Net Worth of the Defendant were in fact based on contracts in the corporate name of Red Lion, Inc. (Gov. Exh. 113-114-115-116-117), with no proof that the expenditures were not made by the contracting party—Red Lion, Inc.

The statement of the United States Attorney is not founded on evidence; is completely unsupported
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2469-70 by any evidence; and is extremely prejudicial.

This supposed analysis of the testimony of Mr. Ashley Arnold can only be termed a deliberate attempt to deceive the Jury. The United States Attorney takes out of context one question and answer, skips the next question and answer, and omits the interrogation that precedes and follows the part stated by the United States Attorney. The part purported to be quoted by the United States Attorney is so accurate, word for word, that the con-

clusion is inevitable that this was a studied and memorized attempt to deceive. Such conduct by the United States Attorney is prejudical and requires the granting of a new trial. The full testimony on this point as it appears in the transcript reads: (Tr. 2237)

"Q. Directing your attention to Government Exhibit No. 95, which is a cashier's check in the amount of $35,000 to the order of Sam Achilli and Ruth Achilli and Theodore Gordon, drawn by the Union National Bank and Trust Company of Elgin, Illinois, can you tell me from your records the manner in which the bank issued that check?

A. Our bank issued this check—

Q. By 'our bank' you are referring to which bank?

A. Union National Bank.

Mr. Russo: You are speaking of personal knowledge now, Mr. Arnold, are you?

The Witness: Yes, I am.

Mr. Russo: All right.

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2469/70 This supposed analysis of the testimony of Mr. Ashley Arnold can only be termed a deliberate attempt to deceive the Jury. The United States Attorney takes out of context one question and answer, misquotes it and then skips the next question and answer, and omits the interrogation that precedes and follows the part stated by the United States Attorney. The part purported to be quoted by the United States Attorney is so exact word for word, excepting the interpolation that the conclusion is inevitable that this was a studied and memorized attempt to deceive. Such conduct by the United States Attorney is reprehensible and prejudicial and requires the granting of a new trial. The full testimony on this point as it appears in the transcript reads: (Tr. 2237)

"Q. Directing your attention to Government Exhibit No. 95, which is a cashier's check in the amount of $35,000 to the order of Sam Achilli and Ruth Achilli and Theodore Gordon, drawn by the Union National Bank and Trust Company of Elgin,

Illinois, can you tell me from your records the manner in which the bank issued that check?

A. Our bank issued this check—

Q. By 'our bank' you are referring to which bank?

A. Union National Bank.

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Mr. Russo: You are speaking of personal knowledge now, Mr. Arnold, are you?

The Witness: Yes, I am.

Mr. Russo: All right.

By the Witness:

A. Our bank issued this check, that is, the Union National Bank of Elgin issued this check as proceeds of a loan made by our bank and also by the First National Bank in Gibson City.

By Mr. Batter:

Q. How much of the loan participation did the Union National Bank take?

A. $23,000.

Q. $23,000, and that loan was made to whom?

To Sam Achilli, Ruth Achilli and Theodore Gordon.

Q. How much of that participation did the First National Bank of Gibson take?

A. $12,000.

Q. Who were the borrowers on that $12,000?

A. The three people mentioned, Sam Achilli, Ruth Achilli and Theodore Gordon."

Of course, the above testimony was given respecting the $35,000 check and clearly discloses

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that the Union National Bank loaned $23,000. and the First National Bank of Gibson took $12,000., accounting for the whole $35,000 being issued on borrowed money.

Nevertheless, the United States Attorney in a carefully memorized exposition of the testimony, takes one question and answer, and includes in the question a complete fabrication completely changing the testimony. He spuriously inserts (Tr. 2237)

"how much of that $23,000"

in the question recorded. The question (Tr. 2237) reads:

"How much of that participation did the First National Bank of Gibson take?"

whereas the question as quoted by the United States Attorney to the Jury reads (Tr. 2470)

"How much of that participation, how much of that $23,000 did the First National Bank in Gibson take?"

The spurious insertion in the question of the phrase "how much of that $23,000" of course distorts the answer. Such conduct by a member of the bar, on so vital an issue, smacks of conduct that would be branded as reprehensible if done by a police court lawyer. By a legal representative of the Department of Justice, charged with the fair and impartial administration of justice, such conduct before a Jury is not to be condoned—it requires action by the Court to correct it. This instance, standing alone—disregarding for the mo-

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ment the cumulative effect of the other matters complained of—in good conscience requires a new trial.

2470/1 This is another instance of the United States Attorney fabricating evidence—he attributes evidence to Earl H. Gromer, the defendant's partner, that in fact Mr. Gromer did not give. We have searched the testimony of Mr. Gromer (Tr. 1599-1825) several times in an effort to find any testimoney whatsoever, respecting Exhibit No. 172 and the $15,000. check so designated.

The record shows no evidence by Mr. Gromer whatsoever on this subject; nevertheless, the prosecutor places in the mouth of Mr. Gromer the statement that Gromer purchased the check; and Gromer said he got the money from Achilli.

Martin Seybold, the banker testified (Tr. 2233, 2234) that Earl Gromer was the purchaser of this check for $15,000.; and he did not know who supplied Mr. Gromer with the funds to purchase the check. (Tr. 2234-2235). The source of the funds have not been shown to be the defendant.

The trial lasted one month; the transcript exceeds 2,500 pages; and the exhibits are almost 300

in number; the statement of the prosecutor to the Jury in the closing moments of the trial attain great magnitude.

This check and its offsetting liability is one of the very important issues in the Net Worth at the close of the period, December 31, 1948 and the

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prosecution's fabrication of testimony respecting it is extremely prejudicial.

2471/3 The misstatement of the evidence by the United States Attorney respecting the corporate stock of Red Lion, Inc., and the charge of "fraud on the face of the returns" relate to an asset that affects the beginning Net Worth and the ending Net Worth. The evidence, Gov. Exh. No. 84, does not contain any reference to the corporate stock, neither does the testimony of Mr. Turpin (Tr. 1014-1027). Mr. Turpin testified that Gov. Exh. 84 correctly described the entire property sold to the defendant. The transcript (page 1019) of the evidence reads:

"Q. Directing your attention again to Government Exhibit No. 84 I will ask you whether it correctly recites the consideration that moved to you from the defendant Sam Achilli.

A. Yes, it does.

Q. Does Government Exhibit No. 84 correctly describe the property that you conveyed to Sam Achilli?

A. Yes, it does."

Defense Counsel objected to the prosecutor's statement, and challenged the prosecutor to point to any reference to the corporate stock in Exhibit No. 84. The Court directed the prosecutor to proceed.

The misstatement of the evidence by the United States Attorney, the colloquy upon the objection,

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and the direction to proceed, followed by the charge of "fraud on the face of the returns", in the closing hour of the trial, created a most prejudicial effect on the Jury; and is conduct unworthy of the Government.

The blasphemy indulged in by the United States Attorney in referring to Bishop Sheen and his angel

and characterizing the prosecution expert, Ralph E. Weber, as an angel; obviously was intended to influence the Jury and lend sanctity to the figures then presented on the blackboard. A more appropriate statement would have informed the Jury of the diabolical mischief Government Counsel and Expert were about to perpetrate. The mischief was particularly grave because it was advanced at a time when it could not be answered and exposed—it was expounded in the close of the prosecutor's argument. The inter-mixing of net income with non-income items was in fact so elementary that its exposition is a hoax and a repudiation of the expertness of Weber.

A recasting of the figures used by the prosecution is now presented.

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Net Income reported per return—$11,753.96:—This figure has no bearing whatsoever on the monies available to the Defendant for expenditures, because it has been decreased by non-cash items such as the fire loss. The spendable income shown by the tax return (Gov. Exh.) is computed as follows:

Highland Motor Sales income (Sched. E)	$23,375.23
288a Rents—(Schedule B) less expenses ($1,175. less $262.01)	912.99
Sale of Pool Hall Equipment ($3,300. less 1947 loss $2,500.) (Sched. D)	800.00
Fire Insurance Proceeds (Schedule attached to Return)	5,000.00
Cash on Contract of Sale 157 Liberty St. ($13,500. (Sched. D) less contract $10,800. (Exh. 280) less expenses $868.56 (Sched. D)	1,831.44
Spendable income per Return (Gov. Exh. 1)	$31,919.66

Unreported Income, gambling and Highland Motor Sales—$14,955.06:—

We shall by-pass this item because the corrections here made in the prosecutor's figures will show the absence of a need for any unreported income.

Borrowed from Earl Gromer, $9,000. This item is correct.

Available to the Defendant, $35,709.06:—The addition of the two items above, without calling upon the use of any supposedly unreported income amounts to $40,919.66.

Now for the expenditure of the funds available in 1946.

Invested in Red Lion, testimony of the architect, Mortimer Hawkins and others $9,417.22:—

The prosecutor has inflated this figure an even $7,000. The expenditures appearing on the third sheet of Gov. Exh. amount $2,417.22, and not $9,

289a

417.22. The actual expenditures were $2,417.22.

Proceeds from sale of 157 Liberty Street $10,800.:—This is a pure, unadulterated inflation of $10,800. It was not an expenditure—if it was anything that has a bearing on spendable funds it was in the form of available funds and not an expenditure. Actually it did not represent spendable funds at all. It is a contract that in 1947 would result in additional spendable funds and is so shown on Exhibit 280. The actual net cash realized in 1946—$1,831.44 is included in our tabulation of spendable income above.

Remaining items of $2,500., $5,426.87, $3,500., and $13,625.61 are correct except for an error in the amount of $13,625.61—it should be $13,725.61.

Total of enumerated expenditures stated by prosecutor		$45,269.70
Less: Inflation in Red Lion Investment (above)	$ 7,000.00	
Inflation in 157 Liberty St., (above)	10,800.00	
Error in partnership investments	(100.00)	
Total corrections		17,700.00
Corrected figure		$27,569.70
Available without calling upon alleged unreported income (supra)		$40,919.66

Obviously, the chicanery indulged in by the United States Attorney was extremely prejudicial. His summation of the year 1946 (Tr. 2477), which reads:

290a "This is what he had available [$35.709.06,]. That is what he spent [$45,269.70] (Indicating figures on blackboard). Where did it come from? Highland Motor Sales suppressed income. He says we haven't put the money in Achilli's hands. Where do you think Achilli got the money?"

The foregoing is so far a departure from the record and the truth on the most vital issue on that Count, that Justice requires the granting of a new trial.

1947

Net Income reported—$16,785.52:—This figure has no hearing whatsoever on the monies available to the Defendant for expenditures, because it has been decreased by non-cash items such as worthless oil investments. The spendable income shown by the tax return (Gov. Exh. 2) is the income from Highland Motor Sales (Sched. E) in the amount of $38,974.95.

Borrowed from Bank $25,000:—is correct.

Red Lion Insurance Proceeds $5,000.:—we omit because we have taken it into account in the 1946 computation (supra)

Unreported income from Highland Motor Sales: We shall by-pass this item because the corrections here made in the prosecutor's figures will show the absence of a need for any unreported income.

291a Omitted by prosecutor $25,800: Here again the prosecutor and his expert exhibit their cunning at a time when the defense is precluded from uncovering their legerdemain. The Defendant borrowed from Lindo Achilli $3,000. (Gov. Exh. 280) and from Henry Santurro $12,000., a total of $15,000. (Gov. Exh. 280) that has not been shown to go into any asset other than the Red Lion. There is also omitted from the prosecutor's figures the $10,800. received in 1947 on the 157 Liberty Street Contract of Sale appearing on Gov. Exh. 280 in the 12/31/46 Net Worth; and, which the prosecutor so adroitly treated as an expenditure

in 1946, when in fact it did not affect the spendable cash at all in that year.

Summarizing the 1947 available spendable cash, exclusive of any alleged unreported income from Highland Motor Sales, we have:

Spendable income disclosed by tax return	$38,974.95
Borrowed from Bank	25,000.00
Borrowed from Lindo Achilli and Henry Santurro	15,000.00
Proceeds of Contract of Sale—157 Liberty Street	10,800.00
a total of spendable cash available of	$89,774.95

compared to the outlays enumerated by the prosecutor of $85,106.97, which we accept for this purpose but do not acknowledge to be an established fact. We make this reservation because it includes $17,284.81 of contracts of Red Lion, Inc., a corporation that has
292a not been shown to be disbursed by the defendant (Gov. Exh. 280).

This brief analysis of the fantastic grouping of figures by the prosecutor, shows the extremes to which he was put to sustain his tottering case; and, how ridiculous his summation for the year 1946 is. It reads (Tr. 2478)

"Take a look at those figures, and ask yourself where that $36,000 came from. It came from where those witnesses testified it came from—Highland Motor Sales, suppressed sales, suppressed income. Have we put the money in Sam Achilli's hands? He spends it. He spent it."

The many actually came from the loans of $15,000. (above); the 157 Liberty Street Contract of Sale, $10,800. (above) and the difference between reported net income of $16,785.52 and spendable net income shown in that return of $38,974.95, a difference of $22,189.43.

Here again, the statement of the prosecutor at the close of his argument is so far a departure from the record and the truth on the most vital issue on that Count, that Justice requires the grant of a new trial.

1948

Here the prosecutor again begins with the taxable net income shown on the return, in the amount of $34,053.12 and completely ignores the spendable net income shown therein. Depreciation deductions, and

293a

the proceeds of sale of assets do not deter him from levying fraud charges in order to procure a conviction at any cost.

The return to which the prosecutor refers, that is the 1948 Joint Income Tax Return of the Defendant and his wife (Gov. Exh. 3) discloses:

Highland Motor Sales share of income (Sched. E)		38,879.26
Elgin Acceptance Co. share of income (Sched. E)		905.58
Rents (Sched. B)	8,320.00	
Expenses	3,036.62	5,283.38
Sale of Stock in Red Lion (Sched. D)		5,894.85
Sale of equipment in Red Lion (Sched. D)		11,000.00
a total of spendable cash available of		$ 61,963.07
the prosecutor charges expenditures for 1948 of		55,068.00
a balance unexpended of		$ 6,895.07

So again, we see that the purported unreported income is not necessary in order to account for the expenditures the prosecutor placed before the Jury. It also shows the deception necessary in order that the prosecutor can conclude the year 1948 with: (Tr. 2479)

"and we show in Exhibit No. 280 where that $21,000. came from. The difference between $34,000 some odd and $55,000 some odd, a difference of $21,000, came from sales that were suppressed by Sam Achilli and from income of those suppressed sales."

294a

It will be noted that the prosecutor refers to Exhibit No. 280 when in fact he meant 279. This is not

surprising—by this time he was so frantic, ranting and pounding his fists, the success of a month's trial was slipping away from him. If disregard for justice was necessary in order to obtain an unjust conviction—what did it matter. What if it was necessary to commit an injustice in order to attain a personal victory. Neither his oath of office nor his responsibilities to the public he was sworn to protect were permitted to interfere with the achievement of a victory.

A new trial is the only remedy, and justice demands it.

The United States Attorney then proceeded to tell the Jury—(Tr. 2479-80) pretending to quote Defense Counsel and an answer of the expert, Weber, as follows:

"That question was, 'What proof do you have that Highland Motor Sales was the owner of those cars?'

The answer is that when those cars were traded in, they were suppressed from the inventory cards. There was no record of their coming into Highland Motor Sales, and consequently all that Weber could say is they weren't on those records.

They were sold by Highland Motor Sales. If Highland Motor Sales sold them, then Highland Motor Sales owned them, and that is the answer."

295a

The foregoing argument to the Jury by the United States Attorney is extremely prejudicial because it is not argument based on the evidence. The answer attributed to Weber "That they were suppressed from the inventory cards" does not appear in his cross-examination, nor is there any answer from which it can be deduced that information was suppressed from inventory cards.

It presents a clear case of the United States Attorney fabricating evidence, and then arguing from such evidence. The conclusion that "If Highland Motor Sales sold them, then Highland Motor Sales owned them" is not a conclusion based on fact; but a conclusion based on fabricated evidence.

Next, the United States Attorney told the Jury that "If Sam Achilli had been just as honest with his Government as he was with his partner, he

wouldn't be here today."

The foregoing argument is entirely improper, inconsistent with the prosecution theory of the case, an impeachment of its own witness unsupported by the record, and assumes honesty with his partner and dishonesty with his Government.

The prosecution theory is that the Defendant enriched himself by the alleged unreported income; and that his partner, Gromer's testimony of his belief in the correctness of the returns which he signed them was truthful. How, then, was he honest with his partner? This argument, assumes that the al-

296a

leged unreported income got into Achilli's hands and that he shared it with Gromer. There is not a scintilla of evidence to support such a construction of the testimony; and is an attempt to overcome the embezzlement theory (Wilcox v. Com) upon which the Court declined to instruct the Jury. We contend that it is not the burden of the Defense to prove an embezzlement by the Defendant or anyone else through whose hands such alleged unreported income passed; but, that the prosecution, in order to prevail, must prove that the money did get into the hands of the Defendant and that he did not embezzle it. The Defendant stands innocent until proven guilty; and, guilt cannot be proven, unless it is proven that he did not embezzle such funds. The evidence if believed is to the contrary.

2480/2 The United States Attorney in the closing section of his closing argument to the Jury departed from the truth to such a degree that Defense Counsel requested a special instruction to the Jury informing them that the Defense under the rules had no opportunity to answer. Such instruction was given.

However, the instruction did not cure the damage done. The granting of the Motion for new trial is the only remedy that will do justice in the case at bar.

297a • • •

298a

APPENDIX "C"

JURY CHARGES

SPECIAL VERDICT

The Court refused to direct the Jury to render a Special Verdict on each Count as follows:

"REQUESTED SPECIAL VERDICT

The Court is requested by the defendant, to require the jury to ballot on and return a verdict on three of the possible six propositions set forth below.

For the year 1946:

'We, the jury, unanimously do find the net worth of the defendant on December 31, 1945 and December 31, 1946 so appearing in the evidence and summarized in Exhibit 280 as we revise it DOES NOT include either as cash, acquired asset, or liquidated liability, the cash or money tabulated in Exhibit 279 for the year 1946.'

The same ballot as above, excluding the word NOT in capital letters.

For the year 1947:

The same ballots as above, with all the dates advanced one year.

For the year 1948:

The same ballots as above, with all the dates advanced two years."

INTENT—EMBEZZLEMENT

The Court did give the following instruction: (Tr. 2548)

"You may find evidence of an intent to commit the crime of attempting to evade and defeat the payment of a tax, even though there is coupled with that intent the desire to suppress information as to acts which are criminal in other ways. Thus, even if you should find that the defendant desired to conceal his
299a receipt of moneys from his partner, Earl H. Gromer, you may also find in addition to such motive the existence of an intent to defraud the United States of moneys due as income taxes and to attempt to defeat or evade such taxes."

but refused the following instructions:

Requested Charge No. N, the last two paragraphs of which are not covered by any other instruction. The requested charge reads:

"Requested Charge No. N

In order for the method of accounting employed by the government to clearly reflect income it is necessary that the net worth at the beginning and at the end of questioned period can reasonably be accepted as accurate. This is also true regarding the end of each intervening year.

Net Worth means the aggregate of a person's assets less his liabilities. The figure so arrived at is adjusted by items of non-taxable income and non-deductible losses. Also by receipts and expenditures that are not income or deductions, such as gifts, bequests, living expenses and income taxes paid.

It is not a precise method of proof—but it must be a reasonably accurate statement, otherwise it lacks probative value. It is a method fraught with great dangers—you must realize the difficulties of endeavoring to prepare a net worth compilation a number of years after the date that governs it. You must realize that such a statement used as a basis for a charge of crime must be extremely convincing, otherwise you would be convicting the defendant on evidence that is based on a reasonable doubt. That you cannot do.

The difference between the income ascertained by the net worth method as you finally determine it and the income reported must be substantial. Substantial to the extent that the variance is so great, that the defendant must have known he was not reporting all his income.

You will observe that the Government has conceded that half of what it contends was unreported income represented an obligation to the defendant's partner. Such is not the law.

300a "I charge you that if you find that the defendant did appropriate to his own use, monies that would be income to the partnership if disclosed by him; then you must acquit him because embezzled funds are not income to him."

"Requested Charge No. R

The jury is instructed that 'Wilfully' means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud the

Government. It is not enough if all that is shown is that the defendant was careless, negligent, or grossly negligent. A defendant is not wilfully evading a tax if he is careless about keeping his books or if he has failed to examine or check books kept for him by employees. He is not wilfully evading a tax if the alleged income was embezzled from the partnership, either by employees or the taxpayer, because embezzled funds are not income."

"Requested Charge No. V

The government has attempted to show sources of the alleged income. If it is mere speculation it may not be used as a substitute for the clear proof required of the government under the indictment. It must be a likely source of income and, I charge you embezzled funds are not income."

"Requested Charge No. EE

The jury is instructed that now the defendant contends that he did not sign the partnership returns. They were prepared by a partner of the defendant's partner and the defendant's partner was a lawyer who understands, is familiar with, and maintained some supervision over the books of the partnership. That partner denies any knowledge of fraud in the return he signed, and subsequent to the years here involved brought a legal action to dissolve the partnership and in such action charged the defendant with defrauding him. Now, if this be true, he would not be guilty of the charges contained in this indictemnt. The defendant does not have the burden of proving the truth of this contention, if the evidence along that line when considered in connection with all the other evidence in the case be sufficient to generate a doubt as to his guilt, it would be your duty to give him the benefit of that doubt and acquit him."

301a "Requested Charge No. FF

The jury is instructed that the defendant contends that the government has failed to show that the defendant had any income in excess of that reported and certainly that the circumstances are not sufficient to show in view of all the proof that the defendant actually could commit this offense without the participation of his partner. The Government does not

contend that the partner participated in the making of a false return with intent to evade tax. If you find this to be so, you should acquit the defendant on all counts."

302a And afterwards, to wit, on the 27th day of May, 1955, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch District Judge, appears the following entry, to wit:

303a

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 53 CR 154) * *

This cause coming on for hearing on the defendant's motion for judgment of acquittal or in the alternative for a new trial comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the Court having heard the arguments of counsel and being fully advised it is

Ordered that said motion be and the same is hereby denied and it is

Further Ordered that this cause be and the same is hereby referred to the Probation Department of this Court for a presentence investigation and continued to June 16, 1955 for disposition

304a And afterwards on, to wit, the 1st day of June, 1955 there was filed in the Clerk's office of said Court a certain Memorandum Of The Court in words and figures following, to wit:

305a

IN THE UNITED STATES DISTRICT COURT

* * * (Caption—No. 53 CR 154) * *

MEMORANDUM

This matter came on to be heard on defendant's motion for judgment of acquittal, or, in the alternative, for a new trial. The Court has carefully studied the record, considered the arguments of counsel presented orally and on briefs, read the authorities to which reference has been made, and is fully informed in the premises.

In support of his motion, defendant raised a number of points to which extensive argument and consideration at length had already been given in the course of the trial. These included the matter of quashing of subpoena duces tecum to introduce in evidence an instruction manual used by revenue agents; instructions to the jury given over defendant's objection, and instructions suggested by defendant which were refused; and a set of special verdicts suggested by the defendant which the jury were not charged to make.

Basically the arguments presented in support of these points had been abundantly covered and the Court found no basis for change in the rulings already made on these questions.

The only new matter presented lay in defendant's characterization of the United States prosecuting attorney's conduct of the case as improper and prejudicial to the defendant. Defendant complains of comments made in the summation to the jury after the trial.

Careful consideration of the record leads this Court to the conclusion that none of these statements, singly or taken together, would so influence the minds of the jurors that they would not appraise the evidence objectively and dispassionately. The Court is of the opinion that none of these statements constituted prejudicial eror. United States *v.* Socony-Vacuum Oil Co., 1939, 310 U. S. 150.

Defendant's motion for judgment of acquittal has, therefore, been denied, and his alternative motion for new trial has also been denied.

Win G. Knoch
United States District Judge

Date: June 1, 1955.

306a-307a • • •

308a And, to wit, on the 16th day of June, 1955, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Win G. Knoch, District Judge, appears the following entry, to wit:

309a Judgment and Commitment (Rev. 7-52)

Cr. Form No. 25

UNITED STATES DISTRICT COURT

• • (Caption—No. 53 CR 154) • •

On this 16th day of June, 1955 came the attorney for the government and the defendant appeared in person and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a verdict of guilty of the offense of 145(b), Int. Rev. Code; 26 U.S.C., Sec. 145(b) (Wilfully and knowingly attemping to defeat & evade large parts of the income tax due and owing by him to the U. S. by filing & causing to be filed with the Coll. of Int. Rev. false & fraudulent income tax returns.)

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Two (2) Years on each of Counts 1, 2 and 3 of the Indictment, that the sentences imposed on counts 2 and 3 shall run concurrently with the sentence imposed on count 1 and besides that he forfeit and pay to the United States of America a fine in the sum of Two Thousand Dollars ($2,000.00) on each of counts 1, 2 and 3 of the Indictment, that said fines shall be cumulative and the defendant to stand committed until said fines are paid or until he shall be otherwise discharged by due course of law

It Is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

It Is Further Ordered on motion of the defendant that the defendant be released on bond of Seven Thousand Five Hundred Dollars ($7,500.00) pending the filing of an appeal and that bond on appeal be and the same is hereby

fixed in the sum of Seven Thousand Five Hundred Dollars ($7,500.00)

The Court recommends commitment to:[6]

Win G. Knoch
United States District Judge

June 16, 1955

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

310a-311a • • •

312a And afterwards on, to wit, the 24th day of June, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Notice Of Appeal (Clerk's Certificate Of Mailing Attached Thereto), in words and figures following, to wit:

313a IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SAM ACHILLI,
Defendant.
No. 53-CR-154

NOTICE OF APPEAL

Name and address of appellant:
Sam Achilli
732 Brook Street
Elgin, Illinois

Name and address of appellant's attorney:
Carl J. Batter
910 17th St., N. W.
Washington 6, D. C.

Service of motions or notices should be made upon Frank J. Gagen, Jr., Suite 845, 29 South La Salle Street, Chicago 3, Illinois (STate 2-0570.)

Offenses: Sec. 145(b), Internal Revenue Code; 26 U. S. C. 145(b). Wilfully and knowingly attempting to defeat and evade large parts of the income tax due and owing by appellant to the United States of America, by filing and causing to be filed with the Collector of Internal Revenue false and fraudulent income tax returns for the years 1946, 1947 and 1948.

Concise statement of judgment or order, giving date, and any sentence:

Judgment was entered by Judge Win G. Knoch on June 16, 1955 on the verdict of the jury finding the defendant guilty on all counts of the indictment.

The defendant was sentenced to the custody of the Attorney General for two years on each of counts 1, 2, and 3, with sentences in counts 2 and 3 to run concurrently with that imposed in count 1, and defendant was fined $2,000 on each of counts 1, 2 and 3, fines to be cumulative.

314a Name of institution where now confined, if not on bail:

The defendant is now at liberty under $7,500 bond, pending appeal.

I, Sam Achilli, the appellant, by my attorney, Carl J. Batter, and local counsel, Frank J. Gagen, Jr., hereby appeal to the United States Court of Appeals for the Seventh Circuit from the above-stated judgment.

Dated: June 24, 1955.

Carl J. Batter
Carl J. Batter
Appellant's Attorney.

Frank J. Gagen, Jr.,
Frank J. Gagen, Jr.,
Appellant's Local Counsel.

315a United States of America }
Northern District of Illinois } ss.

• • (Caption—No. 53 CR 154) • •

CERTIFICATE OF MAILING

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on June 24, 1955, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure, Criminal Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Hon. Robert Tieken
U. S. Attorney
450 U. S. Court House
Chicago 4, Illinois

Hon. Kenneth J. Carrick, Clerk
U. S. Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 24th day of June, 1955.

Roy H. Johnson
Clerk
By Beverly V. Peters
Deputy Clerk

(Seal)

316a-319a * * *

320a And afterwards on, to wit, the 19th day of July, 1955 came the Defendant by his attorneys and filed in the Clerk's office of said Court his certain Statement Of Points And Designation Of Record in words and figures following, to wit:

321a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

STATEMENT OF POINTS TO BE RELIED ON UPON APPEAL

Sam Achilli, defendant in the above-entitled cause, on this appeal to the United States Court of Appeals for the Seventh Circuit from the judgment entered by this Court on or about June 16, 1955, intends to rely on the following points:

1. The indictment failed to set out any crime in violation of the statutes of the United States.

2. The trial court erred in refusing to grant the defendant's motion to dismiss the indictment.

3. The trial court erred in refusing to grant the defendant's motion for a bill of particulars and production of documents for inspection.

4. The trial court erred in refusing to grant the defendant's motion to suppress certain evidence procured by the government in violation of the defendant's rights under the Constitution of the United States.

5. The trial court erred in admitting evidence based upon the Net Worth Method of Accounting, notwithstanding the Commissioner of Internal Revenue determined the defendant's net income by making specific adjustments to the income reported by the defendant.

6. The trial court erred in admitting evidence based upon the Net Worth Method of Accounting, notwithstanding the prosecution did not adduce evidence that the Commissioner of Internal Revenue personally had held that the Net Worth Method did "clearly reflect the income."

322a 7. The trial court erred in failing and refusing to withdraw a juror and declare a mistrial on the motion of the defendant.

8. The trial court erred in quashing the subpoena

duces tecum calling for the production of the Manual of Instructions to Revenue Agents and Special Intelligence Agents.

9. The trial court erred in failing and refusing to direct a verdict of acquittal at the close of the government's case.

10. The trial court erred in submitting the case to the jury notwithstanding the government failed to make out a prima facie case.

11. The trial court erred in failing to decide that the Net Worth Method of Accounting adduced by the government—if admissible under the circumstances of this case—was lacking in probative value for failing to meet the requirements of establishing with reasonable accuracy the Net Worth at beginning and end of the period in issue.

12. The trial court erred in failing to hold that it was necessary for the government to establish that the alleged "likely source of income" did in fact find its way into the component items of the net worth of the defendant.

13. The trial court erred in failing to hold, as a matter of law, that the income, allegedly unreported by the defendant, was in law not income but the proceeds of embezzled funds the embezzlement of which was not condoned.

14. The trial court erred in overruling the defendant's motion to direct a verdict of acquittal at the close of all the evidence.

15. The trial court erred in instructing the jury by failing and refusing to give certain instructions tendered and offered by the defendant.

16. The trial court erred in instructing the jury by giving certain instructions over the objection of the defendant.

17. The trial court erred in failing to direct the jury to render a set of special verdicts as requested by the defendant.

323a 18. The trial court erred in failing to find, as a matter of law, that the proof failed to show a tax owing by the defendant.

19. The trial court erred in permitting evidence to be introduced by the government over the objections of the defendant.

20. The trial court erred in refusing certain evidence tendered and offered by the defendant.

21. The trial court erred in failing to grant the defendant's motion for a new trial, made after verdict, grounded on a gross misconduct of the Special Assistant to the United States Attorney and his argument to the jury.

22. The trial court erred in refusing to grant the defendant's motion for a new trial, or in the alternative, judgment of acquittal.

23. The orders and judgment appealed from are not authorized and find no substance in law, in fact, or by the record before the trial court.

24. The defendant was convicted in the trial without due process of law in accordance with the Constitution of the United States.

Dated: July 19, 1955

Carl J. Batter
Attorney for Defendant
By Frank J. Gagen, Jr.

Received a copy hereof
this 19th day of July, 1955.
Hon. R. Tieken, U. S. Attorney
By R. Tieken J.M.D.

324a

IN THE UNITED STATES DISTRICT COURT

* * (Caption—No. 53 CR 154) * *

DESIGNATION OF RECORD

To: Clerk of the United States District Court
Northern District of Illinois
Eastern Division

You are hereby requested to make a Transcript of the Record to be filed in the United States Court of Appeals for the Seventh Circuit, pursuant to the appeal taken in the above entitled cause, and to include the following:

1. Indictment filed March 9, 1953.
2. Plea and arraignment May 13, 1953.
3. Order of May 13, 1953, allowing time to file preliminary motions within 20 days therefrom.
4. Order of May 28, 1953, extending time within which to file preliminary motions to July 1, 1953.

5. Motion to dismiss filed June 10, 1953, together with alternative motions and affidavits in support thereof.

6. Order of July 28, 1953, giving defendant leave to file instanter supplemental affidavit in support of motion to dismiss indictment.

7. Supplemental affidavit in support of motion to dismiss filed July 28, 1953.

8. Subpoena duces tecum filed August 10, 1953.

9. Government's motion to quash subpoena filed August 28, 1953.

325a 10. Notice to produce for inspection filed September 1, 1953.

11. Subpoena duces tecum filed September 15, 1953.

12. Subpoena duces tecum filed September 15, 1953.

13. Order of September 15, 1953, extending return date on subpoenas to October 23, 1953.

14. Government's answer in opposition to defendant's motion to dismiss filed October 2, 1953.

15. Government's answer in opposition to defendant's motion to produce for inspection filed October 2, 1953.

16. Order by agreement dated and entered October 16, 1953.

17. Order on government motion entered December 1, 1953.

18. Government's motion to quash subpoena duces tecum filed December 18, 1953.

19. Order extending time to June 16, 1954, for hearing on motions and leave granted to defendant to file additional affidavit within 12 days entered May 26, 1954.

20. Supplemental affidavit filed June 7, 1954.

21. Order entered June 23, 1954, denying defense motions to dismiss, for bill of particulars, to suppress evidence, to furnish list of customers, and for production of documents and granting government motions to quash and restrict to matters of law arguments on motion to dismiss.

22. Transcript of proceedings November 8, 9, 15, 16, 17, 18, 22 and exhibits offered on said dates.

23. Defendant's motion for judgment of acquittal with exhibits filed November 8, 1954.

24. Order on defendant's motion for judgment of acquittal denying same dated November 8, 1954.

25. Defendant's renewal of motion for withdrawal of

juror and for mistrial and order entered thereon dated November 18, 1954.

26. Defendant's renewal of motions and order denying motion for judgment of acquittal and granting motion for mistrial dated and entered November 22, 1954.

326a 27. Defendant's motion for judgment of acquittal or in the alternative for withdrawal of juror and declaration of mistrial filed November 22, 1954.

28. Order entered March 2, 1955, denying hearing on defense motion to dismiss or suppress certain evidence and order of same date denying leave to file both motions.

29. Motion filed March 17, 1955, to reconsider denial of motion to dismiss or suppress.

30. Order denying leave to defendant to file and argue motion to dismiss and to suppress evidence entered April 7, 1955.

31. Transcript of proceedings April 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28, 1955, May 2, 3, 4, 5, 9, 10, 11, 27, 1955, and June 16, 1955, and the exhibits offered on said dates.

32. Defendant's renewal of motion for dismissal and to suppress and amendments thereto by designation as motions for acquittal and order denying same dated April 11, 1955.

33. Defendant's motion for withdrawal of juror and for declaration of mistrial and order denying same dated April 13, 1955.

34. Government's motion to quash subpoena duces tecum filed May 4, 1955.

35. Order granting motion to quash subpoena duces tecum entered May 4, 1955.

36. Defendant's motion for judgment of acquittal filed May 5, 1955.

37. Order denying defendant's motion for judgment of acquittal at close of government's case entered May 5, 1955.

38. Defendant's motion for judgment of acquittal at the close of all evidence and order denying same entered May 5, 1955.

39. Verdict of the jury dated May 11, 1955.

40. Appearance bond filed May 11, 1955.

41. Order dated May 11, 1955, extending to May 25, 1955, time within which to file motions for new trial and judgment of acquittal.

327a 42. Defendant's motion for judgment of acquittal or in the alternative for a new trial filed May 25, 1955.

43. Order entered May 27, 1955, denying motions for judgment of acquittal and new trial.

44. Memorandum of Judge Knoch filed June 1, 1955.

45. Judgment and sentence of the Court dated June 16, 1955.

46. Appearance bond pending appeal filed June 16, 1955.

47. Notice of appeal filed June 24, 1955.

48. Proof of service of notice of appeal.

49. Stipulation to extend time to file designation of record on appeal and order thereon extending time to file designation of record to July 19, 1955, entered June 24, 1955.

50. Statement of points to be relied on upon appeal.

51. This designation of record.

52. Prefatory statement under Rule 10 (b) of the Rules of the United States Court of Appeals for the Seventh Circuit to be filed.

Carl J. Batter
Carl J. Batter
Attorney for Defendant
By Frank J. Gagen, Jr.
Frank J. Gagen, Jr.
Local Counsel of Record

Received a copy of the
foregoing this 19th day of
July, 1955.
Hon. R. Tieken, U. S. Attorney
By R. Tieken, JMD

328a-338a • • •

339a United States of America }
Northern District of Illinois } ss

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify the above and foreging to be a true and complete transcript of the proceedings had of record made in accordance with the Designation filed in this Court in the cause entitled: United States of America, Plaintiff *vs.* Sam Achilli, Defendant, No. 53 CR 154, as the same appear from the original records and files thereof now remaining among the records of the said Court in my office, except the exhibits which are incorporated herein originally by direction of this Court.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 22nd day of September, 1955.

Roy H. Johnson
Clerk

By Gizella Butcher
Deputy Clerk

(Seal)

[fol. 1] IN THE UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT, OCTOBER TERM 1955, APRIL SESSION 1956

No. 11575

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges*

OPINION—June 5, 1956

LINDLEY, *Circuit Judge.* Defendant appeals from a judgment entered on a jury verdict finding him guilty on three counts of an indictment charging willful evasion of income taxes for the taxable years 1946, 1947 and 1948, in violation of Section 145 (b) of the Internal Revenue Code of 1939, 26 U.S.C.

The Government employed what is commonly referred to as the net worth method of establishing deficiencies, proceeding on the theory that increases in the taxpayer's net worth over that at the beginning of the taxable year, plus non-deductible expenditures, constituted income to the taxpayer during that period unless satisfactorily explained. Employing this procedure the Government calculated the amount of defendant's net taxable unreported income during the indictment periods at $13,803.94 in 1946, $36,958.63 in 1947 and $20,623.18 in 1948. It offered evidence tending to prove that the income was derived from over-ceiling charges for automobiles sold by a co-partnership composed of defendant and one Gromer, doing busi-
[fol. 2] ness under the name and style of Highland Motor Sales, and Barney's Snooker Hall, owned by defendant until the latter part of 1946, and in interest on loans to various persons.

With respect to the operation of Highland, on the evidence the jury was justified in finding the following pertinent facts. During the three years, defendant, or his

agents, made sales of automobiles at premium prices of about $600 per car above the OPA maximum price. The ceiling price of each car was entered upon the partnership books, and only this amount was reflected in the partnership returns. The black market premium was not recorded or reported. These premium sales seem to have been concealed from defendant's co-partner, Gromer; they were not reported in his individual income tax returns.

Defendant complains of some 19 remarks of counsel excerpted from the record, contending that misconduct of the United States Attorney requires a reversal of the judgment. The first was made during the course of reception of government testimony. Defendant's attorney objected to the use of certain records in the examination of a government witness, asserting that they were admittedly false. The Government's attorney remarked, "And we are going to show they are false because you made them false." On objection, this remark was stricken.

The other 18 instances occurred during the course of final argument to the jury. Of these, objection was made to only two. "Counsel for the defense cannot as a rule remain silent, interpose no objections and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 238. That principal must govern the sixteen asserted instances of misconduct, unless the remaining contentions disclose misconduct of a flagrant nature resulting in a pattern of prejudicial impropriety. We think no such pattern is shown.

We do not condone the prosecutor's unqualified statement that all defense witnesses were unwilling witnesses, responding only to subpoena. However, defendant's objection to the remark was sustained and the remark was stricken. And in addition to such curative action, the court instructed the jury that oral summation was no part [fol. 3] of the evidence and was not to be considered in arriving at a verdict.

The second remark to which objection was taken related to the terms of a purchase contract. The Government introduced evidence showing that defendant had bought the

entire interest of one Turpin, including the realty, equipment and stock of goods in the Red Lion, a local restaurant and bar, in 1945. In his closing argument the United States Attorney, in summing up defendant's beginning net worth, referred to this transaction as including a transfer of the capital stock of Red Lion, Incorporated, when, in fact, the agreement between Turpin and defendant included no reference to capital stock. Defendant's objection to this statement was overruled.

Although counsel's reference to the capital stock was unwarranted, it was an invited response to defense counsel's assertion and argument to the jury that the value of the corporate stock had been omitted from defendant's opening net worth statement. The record discloses the existence of a corporation known as Red Lion, Inc., of which defendant was an officer, and shows that the board of directors, in February, 1948, authorized and directed the officers of the corporation to enter into a lease with defendant of the premises on which Red Lion was located. We are directed to nothing of record which indicates when or by whom Red Lion, Inc., was incorporated, or who owned its corporate stock.

The Red Lion transactions are silent in this respect. Defendant's purchase agreement of the property recited that the seller, Turpin, agreed to convey the real estate, fixtures and stocks of liquors and goods to defendant in consideration of $18,400. In 1948, defendant transferred to one Fritzel an undivided ½ interest in all the chattels, fixtures, liquor and licenses. An attached schedule showed that the value of the stock of merchandise was $10,796.71 and that the sale price of ½ thereof was $5,398.30. Neither transaction alluded to corporate ownership of any of the property and each item was fully reflected in the Government's net worth computation.

Upon the capital gains schedule of defendant's 1948 tax return, notations as follows were entered with respect to an item listed as "Sales of stock in Red Lion": acquired 1945, at a cost basis of $4,673.18; sold 1948 at a sales price [fol. 4] of $5,894.85. In cross-examination of Government's witness Weber, defense counsel interpolated "capital" into this entry immediately preceding the word "stock," and

questioned him as to where the value of the "capital stock" was reflected upon the Government's computation of net worth at the beginning of the taxable periods. Counsel took the same approach in his summation to the jury, arguing that the cost base of this item, $4,673.18, should be set up as an asset omitted from the opening net worth computation. The context of the United States Attorney's argument shows conclusively that his reference to the value of the corporate stock as included in the $18,400 purchase price paid to Turpin was in response to the argument by defense counsel.

Each party was arguing for an inference not supported by the record. The accountant who prepared the 1948 return testified that the capital gains entries thereon were based upon the transaction between defendant and Fritzel. The word "stock" in that entry, therefore, takes its meaning from the contract of the parties to the transaction which, in this respect, purports to convey only a stock of merchandise in inventory. If counsel for the Government went outside the record in the respect noted, the excursion was in response to an opposing venture *de hors* the record by the defense. The error, in overruling the objection was inconsequential, especially in view of the instructions to which allusion has previously been made that oral summation is no part of the evidence.

Government counsel may, at times, have been an overzealous advocate. In most of these instances, his remarks went in without objection, as we have noted. When his argument to the jury is considered as a whole, we think that the excerpts extracted from context for our attention present for the most part nothing more than zealous advocacy, see *Di Carlo* v. *United States*, 6 F. 2d 364, cert. denied 268 U.S. 706 (CA-2), and, in any event, that they can not be classified as misconduct requiring reversal. As we said in *United States* v. *Doyle*, No. 11528, decided May 23, 1956, quoting from *Malone* v. *United States*, 94 F. 2d 281, 288, cert. denied 304 U.S. 562 (CA-7): "Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel, and, [fol. 5] in doing so, statements may be made which otherwise

would be improper. Defendant's trial counsel evidently did not regard the argument as vicious or unfair as objection was made to one statement only * * *." We think the situation wholly unlike the instances of misconduct appearing in the cases relied upon by defendant. *Berger* v. *United States*, 295 U.S. 78; N.Y. *Central R. Co.* v. *Johnson*, 279 U.S. 310; *Pierce* v. *United States*, 86 F. 2d 949 (CA-6); *Volkmor* v. *United States*, 13 F. 2d 594 (CA-6).

Defendant's contention that the net worth evidence was incompetent and inadmissible misconceives the purpose of the provisions of Section 41 of the Internal Revenue Code of 1939, 26 U.S.C. (1952) § 41. He insists that, before the net worth method may be employed in any income tax case, Section 41 requires a determination by the Commissioner of Internal Revnue that use of that method "does clearly reflect the income" of the accused taxpayer; that the Commissioner did determine defendant's income for the indictment years by adjustments to the income reported, and that therefore, the net worth method of proof may not be employed in this prosecution, absent proof that the Commissioner has made the alleged requisite determination.

We think it clear that Section 41 has the limited purpose of insuring that, in an administrative deficiency assessment, the taxpayer's accounting method shall be employed by the Commissioner in the allocation of income and expense items between taxable years. *Holland* v. *United States*, 348 U.S. 121, 131. But that section can have no application in a criminal proceeding which is not based and does not depend upon an administrative determination. Therefore, the cases dealing with the validity of administrative orders upon which defendant relies, are inapposite. See e.g., *Morgan v. United States*, 298 U.S. 468; *Brown* v. *Helvering*, 291 U.S. 193; *Lucas* v. *American Code Co.*, 280 U.S. 445; *Willapoint Oysters, Inc.*, v. *Ewing*, 174 F. 2d 676, cert. denied 338 U.S. 860 (CA-9); *Southern Garment Mfg. Assn.* v. *Fleming*, 122 F. 2d 622 (CA-DC).

These cases obviously have no application to this proceeding, based upon three counts of an indictment returned by a grand jury. It is wholly immaterial that the indictment was preceded by an administrative tax deficiency de- [fol. 6] termination against defendant. Such proceeding was

a civil matter, the validity of which must be determined civilly. Here the Government had the burden of proving the charges made in the indictment beyond a reasonable doubt, and, for this purpose, as in any other criminal prosecution, the admissibility of tendered evidence was to be determined by established rules of evidence. The question of admissibility is not affected by the fact, nature, or validity of a prior administrative determination touching the same subject matter.

The contention now made is not unlike that urged in *Holland* v. *United States*, 348 U.S. 121, that Section 41 restricts the Government's use of the net worth method of proof in criminal prosecutions to those cases where it is shown that the taxpayer has no books or that his books are inadaquate, a contention rejected in this language at page 132; "To protect the revenue from those who do not 'render true accounts' the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history." The legality of the net worth evidence is not affected by what the Commissioner has, or has not, done in a civil matter. To read such a restriction into Section 41 would thwart the intent of Congress. "The existence of unreported income may be proved by any practical method available in the circumstances of the particular case." *United States* v. *Doyle*, No. 11528, decided May 23, 1956 (CA-7); *Davis* v. *United States*, 226 F. 2d 331, 336, cert. denied 350 U.S. 965 (CA-6).

Defendant argues also that the net worth method, as here employed, lacked probative value and should not have been presented to the jury. Government exhibit 280, the summary of the relevant net worth computations, showed an understatement of income for each of the taxable years as follows: for 1946, $13,803.94, for 1947, $36,958.63, and for 1948, $20,623.18. The probative value of this evidence is attacked, defendant asserting that certain specific assets were omitted by the Government in computing defendant's opening net worth and that other specific items were improperly included as assets in the net worth computations for the year 1948. To the extent that these contentions represent merely a suggestion that we weigh conflicting

testimony, they fall within the postulate stated in *United States v. Winston*, 222 F. 2d 323, 325 (CA-7), that "we [fol. 7] must consider the evidence in the light most favorable to the Government and in the light of all reasonable inferences which the [jury] might draw from the evidence." *United States* v. *Iacullo*, 226 F. 2d 788, 795, cert. denied 350 U.S. 966 (CA-7); *United States* v. *Yager*, 220 F. 2d 795, cert. denied 349 U.S. 963 (CA-7). We can only conclude that the evidence supports the verdict; that we cannot say that the challenged evidence, as a matter of law, lacked probative weight sufficient to take the case to the jury.

The Government concedes the merit of defendant's contention that the value of a brick residence, which was sold by defendant in 1946, was erroneously omitted from the opening net worth computation. The capital gains schedule of defendant's tax return for the latter year states that that property was acquired by defendant in 1945 at a cost basis of $11,000. Since this is the only evidence of record with respect to the time when defendant acquired this property, the sum should, as the Government concedes, have been included as an asset in the computation of defendant's net worth as of December 31, 1945. This omission, however, affects only Count I. Since the total unreported income for the year 1946 by the computation most favorable to the Government is an amount of approximately $13,800, only, we feel that this omission must have resulted in serious prejudice to defendant as to the charges of Count I. When employing the net worth method, the Government must prove, beyond a reasonable doubt, "that a substantial amount of tax liability has been willfully evaded." *United States* v. *Doyle*, 11528, decided May 23, 1956 (CA-7); *Sasser* v. *United States*, 208 F. 2d 535 (CA-5). The result of this omission was to interject into the proof as to Count I an erroneous figure which would reduce the evidence tending to prove "a substantial" evasion of tax liability to that which would support a maximum finding of willful evasion in an amount only slightly exceeding $2,800. The error accounts for almost 80% of the deficit shown by the Government's computation. We can only speculate as to whether the jury would have found a substantial evasion for that year. We think an error of

this magnitude in a computative total of less than $14,000 necessarily prejudiced defendant. The judgement as to Count I is reversed.

The last mentioned item was fully reflected in the net worth computations going to the proof of the charges of [fol. 8] Counts II and III; consequently, we think the other contentions of error in this respect are without merit.

Defendant asserts that certain oil well investments in the amount of $5,000, and the value of the capital stock of Red Lion, Inc., in the amount of $4,673.18 were erroneously omitted from the opening net worth computation. What we have said with respect to the Red Lion stock in reviewing the contention as to misconduct of Government counsel disposes of this item. The entries upon defendant's 1946 tax return which are said to support the assertion that defendant acquired "Capital stock" in 1945 were an obvious reference to a stock of goods in inventory. The record is silent as to the existence or ownership of Red Lion corporate shares. With respect to the oil well investments, the evidence is in conflict. The record contains positive testimony that defendant acquired these assets in 1947, and the jury could have resolved this question against defendant. The review of conflicting evidence is beyond the scope of our function.

Defendant also objects to items included as assets in the closing net worth which allegedly were liabilities. There is, however, conflicting testimony with respect to each of them. We might well conclude our review on this note, but we think it wise to refer briefly to the evidence as to these transactions.

The first is a $12,000 item which grew out of a $35,000 cashier's check held by defendant at the end of the taxable year 1948. This check, issued by the Union National Bank and Trust Company of Elgin, was payable to defendant, his wife and one Gordon. The named persons signed a promissory note payable to Union in the amount of $23,000. In computing defendant's net worth at the close of 1948 the $35,000 check was included as an asset and the $23,000 note as a liability. Defendant contends that this computation does not reflect a related transaction in which defendant borrowed the $12,000 representing the difference be-

tween the Union note and the check from the First National Bank. The record includes positive testimony that Union issued the check on consideration of the $23,000 loan and $12,000 cash paid by defendant. Gordon testified that he supplied none of the funds for the purchase of the check and that the latter was used to relieve the obligation of the note. One witness testified that First National was a par-
[fol. 9] ticipant in this transaction to the extent of $12,000. The record clearly shows that Union recorded the transaction as a $23,000 obligation. Gordon testified that he had not executed a note in favor of First National, and no record of such a transaction was produced.

There was also a conflict of testimony with respect to a $7,500 transaction between defendant and one Affeld and another in which Gromer purchased a $15,000 cashier's check payable to defendant, which the latter endorsed and delivered to Gordon as a loan. Both transactions occurred in 1948. With respect to the Affeld transaction, there was a dispute as to whether the $7,500 represented a loan actually made or whether it was a mere commitment to pay on Affeld's account sums to the extent of $7,500 upon proper demand. This figure was set up as a closing net worth asset without a corresponding liability. With respect to the $15,000 check Gromer testified that he purchased it for defendant and delivered it to him. Defendant insists that there is no evidence that the check was purchased with defendant's funds. We have examined the record and believe there was sufficient evidence to submit to the jury upon each of these matters. There was substantial evidence which, if believed, supported the requisite finding that defendant willfully understated his income by substantial amounts in both 1947 and 1948, and that black market receipts received by him in the sale of automobiles was the likely source of his enhanced net worth.

Defendant insists further that the evidence obtained from the partnership books of Highland Motor Sales should have been excluded from evidence as illegally seized in violation of the Fourth Amendment. When the investigation began, Special Agent Weber and Revenue Agent Auld presented themselves at the office of Highland where they met defendant and asked that they be permitted to examine the part-

nership books. Defendant does not deny that he consented to their examination of the books, but argues that the evidence obtained should have been suppressed because Weber did not reveal that he was a Special Agent or disclose the purpose of the investigation. In this respect, Weber testified that when he met defendant at Highland, he identified himself as a Special Agent, displayed his credentials and asked to examine the books of the partnership; that defendant consented to the examination and directed his book-[fol. 10] keeper to supply any books and records which the agents wanted, and, that, thereafter, he sought and received the consent of defendant's co-partner that he might examine the books.

This argument is not essentially different from that advanced in *Turner* v. *United States*, 222 F. 2d 926, cert. denied 350 U. S. 831 (CA-4), wherein defendants contended that evidence obtained from their books and records should have been suppressed, despite their consent to an examination of the books, for the reason that the investigating agents had not warned them that the evidence might be used in a criminal prosecution. The court there aptly stated, 222 F. 2d at 931: "The agents made no investigation to which defendants did not consent. The bookkeeper was ordered by the defendants to show the books and records of the business to the agent; * * *. The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the defendants or intended from the beginning to search for evidence of crime. But even if the latter assumption be made, there was no violation of the taxpayer's constitutional rights. The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance." This principle is cited with approval in *Zacher* v. *United States*, 227 F. 2d 219, cert. denied 350 U. S. 993 (CA-8), and *Eggleton* v. *United States*, 227 F. 2d 493 (CA-6), both evasion cases.

We note briefly defendant's charge that the trial court erred in denying without a hearing, his motion to suppress this evidence, which was made prior to trial and supported by defendant's affidavit. We think, however, the duty of a trial court to afford a hearing upon such a motion is lim-

ited by the prayer of the motion. In this respect, defendant, in his affidavit, did not deny, but rather, at least tacitly, admitted that he consented to examination of the books, but says he did not know of Weber's official title of Special Agent. The only hearing requested was the production of manuals prescribing the duties of special agents. There was no showing to warrant the granting of a hearing, inasmuch as there was no offer to prove that the evidence was submitted to the agents other than with defendant's consent. Cf. *Smith* v. *United States*, 348 U. S. 147, 151.

The case is unlike *United States* v. *Wolrich*, 129 F. Supp. [fol. 11] 528, in which there was evidence that the treasury agents secured defendant's consent upon the assurance that the investigation was merely routine, when in fact, they were seeking evidence of fraud for a criminal prosecution. There is no suggestion of deception such as the court condemned in *Gouled* v. *United States*, 255 U. S. 298. There is no suggestion of lack of consent as appeared in *Fitter* v. *United States*, 258 Fed. 567 (CA-2), and *United States* v. *Brasley*, 268 Fed. 59. The case of *In re Subpoena Duces Tecum*, 81 F. Supp. 418, involved compulsory acquisition of partnership records which were used in evidence against one of the partners. Here, both partners consented to the examination. Upon this record, we must conclude the evidence obtained from Highland's books was properly admitted.

Defendant's remaining argument relates to the alleged defense of embezzlement. He contends that Gromer, his co-partner, filed a suit in 1951 for dissolution of the Highland partnership charging that defendant had embezzled partnership funds arising out of overceiling sales of automobiles. He asserts that the court erred in refusing to admit in evidence the stipulation of the parties settling that suit and in refusing to give defendant's tendered instructions relative to the defense of embezzlement. Argument on this phase of the appeal rests on the decision in *Commissioner* v. *Wilcox*, 327 U. S. 404, that moneys obtained by embezzlement do not constitute income to the embezzler. We think that decision is inapplicable to the case at bar and that the rulings of the court below were corrrect both as to the admission of evidence and as to instructions.

Defendant sought to introduce the stipulation in the

course of the cross-examination of plaintiff's witness Gromer, and to cross-examine the witness with respect to the 1951 lawsuit. The court ruled that this evidence was beyond the scope of proper cross-examination. Gromer was not called as a defense witness, and no attempt was made to introduce evidence as to a defense of embezzlement in defendant's case in chief. This, we believe, brings this question within our holding in *United States* v. *Bender*, 218 F. 2d 869, cert. denied 349 U. S. 920, that the control over the orderly presentation of evidence resides in the sound discretion of the trial judge.

In any event, the defense of embezzlement, under the Wilcox rule, has no application to the case at bar, since under [fol. 12] Illinois law defendant cannot be guilty of the crime of embezzlement because of his wrongful conversion of partnership funds to his own use. I.R.S., c. 38, § 208. The postulate, supported by the Illinois decisions interpreting this statute, is that one having a property interest in funds in his possession is not guilty of embezzlement if he wrongfully appropriates the whole fund to his own use. *People* v. *Ehle*, 273 Ill. 424, 112 N. E. 970; *People* v. *O'Farrell*, 247 Ill. 44, 93 N. E. 136; *McElroy* v. *People*, 202 Ill. 473, 66 N. E. 1058. A necessary element of the crime of embezzlement is the existence of an absolute property right in someone other than the alleged embezzler. *McElroy* v. *People*, *supra*.

Thus, in *McElroy*, defendant, a commission salesman, was convicted upon an indictment charging her with the embezzlement of the proceeds of certain sales. Inasmuch as it appeared from the evidence that defendant was entitled to deduct her commissions from the proceeds of such sales before paying over the balance to the prosecuting witness, the court reversed the conviction saying, 202 Ill. at 475-476: "By this statute, in order to constitute the crime of embezzlement the fraudulent conversion must be of the property of another. If the plaintiff had a right to deduct her commissions from the gross amount collected, then to that extent the money belonged to her,—that is, she and the company owned the gross sum jointly. The law is, that where a defendant has an interest in the property or money alleged to have been fraudulently converted to his or her own use there can be no conviction of the crime of embezzlement."

In *Ehle*, the conviction of embezzlement rested upon proof that defendant, as attorney for Burns, had settled a claim possessed by the latter, had deposited the check therefor in his own bank account and had checked the sum out for his own personal use. The court stated the applicable rule as follows, 273 Ill. at 432: "* * * an agent would not be guilty of embezzlement if such agent had an interest in or part ownership of the funds involved, or until an accounting had been had and a demand and refusal to pay the amount due from such agent to his principal." The conviction was reversed, the court saying, 273 Ill. at 433: "If he took the suit independently for himself he was clearly entitled to fees, and he was not liable to indictment for embezzlement of this money, or to disbarment, until after a demand had been made upon him for the amount and a tender made of his [fol. 13] reasonable fees and expenses. But no demand was ever made."

People v. *O'Farrell*, 247 Ill. 44, 93 N. E. 136, furnishes a good illustration of the application of this principle. O'Farrell was agent for one Vickerage to collect the rents from a hotel and also to negotiate its sale. The indictment charged that O'Farrell had embezzled both the sums collected as rents and those received from one Colgrove, in effecting the sale of the real property. It appeared that O'Farrell's agency, in each instance, grew out of separate contracts. The first provided that he was to deduct his commissions from funds collected as rent and to remit the net fund to Vickerage. The agency contract for the sale of the hotel provided that O'Farrell was to receive a commission for the sale of the property, but made no provision for his retention of his commission out of the funds received for the sale. The court held there was no embezzlement of the rent funds since O'Farrel had an interest therein, but affirmed the conviction because of his conversion of the sale proceeds in which he had no interest.

Before embezzlement can arise, the funds in the hands of a fiduciary must be held under an absolute obligation to remit them to another, but taking of the whole of a fund cannot constitute embezzlement, if the fiduciary has an interest in it and a duty only to account to another for his distributive share thereof. This is a fair summary of the law

of Illinois as established by the cases interpreting an act in all relevant respects identical to § 208. See also *People* v. *Becker*, 414 Ill. 291; 111 N. E. 2d 491.

Defendant had an undistributed one-half interest in the partnership funds in question. His duty to Gromer was that of accounting for the latter's distributive share, and defendant could not be guilty of embezzlement, at least until an accounting had been sought by Gromer and refused. No accounting was sought until 1951.

Even if this were an embezzlement of Gromer's distributive share of such black-market partnership income, the Government took the precautionary measure of allowing one-half of this partnership income as a deduction from net worth. We do not understand defendant's contention to be that he embezzled his own distributive share. Unless such an absurd result were contended, embezzlement, in any event, is removed from the case.

[fol. 14] A vague assertion is made that someone connected with Highland may have embezzled the black-market funds belonging to both partners. The difficulty with this argument is that the record is wholly devoid of any such evidence. Insofar as the instructions rejected by the trial court may have been grounded upon such a contention, they were properly refused. It was incumbent upon defendant to assert and prove such embezzlement if he wanted to rely upon such a defense. He is not entitled to instructions resting upon mere speculative assertions manufactured wholly from thin air.

As to Count I the judgment is reversed. As to Counts II and III it is affirmed. Inasmuch as identical prison sentences were imposed upon each count, and inasmuch as all sentences, expressly, are to be served concurrently, our reversal of the judgment of conviction upon a single count does not necessitate a new trial.

Clerk's Certificate to foregoing paper omitted in printing.

[fol. 15] IN UNITED STATES COURT OF APPEALS, FOR THE SEVENTH CIRCUIT

Before Hon. J. Earl Major, Circuit Judge; Hon. Walter C. Lindley, Circuit Judge; Hon. H. Nathan Swaim, Circuit Judge.

No. 11575

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

SAM ACHILLI, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JUDGMENT—June 5, 1956

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby Reversed as to Count I and Affirmed as to Counts II and III of the Indictment.

[fol. 15a] [File endorsement omitted.]

[fol. 16] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11575

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

SAM ACHILLI, *Defendant-Appellant*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable Win B. Knoch, District Judge.

DEFENDANT-APPELLANT'S PETITION FOR REHEARING—Filed June 20, 1956

Petition

To the Honorable Judges of the United States Court of Appeals for the Seventh Circuit:

Now comes the Defendant-Appellant, Sam Achilli, by his attorneys, Carl J. Batter and Frank J. Gagen, Jr., and petitions this Honorable Court for a rehearing in this matter insofar as the years 1947 and 1948 are concerned and which were decided adversely to the Defendant-Appellant by this Honorable Court on June 5, 1956.

With all due deference and complete humility we submit that it is not our purpose to discuss matters contained in [fol. 17] the opinion of the Court. We, of course, differ with the Court's ultimate conclusions, and reserve our rights, but, nonetheless, this petition is not premised on such grounds. We shall address ourselves, instead, to a void in the evidence—a necessary element to the crimes charged, without which a conviction cannot be sustained.

We suggest three points for the Court's reconsideration: The first deals with the sufficiency of the evidence in the form of the proof taken, the second point, with the newly discovered errors in the net worth statement, and the third point is directed to the jurisdiction of the lower court in its imposition of sentence.

Point One:

The Supreme Court of the United States held in *Holland* v. *U. S.*, (348 U. S. 121, 137-8) that:

> "Increases in net worth, standing alone, cannot be assumed to be attributable to currently taxable income. But proof of a likely source, from which the jury could reasonably find that the net worth sprang is sufficient."

and, again, on page 137 states:

> "Also requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income."

Applying the pronouncement of the Supreme Court to the case at bar, we submit that in order to sustain a conviction, the Government must have proven that the alleged premiums on sales of automobiles, being income but not in-
[fol. 18] cluded in reported income, did find their way into the increase in net worth. That has not been done, nor can it be done, for in fact the proof is to the contrary. This is not a point not previously raised. It was raised in our brief (Brief of Defendant-Appellant page 24) and argued before the Court, but apparently not forcefully enough.

We beseech the Court's indulgence, and pray that it will labor with us through the necessarily difficult and complex analysis of the source of the funds for each change in asset and liability for the two years respecting which this rehearing is sought. It is hoped that the very brief prefatory remarks set out as an appendix to this petition and the analysis following will serve this Court's convenience.

Point Two:

Two errors in the net worth statement for the year 1948 account for seventy per cent of the alleged increase in net worth for that year. These items have shown themselves only on a closer analysis for the year 1948 and have not heretofore been called to the attention of this Court. They are detailed in the analysis for the year 1948 (post) as items (m) and (z).

Point Three:

This Court, in its opinion dated June 5, 1956, sustained the finding of "guilty" on counts II and III of the three count indictment returned against the defendant, Sam Achilli, in case No. 53 CR 154, in the United States District Court for the Northern District of Illinois (R. 3-5).

[fol. 19] Count II charged that Achilli did "wilfully and knowingly attempt to defeat and evade" certain federal income taxes for the calendar year 1947 "by filing * * * with the Collector * * * a false and fraudulent income-tax return. * * * In violation of section 145(b), Internal Revenue Code, Title 26, United States Code." (R. 4).

Count III charged that Achilli did "wilfully and knowingly attempt to defeat and evade" certain federal income taxes for the calendar year 1948 "by filing * * * with the Collector * * * a false and fraudulent joint income-tax return. * * * In violation of Section 145(b), Internal Revenue Code, Title 26, United States Code." (R. 4-5).

On Counts II and III the District Court imposed sentences of two years respectively to run concurrently and fines of $2,000.00 on each count, such fines to be cumulative (R. 1212-1213). It is respectfully submitted that the sentence thus imposed is void as being in excess of that warranted by law.

The draftsman of the instant indictment has, pursuing usual procedure, indicated that, in his opinion, the factual allegations thereof, constitute offenses under Section 145(b) of Title 26, United States Code (Internal Revenue Act of 1939). That section provides that

> "Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000.00, or imprisoned for not more than five years, or both, together with the costs of prosecution." 26 U. S. C. 145 (b)

[fol. 20] It is basic that such indication by the draftsman is without materiality in determining the effect of the indictment and may be regarded as mere surplusage.

> "* * * The recitations of the indorsement constituted no part of the indictment and in no way added to or weakened the legal force of its averments. *Williams* v. *United States*, 168 U. S. 382, 18 S. Ct. 92, 42 L. Ed. 509, *Moore* v. *Hudspeth*, 10 Cir., 110 F. 2d 386, *Capone* v. *United States*, 7 Cir., 51 F.2d 609, 616, 76 A. L. R. 1534, 27 Am. Jur. 613 § 42 * * *", *Pickens* v. *United States*, 123 F.2d 333, 334.

The reviewing court is required to look to the factual allegations of the indictment itself to determine, first, whether they charge an offense and, secondly, whether they charge an offense under one statute or another. *Moore* v. *Hudspeth*, 110 F.2d 386, 388, cert. den. 310 U. S. 643.

This court has affirmatively recognized this principle to be the applicable law in the contemplation of the efficacy of indictments.

> "Judge Wilkerson, in passing upon this question in the District Court, said: 'It is wholly immaterial what statute was in mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. The indorsement on the margin of the indictment constituted no part of the indictment and does not add to or weaken the legal force of the averments. We must look to the indictment itself and if it charges an offense under the laws of the United States, that is sufficient to sustain it, although the representative of the United States may have sup-
> [fol. 21] posed that the offense charged was covered by a different statute.' *Williams* v. *United States*, 168 U. S. 382, 389, 18 S. Ct. 92, 94, 42 L. Ed. 509.
> "With this statement we agree * * *" *Capone* v. *United States* (7th Cir.) 57 F.2d 609, 616.

In recognition of the foregoing controlling principle, we respectfully direct the attention of this Honorable Court to the facts well-pleaded in the indictment and their peculiar applicability to the provisions of Section 3616 (a) of Title

26, United States Code (Internal Revenue Act of 1939) and particularly to the emphasized portion thereof:

> "*Whenever any person—*
>
> "(a) False returns. *Delivers or discloses to the Collector* or deputy *any false or fraudulent* list, *return*, account, or statement, *with intent to defeat or evade the valuation, enumeration,* or *assessment intended to be made;* or,
>
> "• • •
>
> "he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year or both, at the discretion of the Court, with costs of prosecution." 26 U. S. C. 3616 (a) (Emphasis Supplied.)

The Supreme Court of the United States has recently recognized that, in the factual situation here alleged, § 145 (b) and § 3616 (a) of Title 26 are in *pari materia*.

> "• • • For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return (§145 (b)) were [fol. 22] identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§3616(a)). In this instance §§ 145 (b) and 3616(a) covered precisely the same ground." *Berra* v. *United States*, 351 U. S. 131, 134.

We are, thus, faced with a situation wherein two statutes proscribe identical conduct and no different proof is required to convict the defendant of the felony under section 145(b) than is required to convict him of the misdemeanor under section 3616(a). It is elementary that where identity of charges exist, election of the remedy cannot rest in the prosecutor. This Court, in resisting such implication as an unauthorized delegation of legislative power, has said:

> "The matters in the two sections are in *pari materia* • • • When there is a word for word identity of charges in the two counts, we fail to see how the two sections, which may be read upon the allegations of fact, the

one in specific language and the other in general language, can fail to be in *pari materia*.

"* * *

"* * * We think if is indisputable that there is but one offense involved, and that Snitkin cannot properly be subjected to a punishment and judgment for two crimes. If the Government were conceded the right to elect under which statute it would prosecute, it would probably choose the Espionage Act as authorizing the heavier penalty, but in our opinion the district attorney cannot be permitted to make such an election." *Snitkin* v. *United States*, 265 F. 489, 495-6.

[fol. 23] Two statutes thus in conflict and which thus, on the same state of facts, permit a choice between severe and mild punishment, and severe and mild forfeitures, at the mere wish and volition of the government, or of an officer, cannot both stand at the same time. *United States* v. *One Chevrolet Coupe*, 9 F.2d 85, 87.

"For, the very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370.

A prosecutor's caprice cannot be substituted for adjudicatory processes. The principle that all persons must be treated alike under the law contemplates that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same.

The law is equally well settled on which of the two shall prevail in the instant circumstances.

Here we have one statute that proscribes any attempt to evade or defeat a tax "in any manner" (§ 145 (b)) and another which proscribes delivery or disclosure "to the collector . . . any false or fraudulent . . . return" with the "intent to defeat or evade the . . . assessment". (§ 3616 (a)). The two remaining counts of the indictment herein charge the defendant, Achilli, with attempting to defeat or evade taxes by filing with the Collector a false or fraudulent

[fol. 24] return. While such allegation may be said to charge an offense under the general catch-all provisions of section 145 (b), it is obvious that the defendant has been charged with peculiar specificity in the language of section 3616 (a).

It is the general rule that, in such circumstance, the specific provisions of section 3616 (a) are controlling over the general provisions of section 145(b).

An act, specific in its coverage, will be read as an exception to one of general coverage, which may otherwise prove controlling. *Kepner* v. *United States*, 195 U.S. 100, 125; *Ginsberg & Sons* v. *Popkin*, 285 U.S. 204, 208; *In re East River Towing Co.*, 266 U.S. 355, 367; *Washington* v. *Miller*, 235 U.S. 422, 428; *Rosencrans* v. *United States*, 165 U.S. 257, 262; *Red Rock* v. *Henry*, 106 U.S. 596, 603; *Buffum* v. *Chase Nat. Bank of City of New York*, 192 F. 2d 58, 61.

Such is the rule regardless of the relative dates of enactment of the two acts.

> "'*Generalia specialibus non derogant*', is an elementary rule governing the interpretation of statutes. A later general statute, which in its most comprehensive sense would include that which is embraced in an earlier particular enactment, does not, as a general rule, repeal the latter, but applies only to such cases within its general language as are not within the provisions of the particular act. 'The general statute is read as silently excluding from its operation the cases which have been provided for by the special one'." *Wong Yon* v. *United States*, 181 F. 313, 315.

[fol. 25] And,

> "Those parts of the case that have to do with violations of the Selective Service Act and the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a-10212l) must here be eliminated for the following reasons: Count III is for conspiracy to violate the Selective Service Act. Count IV is for conspiracy to violate the Espionage Act. Granting that section 6 of the Penal Code, on which Count I is predicated, is broad enough in its terms to cover conspiracies to use force in preventing, hindering or delaying the execution of

> the Selective Service Act and the Espionage Act, the penal provisions of the last-named acts constitute the specific directions of Congress for the punishment of all obstructions, forcible or otherwise, of the recruiting and enlistment service. Congress did not intend, in the face of the constitutional prohibition to inflict punishment twice for the same offense. Under the familiar maxim, *'generalia specialibus non derogant'*, these specific provisions effected *pro tanta* a repeal of section 6. *Snitkin* v. *United States*, (C.C.A.) 265 Fed. 489." *Haywood* v. *United States*, 268 F. 795, 799.

See also *United States* v. *One Chevrolet Coupe*, 9 F. 2d 85, 87.

The rule is of most particular application in the instant case wherein two vastly divergent remedies exist.

> "The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with a preceding statute and covering the entire ground of the subject matter, it supercedes and impliedly repeals the preceding statute. Especially is this the case when [fol. 26] the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supercede the earlier and heavier." *United States* v. *Windham*, 264 F. 376, 377.

Wherefore it is respectfully submitted that it is required that the defendant be sentenced under the statute that fairly, clearly, and specifically defines the conduct made criminal (§ 3616 (a)); that since the factual allegations of the indictment are specifically provided for under § 3616 (a), they are excluded from the operation of the general statute (§ 145 (b)); that the court below was restricted to sentencing the defendant under the provisions of §3616 (a), the misdeameanor statute; and that the imposition of sentence herein under the felony statute (§ 145 (b)) was in excess of the lower court's power as defined by Congress, and such sentence, is therefore, void.

We add, and emphasize, that we do not urge repeal by implication of § 145 (b) through the enactment of § 3616 (a), but merely stress the unique application of § 3616 (a) to the facts alleged.

> "There may be and can arise situations wherein, upon the facts no such conflict as is here present would occur. This is so because section 3450, *supra*, is general in its application, and covers many more unlawful removals to defraud the government of taxes besides those pertaining to taxes on distilled spirits. . . ." *United States* v. *One Chevrolet Coupe*, 9 F. 2d 85, 87.

[fol. 27] The defendant recognizes that no attack was made on the validity of the sentence imposed by the Court below. The defendant, further, recognizes the lower Court's want of jurisdiction to entertain such an attack at this time.

> ". . . the trial court on appeal lost all jurisdiction of the case, and any power or authority to resentence must have been by virtue of our mandate." *United States* v. *Tuffanelli*, (7th Cir.) 138 F. 2d 981, 983.

This court is the only avenue of relief to the defendant in his present status. It is respectfully submitted that the matter herein involved, relating as it does to imposition of a void sentence and therefore a jurisdictional defect, may be raised at any stage of the proceeding, including this level. We respectfully direct the Court's attention to *Barrow* v. *United States*, 295 F. 949, wherein an improper sentence, not certified as error on appeal, was first raised at the appellate level through the vehicle of a "suggestion" of the prosecutor. That Court remanded the case to the trial court with the direction that the judgment be set aside and the defendant resentenced as required by law. The propriety of this procedure is endorsed in *Egan* v. *United States*, wherein the court said:

> "Objection is made that the punishment imposed is not authorized by the statute, and that the judgment is therefore void.
>
> ". . .
>
> "It is the rule in the Courts of the United States that

the judgment must conform strictly to the statute, and that any variation from the provisions of the statute, [fol. 28] either in character or extent of the punishment inflicted, renders the judgment void. *Harman* v. *United States,* (C.C.) 50 Fed. 922.

"...

"In the present case, inasmuch as the judgment is suspended pending appeal, if this were the only error in the case, it could be remanded, with direction to resentence the defendant in conformity with the provisions of the statute. *In re Christian,* (C.C.) 82 Fed. 199. Since there must be a new trial, this error is adverted to, in order that it may be avoided in the future." *Egan* v. *United States,* 287 F. 958, 971-2.

In a recent decision of the Supreme Court, hereinbefore referred to, brief reference was made to a portion of the argument here posed to this Court. See *Berra* v. *United States,* 351 U.S. 131. That Court closely confined its opinion to "The only question before us. . . ." on whether a requested instruction should or should not have been given. It is apparent that the validity of the sentence was neither formally urged nor argued. In this regard, that case is readily distinguishable from the case at bar. It is further eminently apparent, from the dissent as well as from the main opinion, that jurisdiction of the Court to impose the sentence, which is a question of the dignity of the Constitutional plane, was not submitted; nor was the vulnerability of such a question at any stage of the proceedings suggested.

[fol. 29] Conclusion

Wherefore, it is prayed:

That this Honorable Court grant the rehearing sought hereby and direct oral argument hereon, or,

That this Honorable Court reverse the decision herein and direct the discharge of the defendant, or, order a new trial, or

That this Honorable Court remand the instant matter with directions to resentence the defendant under the misdemeanor statute, § 3616 (a), or,

That this Honorable Court remand the instant matter

with directions that the trial court entertain a motion herein under the provisions of Rule 35 of the Federal Rules of Criminal Procedure.

Respectfully submitted, Carl J. Batter, Frank J. Gagen, Jr., Attorneys for defendant; Anna R. Lavin, Of Counsel.

[fol. 30] — APPENDIX

Prefatory Remarks.

The analysis hereinlater made shows the evidence respecting the manner of payment of the various assets or reduction of liabilities for each of the years 1947 and 1948.

It clearly demonstrates that this is not the ordinary case of supposedly long hidden wealth suddenly exposed to the light of day by being used to acquire assets—no shoebox, suitcase, or closet full of money has suddenly been brought into the open and used in payment of assets, etc.

All transactions were conducted through banks, real estate brokers, lawyers, and the defendant's lawyer-partner. No concealments were practiced and no evidence of cash payments appear.

This Court has before it (Gov. Exh. 92, 93 and 94) Recordak enlargements of the defendant's bank account of all of the years involved. No effort was made to attribute the deposits therein to unreported cash. The Government could have, in fact it was required—in order to prove its case—to produce the deposit slips showing the respective amounts of cash and checks deposited by the defendant and the unexplained deposits, if any. Its failure to do so, in a case where the evidence was so meticulously presented, leaves one to the inescapable conclusion that there were no unaccounted for deposits.

[fol. 31] Unless the alleged unreported premiums on cars found their way into the net worth statement, the necessary element of the crime is missing and a conviction cannot stand.

Analysis - 1947.

Gov. Exh. 280.

The increase in net worth for the year 1947, according to this exhibit amounts to $78,169.96; and is composed of the following increases and decreases:

	Increases in Assets	
(a)	U. S. Treasury 2½% Bonds	$ 8,000.00
(b)	Trust No. 127 (192 Wellington)	1,800.00
(c)	Red Lion (Schedule)	67,822.96
(d)	Red Lion	17,284.01
(e)	75 Grove Avenue	20,000.00
(f)	Lot 7 Oak Hills	2,000.00
(g)	Lot 10 Oak Hills	210.00
(h)	Robert L. Heckman	2,000.00
(i)	Mitchell A. Silagy, Jr.	3,500.00
(j)	Highland Motor Sales	12,538.87
(k)	202 Wellington	8,000.00
(l)	Tucker Speedway	2,000.00
(m)	Additional Value— Red Lion Equipment	2,955.63
	Total Increase in Assets	$148,111.47

[fol. 32]

	Decreases in Assets	
(n)	Union National Bank	$ 1,431.51
(o)	167 Liberty Street, Contract of Sale	10,800.00
(p)	Balance due Achilli on Partnership interests	2,692.00
(q)	Contract receivable on sale of Pool Hall	3,300.00
	Total Decrease in Assets	18,223.51
	Net Increase in Assets	$129,887.96

Increase in Liabilities

(r)	Union National Bank	$ 6,000.00
(s)	Red Lion	21,977.78
(t)	75 S. Grove Avenue, Mortgage	8,500.00
(u)	202 Wellington Ave.	4,584.44
(v)	Personal Loan—Lindo Achilli	3,000.00
(w)	Personal Loan—Henry Santurro	12,000.00
(x)	Reserve for Depreciation	6,696.11
	Increase in Liabilities	$62,758.33

Decrease in Liabilities

(y)	Red Lion	$10,000.00
(z)	Real Estate Loan—213 S. Grove	503.70
	209 Lake Street	536.63
	Decreases in Liabilities	11,040.33
	Net Increase in Liabilities	51,718.00
	Net Increase in Net Worth	$78,169.96

[fol. 33] The testimony respecting the foregoing items is as follows:

(a) Roy E. Flora, a Government witness, testifying from the records of the Union National Bank of Elgin testified (R. 528-529, Gov. Exh. 86 and 87) that the defendant on August 27, 1947 borrowed $8,000 to purchase $8,000 of U. S. Treasury 2½% Bonds; and such bonds were held as collateral on the loan. Testifying from Gov. Exh. 88 he stated payments in reduction of the loan (Item (r)) were made as follows:

September 30, 1947	$500.00
November 1, 1947	500.00
November 28, 1947	500.00
December 24, 1947	500.00
a total of	$2,000.00

leaving a liability of $6,000 at the close of 1947. There was no testimony whatsoever as to the source of the four $500 payments; even though the witness Flora was in a position to testify thereto.

(b) *Trust No. 127 (192 Wellington):* Roy E. Flora, a Government witness testifying from the records of the Union National Bank of Elgin (R. 534-6) testified that monthly payments of $300 were made by the defendant and Gromer (his partner); and Earl Gromer (R. 817) testified that the payments were made by checks of Highland Motor Sales, the partnership of defendant and Gromer.

[fol. 34] C. *Red Lion—Schedule:* Attached to Government Exhibit 280 is a schedule listing expenditures for the year 1947 in the amount of $67,822.96. The evidence with respect to such expenditures is as follows:

1. *Martin Seybold:* This Government witness testified that he was Cashier of the First National Bank of Elgin, Illinois (R. 590); that on May 28, 1947 that bank made a construction loan to the defendant in the amount of $25,000. (R. 591, Gov. Exh. 121); that the mortgage was secured by a trust deed on the Red Lion property (R. 592); and that payments were made to contractors in the amount of $24,715.90 out of such loan (R. 592). A series of twenty-nine Cashier's checks were introduced as evidence by the Government (Gov. Exh. 123 to 151 inclusive). The unspent balance of the loan, $284.10 was applied in reduction of the loan (R. 627, Gov. Exh. 152). On December 31, 1947, the loan had been further reduced from $24,715.90 to $21,977.98 (R. 591); however, the prosecution offered no proof of the manner of payment of the reduction; that is $2,737.92.

2. *Mortimer Hawkins:* The schedule lists two items paid to this Government witness—$1,647.97 and $141.67. The witness testified that the sum of $141.67 represented reimbursement of expenditures he had made (R. 510) and does not show from whom the payment was received nor the manner of payment. The sum of $1,647.97 is part of a larger sum, $3,101.00 paid this witness in 1947. The balance was paid by Cashier's checks out of the $25,000 loan (Gov. Exh. 128 and 139) and the sum of $1,647.97 was paid by the defendant by check (R. 510).

[fol. 35] 3. *Lamar Kidwell:* Testified he was Secretary-treasurer of the Lamp Construction Co. (R. 659) and in 1947 that company received—other than sums paid out of the $25,000 loan—the following:

date not appearing in testimony	$ 3,891.88	(R. 662)
February 11, 1947	2,349.17	(R. 663)
March 11, 947	2,882.52	(R. 663)
April 14, 947	4,602.16	(R. 664)
May 12, 1947	478.39	(R. 665)
May 12, 1947	11,681.42	(R. 664-5)
August 23, 1947	3,015.12	(R. 667-8)
Total	$28,900.66	

The testimony does not disclose the nature or source of the above payments. It is significant that Earl Gromer, a Government witness and the defendant's partner, was attorney for Red Lion, Inc. (R. 883) produced some corporate records in Court (Gov. Exh. 273); but did not testify to financial transactions of Red Lion, Inc.

4. *Mervin Lahbauer:* Testified that he received the following payments:

May 7, 1947	$1,095.35
Aug. 24, 1947	1,282.41
Oct. 24, 1947	421.02
a total of	$2,798.78

but gave no testimony respecting the form of payment or who paid him.

[fol. 36] 5. *Clifford N. Smith:* Government Exhibit 155, the architects certificate shows that he, Clifford N. Smith, was certified for the sum of $4,000. The record does not disclose from whom he received the payment or the form of payment.

6. *C. Walter Magnuson:* Testified that he received $1,071.63 on November 11, 1947 (R. 745-6). There is no testimony indicating who made the payment or the form of payment.

7. *Jack Hintt:* Testified from the records of the A. J. Ironside Company of which he is now co-owner; and, that that company received a check on September 24, 1947 in the amount of $4,069.89. The deposit slip was produced and marked Gov. Exh. 220 (R. 774). No testimony was offered regarding the source of the check.

8. *Bernard Gershisk:* Testified that he received a payment of $100.00 on August 20, 1947 (R. 654-5) and that he looked to Mortimer Hawkins, the architect for payment. He did not testify as to who paid him or the form of payment.

9. Cancelled Certificate retained by bank— $ 26.46
Certificate Stub not shown above— $350.00

These two items appear as worded above in the schedule attached to Gov. Exh. 280. No evidence respecting their nature or what they were in fact appears in the record. It's a bit difficult to understand how they can be charged as assets of the defendant.

The foregoing nine items complete the list contained in the schedule attached to Gov. Exh. 280; and, we submit [fol. 37] there is a complete failure of proof in charging these items to the defendant; and showing that they emerged from his currently taxable income.

(d) *Red Lion $177,284.01:* Robert E. Wales, a Vice-President of the Sun Ray Fixture Company (R. 577) received the following sums:

March 1947	$4,500.00	(R. 579-80)
June 1947	9,400.37	(R. 579-80)

and that both of these payments were by check (R. 580). He also testified to receiving

$ 700.00 in November 1947 (R. 580)
1,963.50 in September 1947 (R. 581)
720.14 in September 1947 (R. 582)

He does not testify as to who paid him or the form of payment of the latter three items. It will be observed that the contracts, etc., regarding the above transactions are all signed by and with the corporation "Red Lion, Inc." (Gov. Exh. 113, 114, 115, 116, 117).

(e) *75 Grove St.—$20,000:* H. Wheeler Britton, an attorney of Dundee, Illinois, (R. 684) a Government witness, testified that he was the attorney for the sellers of this property. That on closing he received the seller's note for $9,300.00 and a check of Mr. Abelmann for $9,700.00 (R. 684). Mr. Abelmann, a realtor, testified he loaned the defendant $5,000.00 on April 17, 1947 (R. 754) which sum was repaid July 1, 1947. Also that he received from the defendant on March 26, 1947—$700.00 and $4,900.00 and on August 1, 1947—$100.00 (R. 753); further that the defendant as-[fol. 38] sumed the seller's debt of $9,300.00 (R. 754) (t) *infra;* further that the $9,300.00 debt had been reduced to $8,500.00 by December 31, 1947 (R. 755). No evidence was adduced to show the source of these payments.

(f) *Lot 7 Oak Hills—$2,000.00:* Edward E. Glashagel, a doctor, testified he sold this lot to the defendant for $2,000.00; and, was paid in cash (R. 559).

(g) *Lot 10 Oak Hills—$210.00:* John Duncan Stewart, the seller testified that he received payment from the defendant through Abelman, the realtor (R. 657). Abelman testified that he received the $210.00 on December 9, 1947 (R. 756); but, he does not testify respecting the form of payment.

(h) *Robert L. Heckman—$2,000.00:* Testified (R. 587-8) that he received $4,000.00 from Gromer and the defendant, in Gromer's office; signed the note in Gromer's office; and made his payments on the loan in Gromer's office. No evidence was adduced to establish the source of the $4,000.00 and its form. Was it Gromer's check? Was it Achilli's check? Was it a check of Elgin Acceptance Corp? Or, was it cash, each partner putting up $2,000.00, all of it by one partner, or what was the fact? The proof has not been adduced.

(i) *Mitchell A. Silagy, Jr.—$3,500.00:* Mr. Silagy testified (R. 777-8) that the $7,000 he received was composed of a $5,000.00 check of Highland Motor Sales, a $1,250 cashier's check drawn to Earl Gromer; and $750.00 in cash.

[fol. 39] (j) *Highland Motor Sales—$12,538.87:* Earl Gromer, a Government witness testified (R. 806-809) that this increase reflected the increase in the defendant's equity

in the partnership; and, included the earnings exclusive of any unreported income.

(k) *202 Wellington $8,000.00:* Earl Gromer, a Government witness testified that this purchase amounted to $16,000 (R. 830) and was paid for by an automobile supplied by the Highland Motor Sales valued at $2,000.00; and the balance of $14,000.00 was paid for by the proceeds of a trust deed loan from the First National Bank of Elgin (Gov. Exh. 251 and 252; R. 831) and the balance from Highland Motor Sales (R. 830); also that the defendant's share was $8,000.00 (R. 831). The reduction of the trust deed loan to $4,584.44 on December, 31, 1947 was made by checks of Highland Motor Sales (R. 832) (Item (u) in preceding summary).

(l) *Tucker Speedway—$2,000.00:* Earl Gromer, a Government witness, testified that this investment was paid for by a refund of $4,000.00 received on the Midwest Tucker transaction (R. 872).

(m) *Additional Value—Red Lion Equipment—$2,955.63:* This item appears to be the difference between the sum of $20,239.54 appearing in Schedule F of Gov. Exh. 2 and item (d) above.

(n) Union National Bank—	$1,431.51
(o) 167 Liberty Street, Contract of sale—	$10,800.00
(p) Balance due Achilli on Partnership Interests—	$2,692.00
[fol. 40] (q) Contract Receivable on sale of Pool Hall—	$3,300.00

This group (n through g) aggregating $18,223.51 reflects the liquidation of assets on hand at the beginning of the year; and, of course, were available for the acquisition of assets, without recourse to any unreported income.

(r) This increase in liabilities is fully explained in item (a) *supra.*

(s) This increase in liabilities is fully explained in item (c) (1) *supra.*

(t) This increase in liabilities is fully explained in item (e) *supra.*

(u) This increase in liabilities is fully explained in item (k) *supra.*

(v) *Personal loan*—Lindo Achilli— $3,000.00.
(w) *Personal loan*—Henry Santurro— $12,000.00.

These two borrowings of $15,000.00, were of course available for the acquisition of assets, without recourse to any unreported income.

(x) *Reserve for Depreciation—$6,696.11:* This item, a depreciation deduction, of course involves no monetary transaction.

(y) *Red Lion—$40,000.00:* The liquidation of the liability to W. A. Turpin on the Red Lion property purchase was made on or before April 16, 1947 (R. 522-523). The [fol. 41] source of the funds or the nature of the payment was not adduced by evidence.

(z) Real Estate loan, 213 S. Grove— $503.70.
Real Estate loan, 209 Lake Street— $536.63.

Government witness Seybold, Cashier of the First National Bank of Elgin, Illinois, testified to the reduction of these loans (R. 637-8, 640); however, no evidence was adduced regarding the source of the payment or its nature.

Summary - 1947.

Summarizing the year 1947 and the various sections of the Net Worth changes, the increase in assets of $148,111.47 is composed of:

Acquisitions for which no money was required	$ 63,836.86
Items paid for by Highland Motor Sales	7,550.00
Items paid by Gromer	250.00
Items paid by Defendant's checks	1,647.97
Items identified as cash	2,750.00
Items the source or nature of which was not testified to	72,076.64
Total increase in assets	$148,111.47

The absence of testimony respecting the amount of $72,076.64 almost 50% of the total leaves too much to speculation. The Government had the means available, the wit-

nesses were produced, the Recordak f the bank was available, the deposit slips showing the composition of the deposits to the defendant's bank account could have been es-
[fol. 42] tablished; the disbursements from the bank account could have been examined; nevertheless the proof was not adduced. The part financed by Red Lion, Inc. was carefully avoided, even though it was found useful for the prosecution to offer in evidence three pages of the Minute Book of that corporation through the attorney for Red Lion, Inc.

As the Supreme Court pronounced in *Holland* v. *U. S.* (348 U.S. 127) at pages 137-8 net worth increases, standing alone cannot be assumed to be attributable to currently taxable income; and also stated at page 137 that requisite to the use of the net worth method is evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income.

Here, no inference is possible, because the alleged cash premiums have not been shown to have been placed in the bank or used to purchase assets. We submit that $72,076.14 of alleged asset values, admittedly paid by some one to some one, without further evidence cannot be attributed to the defendant and his currently taxable income.

The liquidation of liabilities of $11,040.33 (*supra*) falls into the same classification of absence of explanation by the prosecution.

There must also be remembered that the defendant realized $18,223.51 on liquidation of assets and made personal borrowings (items v and w) amounting to $15,000.

[fol. 43] Analysis - 1948.

Gov. Exh. 280.

The increase in net worth for the year 1948, according to this exhibit amounts to $69,651.96; however, it contains two small errors, one of $5.00 and one of 8 cents. This exhibit corrected by such errors reflects an increase of net worth of $69,646.88; and is composed of the following increases and decreases:

	Increases in Assets	
(a)	Union Bank Account	$ 4,786.52
(b)	Cashiers Check	35,000.00
(c)	Trust No. 127 (192 Wellington)	1,900.00
(d)	Red Lion (Schedule)	11,169.38
(e)	Red Lion	314.47
(f)	75 Grove Ave.	5,000.00
(g)	Lot 10 Oak Hills	1,890.00
(h)	18/20 Douglas Ave.	55,000.00
(i)	Part Lot 1—P. J. Kimball's Addition	12,000.00
(j)	Marvin Affeld (Receivable)	7,500.00
(k)	Theodore Gordon (Receivable)	15,000.00
(l)	Marvin Affeld (Oil)	1,500.00
(m)	Highland Motor Sales	16,912.67
(n)	Gas Station (Partnership)	3,450.00
(o)	630 Raymond (Partnership)	1,400.00
(p)	568 Fremont (Partnership)	1,844.48
	Total Increase in Assets	$174,667.52

[fol. 44] Decreases in Assets

(q)	U. S. Treasury 2½% Bonds	$ 8,000.00
(r)	Mitchell A. Silagy, Jr.	3,500.00
(s)	Robert L. Heckman	2,000.00
	Total Decrease in Assets	$ 13,500.00
	Net Increase in Assets	$161,167.52

	Increases in Liabilities	
(t)	Union National Bank	$19,000.00
(u)	75 S. Grove Avenue	11,666.58
(v)	18/20 Douglas Ave.	49,500.00
(w)	Lot 1, Kimball's Addition	5,800.00
(x)	Personal Loan—Lindo Achilli	2,000.00
(y)	Reserve for Depreciation	10,723.52
(z)	Sale ½ Equipment Red Lion	10,119.82
		$108,809.92
	Decreases in Liabilities	
(AA)	Red Lion	$ 6,296.48
(BB)	75 S. Grove Ave. Mtge.	8,500.00
(CC)	213 S. Grove Ave.	650.06
(DD)	209 Lake Street	1,292.54
(EE)	202 Wellington Ave.	550.20
	Total Decrease in Liabilities	$ 17,289.28
	Net Increase in Liabilities	$ 91,520.64
	Net Increase in Net Worth	$ 69,646.88

[fol. 45] The testimony respecting the foregoing items is as follows:

(a) *Union Bank Account $4,786.52:* Roy E. Flora, Vice President of the Union National Bank & Trust Company (R. 526) testified regarding this balance. He produced Recordak enlargements of the account (Gov. Exh. 92, 93 and 94). Deposit slips were not produced and there is no evidence to establish that any of the alleged withheld income was deposited in this account. The conclusion is inescapable that if there were any unexplained bank deposits the Government would have shown it.

(b) *Cashier's Check—$35,000:* The Court has discussed this item in its opinion and states in part:

> "The record includes positive testimony that Union issued the check on consideration of the $23,000 loan and $12,000 cash paid by defendant."

With all due deference to the Court's study of the testimony we submit that there is no evidence whatsoever to support the finding that there is positive testimony that the defendant paid $12,000 in cash in the purchase of this Cashier's check.

The testimony of Mr. Gordon, one of the signers, is based on memory. On direct examination he testifies he advanced no funds pertaining to that check (R. 649). On cross-examination he refers to his belief (R. 651). Mr. Flora, the bank witness, on direct examination testified he had no direct knowledge of the transaction (R. 542). Mr. Arnold testified he was a Vice President of the Union National Bank and a director of the First National Bank of Gibson [fol. 46] (R. 1097-1098), that he had personal knowledge of the transaction (R. 1098); and that the Union National issued the check (R. 1098):

> "A. Our bank issued this check, this is, the Union National Bank of Elgin issued this check as proceeds of a loan made by our bank and also by the First National Bank in Gibson City."

We submit, that where a witness who is Vice President of one bank and a Director of another bank testifies the check was issued as proceeds of loans; there is no room for speculation and interjection of $12,000 cash. Here is a witness who had first hand knowledge of the transaction and he testifies contrary to the Court's finding that is not supported by the record. We ask the Court's reconsideration of this subject.

(c) *Trust No. 127 (192 Wellington) $1,900*: Roy E. Flora, a Government witness testifying from the records of the Union National Bank of Elgin (R. 534-6) testified that monthly payments of $300. were made by the defendant and Gromer (his partner); and Earl Gromer (R. 817) testified that the payments were made by checks of Highland Motor Sales, the partnership of defendant and Gromer.

(d) *Red Lion (Schedule) $11,169.38*: This subject has been dealt with extensively in the 1947 Analysis under Item (c), and that analysis has full application here, excepting for Frank Marker $3,591.42 who does not appear

in the 1947 list. The witness Marker, produced a photostat of the deposit slip for the deposit of a check for $3,591.42 [fol. 47] on May 2, 1948 (R. 701, Gov. Exh. 191). No proof was offered to indicate the maker of the check.

(e) *Red Lion $314.47*: Mr. Wales testified that he received payment of this sum in February, 1948 (R. 581); but no evidence is offered as to who paid him or the manner of payment.

(f) *75 Grove Ave., $5,000:* Lamar J. Kidwell testified that the Lamp Construction Company did a remodeling job on this property and that a remittance of $5,000. was received on May 14, 1948, (R. 669). No evidence was offered as to the form of payment, or by whom made.

(g) *Lot 10 Oak Hills—$1,890.*: Mr. Abelmann, testifying from Gov. Exh. 213, testified that a check for $1,983.25 including abstract expense revenue stamps and commission was given Mr. Stewart (R. 756). He does not testify as to who paid him or the manner of payment.

(h) *18/20 Douglas Ave.,—$55,000:*—Ranstead S. Lehmann testified a contract of sale was made on this property with the defendant and his wife September 14, 1948 (R. 573) at which time a down payment of $5,500 was made (R. 574. The balance of the purchase price was paid in September, 1949. The $5,500 was placed in escrow and delivered to him by Mr. Weideman, a realtor, in September, 1949 (R. 574). The Government treats as a liability (Item (v)) the difference of $49,500. Mr. Weideman got the $5,500 from the broker, Abelmann (R. 576). Mr. Abelmann's testimony made no reference to this transaction. (R. 750-761); there is, therefore, no record of the source or nature of the $5,500.

[fol. 48] (i) *Part Lot 1—P. J. Kimball's Addition—$12,000:* The Government shows a partially offsetting item to this transaction in the amount of $5,800 (Item (w)). The witness, Middleton, testified to receiving $6,000 as a down payment (R. 656) and another payment of $200 (R. 565). The witness testifies he made the deal with Abelmann, the realtor (R. 564) and the defendant's and his wife's signatures appear on the contract (R. 565). Abelmann in his testimony does not touch on this transaction (R. 750-761). No evidence has been adduced to show who made the payments aggregating $6,200 or the nature of the payments.

(j) *Marvin Affeld (Receivable). $7,500.:* The Court discusses this item in its opinion and holds there was sufficent to submit the matter to the jury. We respectfully direct the Court's attention to the admonition of the Supreme Court where it states in *Holland* v. *U.S.* (348 U.S. 127, 132)

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

The uncontradicted testimony of Mr. Affeld (R. 763) is that he did not receive the money; that it was agreed he should finish his home and turn in the bills up to $7,500. The deal was not made until November 15, 1948 (R. 763); and Gromer wrote the checks in payment of the bills when rendered (R. 763). There is no evidence that the defendant parted with a solitary penny in 1947; and, with no evidence we submit it was not a matter to submit to the Jury.

(k) *Theodore Gordon (Receivable) $15,000.:* The Court in discussing this item states:

> [fol. 49] "With respect to the $15,000 check Gromer testified that he purchased it for defendant and delivered it to him."

May we respectfully remind the Court that we can find no such testimony; and Government counsel in its brief appears to be in accord with our view. On *page 44* of the Government Brief, Counsel discusses this item and states:

> "The prosecutor argued that Gromer testified that he got the money from Achilli. (R. 1146). There does not appear to be anything in Gromer's testimony directly to support this argument."

The Government then argues that the inference that the defendant paid Gromer this sum can be drawn from the testimony of Gromer to the effect that his accounts and the account of Gromer and Brady was in balance at the end of the year. That may be true; so far as the running account is concerned; but it is not true as far as the full accounts between the defendant and Gromer are concerned. Gov.

Exh. 280 and Gromer's testimony (R. 874) recites that Gromer loaned the defendant $9,000 in 1946 that still appears as a liability on December 31, 1948 (Gov. Exh. 280) and that was included in the final settlement at the time of dissolution (R. 874) in 1951.

We beg the Court to reconsider its finding on this item in the interests of Justice. There is no evidence of cash or a check from the defendant to Gromer for this item whatsoever.

(l) *Marvin Affeld (Oil)—$1,500.:* Mr. Affeld testified that he received from the defendant about May 11, 1948, [fol. 50] two sums, one of $500, and one of $1,000 (R. 764). No testimony was offered regarding the form of the payment. It was not shown to be from alleged unreported income.

(m) *Highland Motor Sales—$16,912.67:* Gov. Exh. 280 shows a partnership balance due the defendant from Highland Motor Sales at December 31, 1947, in the amount of $27,528.60; and, in the 1948 column this line is left blank. Further down the page on Gov. Exh. 280 under the title "Assets from Return filed" there appears nothing in the 1947 column and $44,441.27 in the 1948 column, resulting in a difference of $16,912.67.

The fact is that Gov. Exh. 6, the partnership return for 1948 in Schedule H omits the Balance Sheet at the end of 1948 and Ralph A. Weber the Government expert testified (R. 953):

> "The Tax Returns—well, I have just testified as to the balance of Mr. Achilli's capital account at December 31, 1948, to be $44,441.27."

The fact is he did not so testify. He did testify as follows (R. 952):

> "Highland Motor Sales, Exhibits 4, 5 and 6, December 31, 1945, $7,275.92; December 31, 1946, $14,989.73; December 31, 1947, $27,528.60".

Government Exhibit 6, prepared by Gromer's partner Brady (R. 93 and signed by Gromer does not contain the figure $44,441.27 or any other figure as capital at the end of 1948.

This artful manner of testifying emphasizes the Supreme Court's admonition regarding schedules such as Gov. Exh. [fol. 51] 280 contained in the opinion in *Holland* v. *U. S.* (348 U. S. 121, 127-8):

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; bare figures have a way of acquiring an existence of their own, independent of the evidence which gave use to them."

We sincerely hope that this Court will not be deceived by a figure purporting to appear in Schedule H of Gov. Exh. 6, when in fact the year end column of that schedule (H) is blank. Why Gromer and his law partner Brady left it blank was not explained. Is a man to be deprived of his liberty by such chicanery by Brady, Gromer and Weber?

Continuing our exposition of the absence of proof respecting the alleged unreported income finding its way into the Net Worth statement, we submit that Earl Gromer testified (R. 806-809) that the partnership records did not include any unreported income.

(n) *Gas Station (Partnership) $3,450:* Earl Gromer testified that this property (Gov. Exh. 253-254) purchased by the partners, the defendant and Earl Gromer, on December 9, 1948, was paid for by funds of Highland Motor Sales (R. 833-834). Obviously none of the alleged unreported income was used to purchase this asset.

(o) *630 Raymond (Partnership) $1,400.:* Earl Gromer testified (R. 835-839) respecting this property, and the [fol. 52] funds used in payment therefor. The property was purchased for $1,200, out of Highland Motor Sales funds (R. 836); and, the improvements of $1,600 were paid for by Highland Motor Sales as evidenced by a receipt (R. 838). Here, none of the alleged unreported income was used to purchase or improve the property.

(p) *568 Fremont (Partnership)—$1,844.48:* Earl Gromer testified respecting this proper (R. 840-845); and the

total cost of property and improvements was paid for by Highland Motor Sales (R. 845). Again, no unreported income was used to purchase or improve the property.

(q) *U.S. Treasury 2½% Bonds*	*$8,000.*
(r) *Mitchell A. Silagy, Jr.*	*$3,500.*
(s) *Robert L. Heckman*	*$2,000.*

This group, aggregating $13,500, reflects the liquidation of assets on hand at the beginning of the year; and, of course, were available for the acquisition of assets, without recourse to any alleged unreported income.

(t) *Union National Bank*	*$19,000.00*
(u) *75 S. Grove Ave.*	*$11,666.58*
(v) *18/20 Douglas Ave.*	*$49,500*
(w) *Lot 1, Kimball's Addition*	*$5,800.00*

This group of increased liabilities, aggregating $85,966.58, all relate to acquired assets shown gross in the asset part of the net worth statement (Gov. Exh. 280); therefore, form no part of any total that could possibly be construed as the utilization of alleged unreported income.

(x) *Personal Loan—Lindo Achilli—$2,000:* This loan of $2,000. (R. 731) naturally makes that sum available for [fol. 53] acquisition of assets, etc., without recourse to any alleged unreported income.

(y) *Reserve for Depreciation $10,723.52:* This is not a monetary item. It is a deduction for depreciation allowed under the tax laws.

(z) *Sale ½ Equipment Red Lion $10,119.82:* This is not a liability—its very characterization (Gov. Exh. 280) belies that. It is the proceeds of sale to Mike Fritzel of some Red Lion Equipment (Sched. D, Gov. Exh. 3) this makes that much money available to the defendant for reinvestment in other assets without recourse to any alleged unreported income.

Here again, Schedule D, Gov. Exh. 3, shows the further sale of "stock in Red Lion" "$4,673.18", which to say the least certainly frees that much as assets, reducing it to money available for reinvestment in other assets, without recourse to any alleged unreported income.

Assuming, arguendo, that the Government's treatment

of the $10,119.82, while perhaps incorrect, nevertheless, has no effect on the net worth, because the asset has been retained at full value; what answer is there to the failure to treat the $4,673.18 in the same manner. Its omission from the Net Worth obviously inflates it to that extent; and if not expended by the defendant is contained in his increased bank balance (Item (a) *supra*); or if expended is duplicated in the asset value assigned such expenditure.

[fol. 54] SUMMARY—1948

Before summarizing the foregoing material, we direct the attention of the Court to the following:

The inclusion as an asset (Item m) of the alleged equity of the defendant in Highland Motor Sales on December 31, 1948, in the amount of $44,441.27, in the Net Worth without any foundation of any kind whatsoever in the evidence; and the omission from net worth of the proceeds of sale of "stock in Red Lion" $4,673.18 (Item z); the two aggregating $49,154.45 and being 70% of the alleged increase in net worth in 1948 of $69,651.96; so discredits the net worth as to require its rejection by this Court. Again it is an example of the wisdom of the Supreme Court when it states in *Holland* v. *U. S.* (348 121, 127-8):

> "There is great danger that the jury may assume that once the Government has established the figures in its net worth computations, the crime of tax evasion automatically follows. The possibility of this increases where the jury, without guarding instructions, is allowed to take into the jury room the various charts summarizing the computations; *bare figures have a way of acquiring an existence of their own*, independent of the evidence which gave use to them." (Emphasis supplied)

How much more tragic it is when "bare figures have a way of acquiring an existence of their own" when no evidence whatsoever gives use to them.

The analysis here made for the year 1948 shows that the increase in assets of $174,667.52 is accounted for as follows:

[fol. 55] Acquisitions for which no money was required	$114,712.67
Items paid for by Highland Motor Sales	8,594.48
Items advanced by Gromer	15,000.00
Items, the source or nature of which *which* was not testified to	36,360.37
total increase in assets	$174,667.52

The decrease in assets of $13,500 resulted in funds other than alleged unreported income being available for reinvestment.

The increase in liabilities of $108,809.92 falls into categories, none of which relates to the alleged unreported income.

(t) *Union National Bank $19,000.*

(x) *Personal Loan—Lindo Achilli $2,000.*

These borrowings augmented the funds available for investment. The Union National Bank item reflects the increase of the defendant's indebtedness to that bank on December 31, 1948 over the preceding year. Roy E. Flora, a Vice President of the bank (R. 526), testified that the defendant borrowed $2,500 on November 17, 1948 and $23,000 on December 20, 1948; and that on December 31st, 1948 his indebtedness was $25,000 (R. 541).

The Personal Loan from Lindo Achilli represents an increase of $2,000 over the preceding year (R. 731).

[fol. 56] (u) *75 Grove $11,666.58:* Erven Jurs, Vice President of the First Federal Savings & Loan (R. 721) testified that the defendant procured a loan from that bank in the amount of $13,000 on May 20, 1948 (R. 723); and that at the end of 1948 the balance on the loan was $11,666.58. This loan, supplied the defendant with additional funds for reinvestment without recourse to any alleged unreported income.

(v) *18/20 Grove Ave. $49,500.:*

(w) *Lot 1, Kimball's addition $5,800.:*

Both relate to unpaid balances on assets—(v) relates to (h), and (w) relates to (i).

(y) *Reserve for Depreciation $10,723.52* by its very nature involves no money.

(z) *Sale of ½ Equipment Red Lion $10,119.82* yielded just that much of available funds.

The decrease in liabilities, items (AA) through (EE) amounting to $17,289.28 has been fully covered in connection with the asset involved (AA) relates to (d); (BB) was the old mortgage before (u) refinancing; (CC) is related to (e) in the 1947 analysis; (DD) is related to (z) in the 1947 analysis; and (DD) is related to (u) in the 1947 analysis.

[fol. 57] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 58] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11575

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

vs.

SAM ACHILLI, *Defendant-Appellant*

OPINION ON REHEARING—July 31, 1956

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Upon defendant's conviction on three counts of an indictment charging attempts to evade the payment of income taxes for the taxable years 1946, 1947 and 1948 by filing, or causing to be filed, false and fraudulent income tax returns in violation of 26 U.S.C. §145 (b), (I.R.C. 1939), he was sentenced, on each count, to serve two years in prison, the sentences to run concurrently.

On appeal, we reversed the conviction as to Count I and affirmed as to Counts II and III. Defendant's petition for a rehearing is based, *inter alia,* upon arguments addressed to the sufficiency of the evidence to prove his guilt

upon the net worth theory of proof. We think nothing is added thereby to the points raised and argued on appeal. We adhere to our judgment affirming the conviction as to the two counts.

[fol. 59] A rather troublesome question raised by the petition is one upon which defendant did not rely either in the trial court or before us on appeal, namely, that the sentence is invalid. As we have previously stated, the indictment charged three separate attempts to evade income taxes by filing false and fraudulent returns, a charge which has been repeatedly held to allege the felony defined in Section 145 (b).[1] See *e.g. United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Raub*, 177 F. 2d 312 (CA-7); *United States* v. *Rosenblum*, 176 F. 2d 321, cert. denied 338 U.S. 893 (CA-7). Defendant now contends, for the first time, that the charge contains the elements of the misdemeanor defined in 26 U.S.C. § 3616 (a) (I.R.C. 1939)[2], that those elements and those of the felony are in all respects identical and that, therefore, it was error for the trial court to impose a sentence greater than that prescribed for the misdemeanor by § 3616 (a).

The government admits that both § 145 (b) and § 3616 (a) apply to income tax returns and cover identical ground. It contends, however, that the government has the authority

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[1] "(b) * * *. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[2] "Whenever any person

"(a) FALSE RETURNS. Delivers or discloses to the collector * * * any false or fraudulent list, return, * * *, with intent to defeat or evade the * * * assessment to be made;

* * *

"He shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

to elect under which statute it will proceed, or, alternatively, that the subsequent enactment. 145 (b), repeals § 3616 (a) by implication.

Before reaching the merits of defendant's petition, we must determine whether the question can properly be raised at this late date. We think that it cannot. We say this [fol. 60] advisedly, and do not purport to determine whether, were the question an open one, we would construe the conceded overlapping of the two statutes as a question of plain error "affecting substantial rights" and therefore noticeable "although * * * not brought to the attention of the trial court." Fed. Rules Crim. Proc. 52 (b). We think that a determination that the question does not present such error is manifest in the recent pronouncements by the Supreme Court in *Berra* v. *United States*, 351 U.S. 131, which, at least, imply that the validity of a sentence under § 145 (b) must be challenged by an appropriate proceeding in the trial court.

The indictment in Berra was in all material respects identical to that before us. At the close of all the evidence Berra requested an instruction "that a verdict of guilty of the 'lesser crime' under § 3616 (a) would be permissible." 351 U.S. at 132. Although the Court's decision affirming Berra's sentence is restricted to the narrow question whether that requested instruction was properly refused, the Court concluding that the refusal did not constitute error, the intendments of the opinion are much broader. The Court assumed, *arguendo*, that both § 145 (b) and § 3616 (a) applied and "covered the same ground." 351 U.S. at 134. It held, however, that the implication of such overlapping was a question of law for the court which had not been raised in the trial court and that "no such questions are presented here." 351 U.S. at 135.

Mr. Justice Black filed a dissenting opinion, in which Mr. Justice Douglas joined, stating that he would reverse the judgment, or at least remand the case to the district court "for resentencing under the misdemeanor statute, § 3616 (a)." 351 U.S. at 140. The dissent is based upon the postulate that the case presented an issue of plain error affecting substantial rights.

We can only conclude that the majority opinion in Berra inherently impels a determination that the question before

us does not reflect plain error. Rule 52 (b) was designed to reach errors of such a substantial nature that they would, if not corrected, result in a manifest miscarriage of justice. *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395; *United States* v. *Vasen*, 222 F. 2d 3, cert. denied 350 U.S. 834 (CA-7). Inasmuch as errors within the com- [fol. 61] prehension of the provisions of this rule are those of such a nature that they must be corrected to prevent a manifest injustice, it is incumbent upon a reviewing court to notice such error *sua sponte* although the issue presented is not raised on appeal. *Screws* v. *United States*, 325 U. S. 91, 107; *United States* v. *Dressler*, 112 F. 2d 972 (CA-7); *Lash* v. *United States*, 221 F. 2d 237, cert. denied 350 U.S. 826 (CA-1); *Austin* v. *United States*, 208 F. 2d 420 (CA-5); *Simmons* v. *United States*, 206 F. 2d 427 (CA-DC); *United States* v. *Kemble*, 197 F. 2d 316 (CA-3). Cf. *United States* v. *Jonikas*, 187 F. 2d 240, cert. denied 344 U.S. 877 (CA-7).

In the face of this pronounced duty upon federal appellate courts, see *Screws* v. *United States, supra*, the Court in Berra took the position that the issue of the implication of the overlapping of §§ 145 (b) and 3616 (a) was not preserved because Berra had presented no proper challenge to the sentence to the trial court. As the dissenting Justices aptly observed, 351 U.S. at 137, the instruction which Berra requested advised the lower court of "petitioner's contention that the offense charged was not a felony but a misdemeanor." If the question was not preserved for review under the circumstances of that case, it certainly cannot be raised on this appeal in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed.

The petition is denied.

[Clerk's Certificate to foregoing paper omitted in printing].

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—July 31, 1956

It is ordered by the court that the petition for a rehearing of this cause be, and the same is hereby, denied.

[fol. 63] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

MOTION FOR LEAVE TO PROCEED IN THE UNITED STATES DISTRICT COURT, ETC.—Filed August 2, 1956

Now comes the Defendant-Appellant herein by his attorneys and moves this Honorable Court for leave to proceed in the United States District Court for the Northern District of Illinois for the limited purpose of filing therein a motion pursuant to Rule 35, Federal Rules of Criminal Procedure and as grounds therefor shows:

1. That this Honorable Court's opinion of July 30, 1956 on the Petition for Rehearing heretofore filed herein on June 20, 1956 has left undetermined a point raised therein which point was considered at length in the Court's opinion but decided adversely for another reason without direct ruling thereon.

2. That so multiplicity of appeals may be avoided such a motion in the trial court in the more proper sequence of proceedings should be made at this time in view of this Court's decision.

3. And Appellant further moves, that a stay be granted on the mandate of this Court pending the disposition of the motion in the trial court.

[fol. 64] Wherefore, the Appellant respectfully moves this Honorable Court for leave to proceed in the United States District Court for the Northern District of Illinois, Eastern Division for the sole and limited purpose of filing

therein a motion pursuant to Rule 35, Federal Rules of Criminal Procedure, and that a stay of the mandate of this Court be granted pending the disposition of said motion.

Carl J. Batter, Frank J. Gagen, Jr., Attorney for Defendant-Appellant. Anna R. Lavin, of Counsel.

[fol. 65] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

NOTICE OF AND AMENDMENT TO MOTION TO STAY MANDATE—
Filed August 7, 1956

To: Honorable Robert Tieken, United States Attorney, United States Courthouse, Chicago 4, Illinois:

Please take notice that I have this 7th day of August, 1956, filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago 10, Illinois, an Amendment to the Motion to Stay the Mandate herein, a copy of which Motion and Amendment is herewith served upon you.

Frank J. Gagen, Jr., Attorney for Defendant-Appellant.

Proof of service (omitted in printing).

[fol. 66] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

[Title omitted]

AMENDMENT TO MOTION TO STAY MANDATE

Now comes the Defendant-Appellant herein by his attorneys and asks leave of this court to amend his Motion for stay of mandate in the cause herein, which said motion

was heretofore, on the 2nd day of August, 1956, filed in this Honorable Court, to pray the following relief in the alternative:

"Wherefore, the Appellant respectfully moves this Honorable Court for leave to proceed in the United States District Court for the Northern District of Illinois, Eastern Division, for the sole and limited purpose of filing therein a motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, and that a stay of the mandate of this Court be granted pending the disposition of said motion,

"Or, in the alternative, that a stay of the mandate of this Court be granted to and including the 30th day of August, 1956, pending petition by the Defendant-Appellant for Certiorari to the Supreme Court of The United States."

Carl J. Batter, Frank J. Gagen, Jr.

[fol. 67] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, CHICAGO 10, ILLINOIS

[Title omitted]

ORDER DENYING MOTION FOR LEAVE TO PROCEED IN THE U.S.D.C.—August 13, 1956

On consideration of the Amendment to Motion of Defendant-Appellant to stay mandate, file on August 7, 1956.

It is ordered that that part of said Amendment to Motion which seeks leave of this Court to proceed in the United States District Court for the Northern District of Illinois, Eastern Division, for the purpose of filing therein a Motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, be and the same is hereby, Denied.

[fol. 68] In United States Court of Appeals for the Seventh Circuit

[Title omitted]

Order Staying Mandate—August 13, 1956

On consideration of that part of the Amendment to Motion of Defendant-Appellant filed on August 7, 1956, which seeks a Stay of Mandate,

It is ordered that the issuance of the Mandate of this Court be stayed until August 30, 1956, subject to the provisions of Rule 28 of the revised Rules of this Court.

[fol. 69] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 70] Supreme Court of the United States, October Term 1956

No. —

Sam Achilli, *Petitioner*

vs.

The United States of America

Order Extending Time to File Petition for Writ of Certiorari—August 23, 1956

Upon consideration of the application of counsel for petitioner,

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Sept. 20th, 1956.

Sherman Minton, Associate Justice of the Supreme Court of the United States.

Dated this 23rd day of August, 1956.

[fol. 71] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 430

[Title omitted]

On petition for writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

ORDER DENYING PETITION FOR WRIT OF CERTIORARI—November 19, 1956

On consideration of the petition for a writ of certiorari herein to the United States Court of Appeals for the Seventh Circuit, it is ordered by this Court that the said petition be, and the same is hereby, denied.

[fol. 72] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The order of November 19, 1956, denying the petition for writ of certiorari to the Court of Appeals for the Seventh Circuit is vacated and the petition for writ of certiorari to the United States Court of Appeals is granted limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of § 145 (b) of the Internal Revenue Code of 1939 where the facts also showed a violation of § 3616 (a) of the Internal Revenue Code of 1939. The case is transferred to the summary calendar. The brief of counsel for the petitioner shall be filed by

March 30, 1957, and that of the respondent by April 26, 1957.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4462-8)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 834

SAM ACHILLI, PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 28, 1957

—4637-5

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A

IN UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

JUDGE KNOCH

CRIMINAL CALENDAR

TITLE OF CASE	ATTORNEYS
THE UNITED STATES **11971**	*For U. S.:* ROBERT TIEKEN, ~~Otto Kerner, Jr., U. S. Atty.~~
vs.	
SAM ACHILLI	
732 Brook St.	
Elgin, Ill.	ACHILLI - Peter B. Atwood 10 So. LaSalle St.
	For Defendant: RA 6-9060
	withdrawn ~~Joseph A. Struett 105 W. Madison St~~
	Anna R. Lavin, 1 No. LaSalle St. RA 6-7855
	~~F. A. Ferrari 325 W. North~~
withdrawn	Ave., Chicago, Illinois
Sub-	~~Frank J. Cayen, Jr. 29 S. LaSalle St~~
	Carl J. Better
	910 17th St. N.W.
	Washington 6, D. C.

~~STRIKE OR COSTS~~	AMOUNT	CASH RECEIVED AND DISBURSED				
		DATE	NAME	RECEIVED		DISBURSED
		4-24-55	F.B. - Not. Appeal	5	00	
		6-21-55	- Trans. C.A. 182			5 00
		9-22-55	- Fees - Dr. Appeal	48	45	
		9-26-55	- Clk. C.A. 77			48 45
		6-21-55	- Trans. C.A. 182			5 00
		9-22-55	- Fees - Dr. Appeal	48	45	
		9-26-55	- Clk. C.A. 77			48 45
		1-4-56	Appeal	5	00	
		1-18-56	Trans. to C.A. 182			5 00

~~DISPOSITION~~

DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
	VIO.: Sec. 145(b), Int. Rev. Code; 26 U.S.C., Sec.145(b) (Wilfully and knowingly attempting to defeat & evade large parts of the income tax due & owing by him to the U. S. by filing & causing to be filed with the Coll. of Int. Rev. false & fraudulent income tax returns.)		

A

DOCKET ENTRIES

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF
3-9-53	Filed Indictment (3) (JS-2)	15 00
3-9-53	Order to issue bench warrant and fix bond at $5,000.00 - BARNES, J.	
3-9-53	Issued bench warrant with copy of indictment. mk.	
3-16-53	Filed appearance. bond $5,000.00	
3-18-53	Ent order continue arraignment from March 24, 1953 to April 15, 1953 - Sullivan, J.	
3-19-53	Mld ntc	
" " "	Filed warrant ret'd exctd $2.00	
4-13-53	On defts. motion cs. cont'd. to May 4, 1953 for arraignment and plea-Igoe, J.	
	Mld. notice to attys. 4-14-53.	P
5-4-53	On defts. motion cs.cont'd. to May 13, 1953 for arr and plea-Igoe, J.	
	Mld. notice to attys.5-5-53.	P
5-13-53	Defendant with counsel enters a plea of not guilty and is given 20 days herefrom to file any preliminary motions. U.S.Attorney given 20 days thereafter to answer said motions and hearing on said motions, if any, is set for June 19, 1953 2 P.M.-Igoe,J	
5-13-53	Mld ntcs	
MAY 22 1953	Cause Reassigned to Calendar of Judge KNOCH	
5-28-53	By agreement order time for deft to file preliminary motions extended to July 1, 1953 and hearings on said motions reset to September 25, 1953 - Knoch, J.	
5-29-53	Mld ntc	
6-10-53	Filed motion to dismiss and alternative motions, affidavit in support thereof, brief in support thereof (10) and copy of same	
7-1-53	On Govt's motion enter order to extend time for Government to file its brief in opposition to defendant's motion to dismiss indictment up to and including 8/15/53 - Knoch, J.	
7-2-53	Mld ntc	
7-28-53	Filed Notice. (1)	
" " "	Leave deft. to file instanter supplemental affidavit in support of motion to dismiss indictment, Order time for Govt. to ans. defts. motion to dismiss extended to August 24, 1953-Barnes, J.	
	Mld. notice to attys. 7-29-53.	
7-28-53	Filed Supplemental Affidavit of Joseph A. Strnett in support of motion to dismiss (12)	P
8-10-53	Filed Subpoena Duces Tecum ret'd, served on Ernest C. Wright .70	P
9-2-53	Ent motion [illegible] for inspection (2)	

C

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
6-1-55	Filed memorandum of Judge Knoch (1)		
6-3-55	Mailed copies to atty & U.S.Atty	s	
6-6-55	Filed memorandum for plaintiff in opp to deft's mo for judgt of acquittal etc (14)	s	
6-16-55	On finding of guilty deft committed 2 years on each of counts 1,2 & 3 with sentences in cts 2 & 3 to run concurrently with that imposed in ct 1 & deft fined $2,000.00 on each cts 1,2 & 3-fines to be cumulative. On mo deft order deft released on bond of $7,500 pending appeal & bond on appeal fixed in sum of $7,500 - Knoch, J.	JS3	
6-16-55	Filed appearance bond $7,500.00		
6-21-55	Mailed notices		
6-[illegible]-55	Issued commitment & copy to U.S.Marshal	s	
6-[illegible]-55	Filed Notice of Appeal by Defendant (2)		5 00 pd
6-24-55	Mailed copy of Notice of Appeal to U. S. Atty., U. S. Marshal and copy with Statement of Docket Entries to U. S. C. A.	P	
6-24-55	Filed stipulation		
6-24-55	By stip time in which d t is to file his designation of record on appeal be & is extended to & including July 19,1955-Hoffman,J.		
6-27-55	Mailed notices	s	
[illegible]-19-55	Filed Statement of Points (2)		
[illegible]-19-55	Filed Designation of Record (3)	P	
7-28-55	Filed Notice and Motion (1)(1)		
"	Order time for docketing and filing the record on appeal extd to Sept. 22, 1955 - LaBuy, J. - DRAFT/		
	Mld ntcs 7-29-55	H	
[illegible]-[illegible]-55	Filed Subpoena retd unexecuted (H.Jahnke)		
"	Filed Subpoena retd served (E. Munts) 5.50		
"	Filed Two Subpoenas Duces Tecum retd unexecuted -		

[illegible]-19-55	Filed Designation of Record (3)	P	
7-28-55	Filed Notice and Motion (1)(1)		
"	Order time for docketing and filing the record on appeal extd to Sept. 22, 1955 - LaBuy, J. - DRAFT/		
	Mld ntcs 7-29-55	H	
[illegible]-[illegible]-55	Filed Subpoena retd unexecuted (H.Jahnke)		
"	Filed Subpoena retd served (E. Munts) 5.50		
"	Filed Two Subpoenas Duces Tecum retd unexecuted -		
"	Filed 35 Subpoenas Duces Tecum retd executed (no charge) -		
"	Filed 23 Subpoenas Duces Tecum retd executed 77.30	H	
[illegible]-[illegible]-55	Filed Notice (1)		
"	Filed Motion of defendant (1)		
	Enter order excusing Clerk on Completion of Transcript of record and to certify original exhibits on appeal in lieu of copies - DRAFT - Knoch, J. (1)		
	Mailed Notice to ATtys. 9-22-55		
[illegible]-[illegible]-55	Filed Government's Exhibits 1 to 27 incl.; 29 to 32 incl.; 32a;33 to 56 incl.; 58, 60, 60a, 62 to 79 incl.; 80a, 81 to 90 incl.; 92, 102, 104 to 108 incl.; 110 to 123 incl.; 123a,b & c; 124, 124a,b & c; 125, 125a & b; 126; 126a,b & c; 127, 127a,b & c; 128; 129, 129a, b,c & d; 130, 130a & b; 131; 131a, b & c; 132; 132a,b & c; 133, 133a, b & c; 134; 134 a& b; 135; 135a,b & c& d; 136,136a, b & c; 137, 137a, b & c; 138; 138a,b & c; 139a, 140, 140a, b & c; 141; 141a,b & c; to 144, 144a,b & c; incl.; 145, 145 a & b; 146, 146a, b & c; to 149, 149, a, b & c; 150; 150a & b; 151; 151a,b & c; 152; 153; 153a & b; 154, 154 a & b; 155; 155a, b & c; 156; 156a, 157a, 158a, 159; 159a & b; 160; 160a, b c, d & e; 161, 161a, 162, 164, 165, 166, 167, 167a, 168 to 175, 177 to 182 incl.;183, 183a,b & c; 184; 184a and b; 184, 185a, b & c; 185; 186, 186b, c & d; 187, 187a, b, & c & d, 188; 188a, b & c; 189 to 196, incl.; ;96F. 197to 202, incl., 203, 203a & b, 204to 216, 220 to 232 incl.; 233b, 234 to 266, 269, 270a, 271, 272, 273, 273a, 274, 275, 278, 279, and 280.		
[illegible]-[illegible]-55	Filed Defendant's exhibits 4, 5, 6, 7, 8, 9, 10, 12, 13 and 17		
[illegible]-[illegible]-55	Clerk's file copy of transcript of proceedings had on Nov. 8, 9,15, 16, 17, 18 and 22, 1954; before Judge Knoch, filed by official court reporter - two volumes		

C

D

DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
9-22-55	Clerk's file copy of transcript of proceedings had before Judge Knoch, on April 11, 12, 13, 14, 18, 19, 20, 21, 25, 26, 27, 28, and May 2, 3, 4, 5, 9 and 10 and 11, 1955 filed by Official court reporter (six (6) Volumes) (2569)		
	Clerk's File copy of Transcript of proceedings had on May 27, 1955 and June 16, 1955 before Judge Knoch, filed by official court reporter (59 & 6)		
9-22-55	Transmitted Transcript of record on appeal to USCA together with original exhibits filed 9-20-55 B		48 45
11-26-56	Filed Opinion of U.S.C.A.		
	Filed Mandate of U.S.C.A., Judg. of D.C. is REVERSED as to Count I and AFFIRMED as to Counts II and III H		
11-26-56	Filed Notice, Motion and Petition (1)(1)		
"	On deft's motion order stay of mittimus until 12 noon, Dec.27,1956, and order deft's motion to correct or reduce sentence entd and taken under advsmt on brfs; supptg brf to be filed by Nov.28,1956; answering brf by Dec.10,1956 and reply within 5 days thereafter. Order leave to Anna R. Lavin to file appearance as addtl counsel for deft - Knoch,J.		
	Mld ntcs 11-26-56		
11-26-56	Filed appearance of atty for deft. H		
11-28-56	Filed deft's memo in suppsrt of mo to vacate or reduce sent. jk		
12-7-56	Filed Memo in opp. to deft's mo to vacate jk		
12-14-56	Filed Reply in support of motion pursuant to Rule 35 H		
12-20-56	Filed Notice and Motion		
	Order deft's motion to conform judgment & commitment to Mandate entd & contd for entry of order until dispsn of motion now under advsmt - Knoch, J.		
	Mld ntcs 12-20-56		

11-28-56	Filed deft's memo in suppsrt of mo to vacate or reduce sent. jk		
12-7-56	Filed Memo in opp. to deft's mo to vacate jk		
12-14-56	Filed Reply in support of motion pursuant to Rule 35 H		
12-20-56	Filed Notice and Motion		
	Order deft's motion to conform judgment & commitment to Mandate entd & contd for entry of order until dispsn of motion now under advsmt - Knoch, J.		
	Mld ntcs 12-20-56 H		

12-27-56	Enter order amending judg and comm. of June 16,1955 to conform to Mandate of U.S.C.A: for the 7th Circuit - DRAFT - Knoch, J.		
	Mld ntcs 12-28-56		
12-27-56	Enter order denying deft's motion heretofore made to correct sentence and granting deft's motion to reduce sentence on Counts 2 and 3 to 1 year on each of said counts and imposing a fine of $1,000.00 on each of said counts with sentence in Count 3 to run concurrently with Count 2 and fines to be cumulative. On deft's motion order stay of execution extended to Jan.28,1957 at 12:00 noon with present bond to stand - DRAFT - Knoch, J. Supp. J.S-8. ntc.		
	Mld ntcs 12-28-56		
12-28-56	Issued 2 c.c. each of above two orders to U. S. Marshal H		
1-8-57	Filed Memorandum of Judge Knoch		
	(Mld copies to U.S.Atty and attys.) H		
1-8-57	Filed Notice of Appeal of Defendant (2)		5 .0
	Mailed copy of Notice of Appeal to U.S.Atty., and U.S.Marshal, copy with statement of docket entries to U.S.C.A. 7th Circuit B		
1-9-57	On defendant's motion order bond on appeal fixed in sum of $7500.00 and leave granted to file amended notice of appeal - Knoch, J.		
	Mailed notice to attorneys 1-9-57		
1-9-57	Filed Amended Notice of Appeal (2)		
	Mailed copy of Amended notice of appeal to U.S.Atty., U.S.Marshal and U.S.C.A. 7th Circuit B		
1-10-57	Filed Appeal Bond - $7,500.00 (Marshal notified) H		
2-6-57	Clerk's file copy of transcript of proceedings had on Dec. 27,1956 before Judge Knoch filed by official court reporter (11)B		
2-[illegible]	Filed Appearance of atty for deft. H		

D

[fol. E] UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and partial copy of the original docket entries in the cause entitled:

United States of America vs. Sam Achilli No. 53 CR 154;

now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois this 8th day of February, A. D. 1957.

Roy H. Johnson, Clerk, by Gizella Butcher, Deputy Clerk.

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA, Plaintiff,

v.

SAM ACHILLI, Defendant

PREFIX TO RECORD PURSUANT TO RULE 12(c)—February 6, 1957

Style of Court: District Court of the United States for the Northern District of Illinois, Eastern Division.

Title of Case: United States of America v. Sam Achilli, No. 53-CR-154.

Commencement of Action: Indictment filed March 9, 1953.

Parties: United States of America, Plaintiff; Sam Achilli, Defendant, 732 Brook Street, Elgin, Illinois.

Pleadings Filed: Indictment March 9, 1953, charging the filing of false and fraudulent income tax returns, with intention to evade the tax for the calendar years 1946, 1947 and 1948. Not Guilty plea, May 13, 1953.

Defendant Status: Bail taken for trial in District Court. Bail taken for this Appeal.

Trials: First trial: November 8 to 22, 1954, resulting in declaration of mistrial by Court: Second trial: April 11 to May 27, 1955, resulting in conviction on all three counts of Indictment.

Judge: Hon. Win G. Knoch.

Verdict: Trial by Jury. Verdict of guilty by Jury on all three counts of Indictment.

Final Decree: Judgment and sentence of the Court was on June 16, 1955.

Sentence: Two years on each count, sentences to run concurrently; and fine of two thousand dollars ($2,000) on each count.

Date of Appeal: June 24, 1955.

[fol. 2] Opinion of United States Court of Appeals, Seventh Circuit, filed June 5, 1956, reversed the judgment of conviction on the first count, and affirmed the judgment of conviction on the second and third counts (234 F. 2d 797). The Supreme Court on November 19, 1956, denied certiorari, and the matter came on before The Honorable Win G. Knoch, District Judge, for sentencing under the mandate of the Court of Appeals.

The mandate of the Court of Appeals, Seventh Circuit, filed November 26, 1956.

Pleadings Subsequent to Filing of Mandate:

November 26, 1956. Motion and Petition filed to correct or reduce sentence.

December 19, 1956. Motion to conform judgment and commitment to mandate.

December 27, 1956. Order amending judgment and commitment to conform to mandate.

December 27, 1956. Order denying motion to correct sentence and granting motion to reduce sentence.

January 2, 1957. Memorandum Opinion of The Honorable Win G. Knoch, District Judge, filed.

January 4, 1957. Notice of appeal filed.

January 7, 1057. Amended notice of appeal filed.

January 17, 1957. Bail taken for this Appeal.

Date of this Appeal; January 7, 1957.

Peter B. Atwood, Attorney for Defendant.

Dated, February 6, 1957.

[fol. 3] Placita (omitted in printing).

[fol. 4] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

(Sec. 145(b), Internal Revenue Code; Title 26, United States Code.

UNITED STATES OF AMERICA

vs.

SAM ACHILLI

INDICTMENT—Filed March 9, 1953

The March 1953 Grand Jury charges:

That on or about the 10th day of March, 1947, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $11,753.96 and that the amount of tax due and owing thereon was the sum of $2,780.15; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $44,254.60, upon which said net income he owed to the United States of America as income tax of $20,856.74.

In violation of Section 145(b), Internal Revenue Code; Title 26, United States Code.

[fol. 5] Count Two

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1948, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, did wilfully and knowingly attempt to defeat and evade a large part of the

income tax due and owing by him to the United States of America for the calendar year 1947, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, a false and fraudulent income tax-return wherein he stated that his net income for said calendar year was the sum of $16,785.52 and that the amount of tax due and owing thereon was the sum of $4,620.98; whereas, as he then and there well knew, his net income for the said calendar year was the sum of $70,785.75, upon which said net income he owed to the United States of America an income tax of $39,484.76.

In violation of Section 145(b), Internal Revenue Code; Title 26 United States Code.

[fol. 6] Count Three

The March 1953 Grand Jury further charges:

That on or about the 15th day of March, 1949, in the Northern District of Illinois, Eastern Division, the defendant, Sam Achilli, late of Elgin, Illinois, who during the calendar year 1948 was married, did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him and his wife to the United States of America for the calendar year 1948, by filing and causing to be filed with the Collector of Internal Revenue for the First Internal Revenue Collection District of Illinois, at Chicago, Illinois, a false and fraudulent joint income tax-return on behalf of himself and his said wife, wherein it was stated that their net income for said calendar year was the sum of $34,053.12 and that the amount of tax due and owing thereon was the sum of $8,968.52; whereas, as he then and there well knew, their joint net income for the said calendar year was the sum of $52,805.05, upon which said net income there was owing to the United States of America an income tax of $17,997.25.

In violation of Section 145(b), Internal Revenue Code; Title 26, United States Code.

A true bill.

[Illegible] Foreman.

[Illegible], United States Attorney.

[fol. 7] [File endorsement omitted.]

[fol. 8] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, ss:

The President of the United States of America

To the Honorable the Judges of the United States District Court for the Northern District of Illinois, Eastern Division, November 23, 1956.

MANDATE

Greeting:

Whereas, lately in the United States District Court for the Northern District of Illinois Eastern Division before you, or some of you, in a cause between the United States of America, Plaintiff and Sam Achilli, Defendant, No. 53-Cr-154, a judgment was entered on the sixteenth day of June, 1955.

[fol. 9] as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Seventh Circuit by virtue of an appeal by Sam Achilli, agreeably to the act of Congress, in such case made and provided fully and at large appears.

[fol. 10] And whereas, in the term of October, in the year of our Lord one thousand nine hundred and fifty-five, the said cause came on to be heard before the said United States Court of Appeals for the Seventh Circuit, on the said transcript of record, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed as to Count I and affirmed as to Counts II and III of the Indictment.

Tuesday, June 5, 1956

And afterwards, to-wit, on the twentieth day of June, 1956, there was filed in the Office of the Clerk of this Court a Petition for Rehearing, which said Petition for Rehearing was denied on the thirty-first day of July, 1956.

[fol. 11] You, therefore, are hereby commanded that such further proceedings be had in said cause, as according to right and justice, and the laws of the United States, ought

to be had, the said Judgment notwithstanding. Witness, the Honorable Earl Warren, Chief Justice of the United States, the twenty-third day of November, in the year of our Lord one thousand nine hundred and fifty-six.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit.

[File endorsement omitted]

[fol. 12] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION TO CORRECT OR REDUCE SENTENCE AND PETITION FOR STAY OF MITTIMUS—Filed November 26, 1956

Now comes the defendant, Sam Achilli, by his attorneys, Frank J. Gagen, Jr., and Anna R. Lavin, and moves the court, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, to vacate, set aside, correct or reduce the sentence heretofore imposed herein, on the following grounds:

1. The pertinent counts of the indictment herein whereupon the judgment of guilty was imposed are duplicitious
2. The sentence and fine are in excess of that authorized by law.
3. The equitable considerations occurring subsequent to sentence, and therefore, without the knowledge of the Court.

The defendant further prays the court to stay the mittimus hereon pending the determination of the foregoing motion, or until such time as this Court may deem meet.

Frank J. Gagen, Jr., 29 South LaSalle Street, Chicago 3, Illinois, Anna R. Lavin, One North LaSalle Street, Chicago 2, Illinois.

[fol. 13] [File endorsement omitted]

[fol. 14] IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA,

vs.

SAM ACHILLI, Defendant

TRANSCRIPT OF PROCEEDINGS—Filed February 6, 1957

had in the above-entitled cause before the Honorable WIN G. KNOCH, one of the Judges of said Court, in his Court Room in the United States Court House, Chicago, Illinois, on Thursday, December 27, 1956, at 10:30 o'clock a. m.

PRESENT:

Hon. Robert Tieken, United States Attorney, Northern District of Illinois, Eastern Division, by

Mr. Edward J. Calihan, Jr., Assistant United States Attorney, appeared for the United States of America;

Mr. Frank J. Gagen, Jr., and Miss Anna R. Lavin, appeared for the Defendant.

[fol. 15] The Clerk: 53-CR-154, United States of America, against Sam Achilli, Motion of Defendant for further stay of mittimus until disposition of motion now under advisement.

Mr. Gagen: Good morning, your Honor. We are presenting this motion to your Honor this morning, recalling to you that the stay heretofore granted expires at noon today. The stay, of course, was granted pending motion under Rule 35 for reduction of sentence.

By this motion I do not by any means mean to hurry the Court in its decision at all, but I would just like to point out the timeliness of it to you.

I also would like to urge upon your Honor further certain considerations that I feel very strongly about, and those pertain to the situation facing the Defendant at this time relative to the sickness of his wife.

I do not imagine, because of the lengthy briefs that the Defendant and the Government have filed with respect to this motion, that your Honor has had an opportunity fully to consider another investigation to advise you of the cir-
[fol. 16] cumstances of this family group. It is quite an impelling thing, and although I do not understand the full significance of it myself, there seems to be quite a degree of permanent injury seriously affecting this woman's ability to care for three little boys, thirteen, nine and four, I believe their ages are.

I know your Honor by reputation would be greatly concerned with seeing the best interests of justice served, and possibly you would further consider it. I do not know what decision you may have reached on it; I just further urge it upon you.

I, of course, have made a great mistake in this case in that I do not think any attorney is wise to allow himself to become emotionally involved with his client, but I feel very strongly for Mr. Achilli apart from being an advocate. I have tried to brush a little of that off on Miss Lavin, and I have had her advice in this case and I am sure you will recognize it in the care with which we have approached the matter now before the Court.

[fol. 17] Of course, your Honor will recall that I sat here as local counsel during the trial of this case. I came in on the case on the day it started to trial. I feel that Mr. Achilli has been the subject of advice that possible has prejudiced him in many instances, but I think that the facts and circumstances that now face him are such that the Court should be well advised. I would just urge in considering further disposition of the stay of mittimus that you give us additional time, if you need additional time to reach a ruling on the matter that has been presented to you.

The Court: Well, I have taken the time in the last two days to go into this matter very thoroughly. I have examined the briefs submitted, the law involved and have given consideration to every conceivable angle in this case.

It is hardly necessary to say that the Court has devoted a lot of time to this case over the last two years. The Defendant has had the benefit of a review both by the Circuit Court of Appeals and the United States Supreme Court.

[fol. 18] Now, with respect to the first count, the Court was reversed, and the Court was affirmed on the last two counts of the indictment. Have you examined this Order, counsel, that has been submitted?

Mr. Calihan: Yes.

The Court: Is that agreeable with the Government?

Mr. Calihan: Yes.

The Court: I am going to enter this Order.

Mr. Gagen: I assume you are referring to the conformance of the judgment commitment to the mandate of the Court.

The Court: That is right.

Mr. Gagen: Thank you, your Honor.

The Court: Now, we have two motions here. One is a motion to correct and the other is a motion to reduce the sentence. After giving this matter very thorough attention I am of the opinion that the motion to correct should be denied.

With respect to the motion for reduction of sentence, I have given much consideration to that particular matter in [fol.19] view of all the circumstances and everything that has transpired here. Now, the point raised by the defense is that the Defendant was actually involved in a misdemeanor under both the second and third counts of the indictment, rather than a felony.

That matter has never been finally adjudicated by our Supreme Court. I can conceive that there is quite a diversity of opinion on that question. I am, therefore, taking that into consideration in my final judgment in this case.

Another matter, of course, is that the first count which involved a sizable amount of non-payment of tax has been eliminated from this case; and I am taking that into consideration.

It is the judgment of the Court, and I will file a memorandum to convey more completely my ideas in this matter, that the sentence should be reduced to one year and that there should be a $1,000 fine under each one of the two counts, the second and third counts of the indictment; [fol. 20] and the sentences are to run concurrently and not consecutively. That is the judgment of the Court.

I feel that I have taken into consideration every conceivable aspect of this matter, and it is my present conviction

that this determination, even after the long road that we have traveled, has given the Defendant the benefit of every doubt. I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done. With all that in mind, I think this is a sound and proper disposition of the case, and that the ends of justice have been met. That is it, ladies and gentlemen.

Mr. Gagen: Thank you, your Honor.

The Court: It is the judgment of the Court that the Defendant be taken from the bar of this Court—

Mr. Gagen: Your Honor, may I just urge upon you—may I interrupt you, please?

The Court: What have you now?

[fol. 21] Mr. Gagen: I am asking for a stay on this, your Honor. You see, we have never had a terminal date with reference to this man's ability to prepare himself for incarceration. I would just ask for a stay of 30 days, at the end of which he will submit himself to the Attorney General for imprisonment. As you know, he has this active automobile business, and his situation at home, and he has to make other arrangements. In view of those circumstances, would you please consider a 30-day stay for those purposes?

Mr. Callihan: Before getting to that, is it my understanding that the net result is that there be a one-year sentence and a $2,000 fine, $1,000 on each of the two counts?

The Court: Yes.

Mr. Gagen: The fines cumulative.

The Court: Yes.

Mr. Callihan: As far as the stay is concerned, your Honor, I am only down here to represent the Government in place of Mr. Russo. I am not too familiar with the facts.

I do know, however, that he does have a going business [fol. 22] and that he does have responsibilities at home. Therefore it would be our position that it would be a matter entirely within the sound discretion of the Court.

The Court: Well, with the understanding that this matter is finally concluded and that there will be no further motions of any kind or character——

Mr. Gagen: Yes, your Honor.

The Court: (continuing)—it will be the judgment of the Court that the Defendant be taken from the bar of this Court and placed in the hands of the Attorney General of the United States under the second count of the indictment for a period of one year, together with a fine of $1,000, unless sooner released by due process of law; and that under the third count of the indictment, the Defendant be placed in the hands of the Attorney-General for disposition to a proper penal institution for a period of one year, with a fine of $1,000, unless sooner released by due process of law, the sentence on Count 3 to run concurrently with that on Count 2, the fines to be cumulative, or a total of $2,000.

[fol. 23] Execution will be stayed to January 28th at the hour of twelve o'clock noon. He is to report at the Marshal's office at that time. Now there is a question of a bond.

Mr. Gagen: I have the surety present. He has no objection to a further continuance on this bond.

The Court: Let's make that a matter of record, then.

Mr. Gagen: Will you step forward, please.

The Court: Are you agreeable to continuing on the bond to the date indicated and the hour indicated by the Court?

Mr. Markheim: Yes.

The Court: All right. That will be all.

Mr. Gagen: Thank you very much, your Honor.

Miss Lavin: Thank you.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

[fol. 24] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

MOTION TO CORRECT THE JUDGMENT AND COMMITMENT ETC.—
Filed December 19, 1956

Now comes Sam Achilli, defendant, by and through his attorneys, Frank J. Gagen, Jr. and Anna R. Lavin, and moves the Court as follows:

1. On June 16, 1955, upon a verdict of guilty on all three counts of the indictment herein, this Court entered its judgment on said verdict and committed the defendant, Sam Achilli, ". . . to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on each of Counts 1, 2 and 3 of the Indictment, that the sentences imposed on counts 2 and 3 shall run concurrently with the sentence imposed on count 1 and besides that he forfeit and pay to the United States of America a fine in the sum of Two Thousand Dollars ($2,000.00) on each of counts 1, 2 and 3 of the Indictment, that said fines shall be cumulative and the defendant to stand committed until said fines are paid or until he shall be otherwise discharged by due course of law. . . ."

2. That on November 26, 1956 the mandate of the United States Court of Appeals for the Seventh Circuit was filed herein, in substance, as follows:

[fol. 26] ". . . the judgment of said District Court in the cause appealed from be, and the same is hereby, Reversed as to Count I and affirmed as to Counts II and III of the Indictments. . . ."

Wherefore, defendant moves to correct the judgment and commitment heretofore entered herein to conform to the mandate of the United States Court of Appeals for the Seventh Circuit and prays that such a further order be entered in such form as this Court directs.

Frank J. Gagen, Jr., Anna R. Lavin, Attorneys for Defendant.

[fol. 26a] [File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA, PLAINTIFF

vs.

SAM ACHILLI, Defendant

ORDER AMENDING JUDGMENT AND COMMITMENT TO CONFORM TO MANDATE—December 27, 1956

This cause coming on to be heard on notice and on the motion of Sam Achilli, defendant, through his respective counsel, for an order to conform the prior judgment and commitment of this Court on June 16, 1955 to the mandate of the United States Court of Appeals for the Seventh Circuit as filed herein on November 26, 1956.

And the Court being fully advised in the premises,

It is hereby ordered, that the judgment and commitment of this Court entered herein on the 16th day of June, 1955 be and the same is hereby amended to conform to the mandate of the United States Court of Appeals for the Seventh Circuit to read in part as follows:

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two (2) years on each of Counts 2 and 3 of the Indictment, that the sentence imposed on Count 3 shall run concurrently with the sentence imposed on Count 2 and besides that he shall forfeit and pay to the United States of America a fine [fol. 28] in the sum of Two Thousand Dollars ($2,000.00) on each of Counts 2 and 3 of the indictment, that said fines shall be cumulative and the defendant to stand committed until said fines are paid or until he shall be otherwise discharged by due course of law.

It is ordered that the Clerk deliver a certified copy of the judgment and commitment to the United States Marshal

or other qualified officer and that the copy serve as the commitment of the defendant.

Entered this 27th day of December, 1956.

Win G. Knoch, United States District Judge.

[fol. 28a] [File endorsement omitted.]

[fol. 29] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

ORDER DENYING MOTION TO CORRECT AND GRANTING MOTION TO REDUCE SENTENCE—December 27, 1956

This cause this day coming on for hearing on the defendant's motions heretofore entered herein to correct or reduce sentence comes the United States by the United States Attorney comes also the defendant Sam Achilli in his own proper person and by his counsel and the Court being fully advised in the premises it is

Ordered that the defendant's motion to correct sentence be and the same is hereby denied and it is

Further ordered that the sentence heretofore imposed on Counts 2 and 3 of the Indictment be and the same is hereby reduced to a period of One (1) Year on each of said counts and that the fine heretofore imposed on each of Counts 2 and 3 be and the same is hereby reduced to the sum of One Thousand Dollars ($1,000.00), that the sentence imposed on Count 3 shall run concurrently with the sentence imposed on Count 2 and that the fines shall be cumulative and on the defendant's motion it is

Further Ordered that the stay of execution be and the same is hereby extended to January 28, 1957 at 12:00 o'clock Noon and that the defendant's present bond shall remain in full force and effect.

December 27, 1956.

Win G. Knoch, United States District Judge.

[fol. 30] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 53-CR-154

UNITED STATES OF AMERICA

vs.

SAM ACHILLI

MEMORANDUM—January 2, 1957

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceivable aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved nonpayment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1000, and one year under the Third Count of the indictment together with a fine of $1000, unless sooner

released by due process of law, the sentence under the Third [fol. 31] Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

Win G. Knoch, United States District Judge.

Date: Jan. 2, 1957.

[fol. 31a] [File endorsement omitted.]

[fol. 32] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

NOTICE OF APPEAL—Filed January 4, 1957

Name and address of appellant: Sam Achilli, 65 River Bluff Road, Elgin, Illinois.

Names and address of appellant's attorneys: Frank J. Gagen, Jr., #845, 29 S. LaSalle St., Chicago 3, Illinois. Anna R. Lavin, One North LaSalle St., Chicago 2, Illinois.

General Statement of Offense: Wilfully and knowingly attempting to defeat income taxes by filing with the Collector of Internal Revenue false income tax returns for the years 1947 and 1948.

Concise Statement of Judgment and Order, Dates and Sentences: Judgment was entered on June 16, 1955 by Win G. Knoch Judge, United States District Court for the Northern District of Illinois, on a jury verdict of guilt on three Counts of the Indictment.

The defendant was sentenced to two years concurrently

on all three counts and fined $2,000.00 on each count, cumulatively. On June 5, 1956, the United States Court of Appeals for the Seventh Circuit on the convictions and sentences reversed count I and affirmed counts II and III. [fol. 33] On November 26, 1956, on the date the Mandate of the United States Court of Appeals for the Seventh Circuit was filed, the defendant moved to vacate, correct or reduce the sentences and fines of June 16, 1955. On December 27, 1956 the Honorable Win G. Knoch, Judge, United States District Court for the Northern District of Illinois denied said motion in part.

The defendant is at liberty on $7,500.00 bond, pending appeal.

I, Sam Achilli, the appellant, by my attorneys, Frank J. Gagen, Jr., and Anna R. Lavin, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order of December 27, 1956, denying the motion to vacate or correct the sentences and fines heretofore imposed on me.

Dated: This 4th day of January, 1957.

Sam Achilli, by Frank J. Gagen, Jr., Anna R. Lavin.

[fol. 34] Certificate of Mailing (omitted in printing).

[fol. 35] IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

Present: Honorable Win G. Knoch, District Judge.

[Title omitted]

ORDER FIXING APPEAL BOND—January 7, 1957

On motion of defendant by his counsel it is

Ordered that bond on appeal be and the same hereby is fixed in the sum of $7,500.00 and that leave be and hereby is granted to file an amended notice of appeal.

[fol. 36] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

[Title omitted]

AMENDED NOTICE OF APPEAL—Filed January 7, 1957

Name and Address of Appellant: Sam Achilli, 65 River Bluff Road, Elgin, Illinois.

Name and Address of Appellant's Attorneys: Frank J. Gagen, Jr., 29 South La Salle St., Chicago 3, Illinois, Anna R. Lavin, One North La Salle St., Chicago 2, Illinois.

General Statement of Offense: Wilfully and knowingly attempting to defeat income taxes by filing with the Collector of Internal Revenue false income tax returns for the years 1947 and 1948.

Concise Statement of Judgment and Order, Dates and Sentences: Judgment was entered on June 16, 1955 by Win G. Knoch, Judge, United States District Court for the Northern District of Illinois, on a jury verdict of guilt on three Counts of the Indictment.

The defendant was sentenced to two years concurrently on all three counts and fined $2,000.00 on each count, cumulatively. On June 5, 1956, the United States Court of Appeals for the Seventh Circuit on the convictions and sentences reversed count I and affirmed counts II and III.
[fol. 37] On November 26, 1956, on the date the Mandate of the United States Court of Appeals for the Seventh Circuit was filed, the defendant moved to vacate, correct or reduce the sentences and fines of June 16, 1955. On December 27, 1956 the Honorable Win G. Knoch, Judge, United States District Court for the Northern District of Illinois, granted the motion to reduce the sentence, setting same at one year, concurrent, and $1,000.00, cumulative, but denied the motion to correct sentence; later, on January 2, 1957, the Court filed a memorandum decision to the orders of December 27, 1956 wherein said decision denied the motion to correct and an integral part of the motion to reduce previously acted upon favorably.

The defendant is at liberty on $7,500.00 bond, pending appeal.

I, Sam Achilli, the appellant, by my attorneys, Frank J. Gagen Jr., and Anna R. Lavin, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the orders of December 27, 1956, and January 2, 1957, denying the motion to vacate, correct or reduce the character of the sentences and fines imposed on me.

Dated: This 7th day of January, 1957.

Sam Achilli, By: Frank J. Gagen, Jr., Anna R. Lavin.

[fol. 38] Certificate of Mailing (omitted in printing).

[fol. 39] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted]

STIPULATION OF RECORD ON APPEAL—Filed February 7, 1957

It is hereby stipulated and agreed by and between the undersigned counsel for the respective parties to the above entitled cause, that the record to be filed in the United States Court of Appeals for the Seventh Circuit, pursuant to the appeal taken in the above entitled cause, include therein the following:

1. Indictment filed March 9, 1953.
2. Mandate of United States Court of Appeals, Seventh Circuit, dated November 26, 1956.
3. Motion to Correct or Reduce Sentence and Petition for Stay of Mittimus, filed November 26, 1956.
4. Transcript of proceedings before The Honorable Win G. Knoch, Judge, had on December 27, 1956, with respect to the hearing on said Motion to Correct or Reduce Sentence.

5. Motion to Conform Judgment and Commitment to Mandate, filed December 19, 1956.

6. Order entered December 27, 1956, amending judgment and commitment to conform to mandate.

[fol. 40] 7. Order entered December 27, 1956, denying Motion to Correct and granting Motion to Reduce Sentence.

8. Memorandum Opinion of The Honorable Win G. Knoch, Judge, filed January 2, 1957, with respect to Order entered December 27, 1956 denying Motion to Correct Sentence and granting Motion to Reduce Sentence.

9. Notice of Appeal filed January 4, 1957.

10. Amended Notice of Appeal filed January 7, 1957.

11. This Stipulation of Designation of Record on Appeal.

Dated, this 6th day of February, 1957.

The United States of America, By R. Tieken, United States Attorney, Attorney for Plaintiff, Sam Achilli, By Peter B. Atwood, Attorney for Defendant.

[fol. 41] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

[Title omitted]

STATEMENT PURSUANT TO RULE 12(D) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT—Filed February 8, 1957

R. Tieken, United States Attorney, makes the following statement pursuant to Rule 12(d) of the United States Court of Appeals:

1. The name of the appellee is the United States of America.

2. Counsel for the appellee are as follows:

R. Tieken,
United States Attorney,
450 United States Court House,

Chicago 4, Illinois;
John P. Lulinski,
Assistant United States Attorney,
450 United States Court House,
Chicago 4, Illinois;
Edward A. Strugala,
Assistant United States Attorney,
450 United States Court House,
Chicago 4, Illinois.

R. Tieken, United States Attorney.

JPL:meh.

[fol. 42] In United States District Court

United States of America,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States of America, vs. Sam Achilli, No. 53 CR 154, as follows:

Indictment filed March 9, 1953.

Mandate of the United States Court of Appeals, for the Seventh Circuit filed November 26, 1956.

Defendant's motion to Correct or Reduce Sentence and Petition for Stay of Mittimus filed November 26, 1956.

Clerk's File copy of Transcript of Proceedings had before the Honorable Win G. Knoch, District Judge on December 27, 1956 and filed February 6, 1957.

Motion of Defendant to correct judgment and commitment filed December 19, 1956.

Order entered December 27, 1956 amending judgment and commitment to conform to mandate.

Order entered December 27, 1956 denying motion to correct and granting motion to reduce sentence.

Memorandum of the Court filed January 2, 1957.

Defendant's Notice of Appeal filed January 4, 1957 (Clerk's Certificate of mailing attached).

[fol. 43] Order entered January 7, 1957, fixing appeal bond in the sum of $7500.00.

Amended Notice of Appeal filed January 7, 1957 (Clerk's Certificate of mailing attached).

Stipulation of Record on appeal filed February 7, 1957.

Statement pursuant to Rule 12(d) of the United States Court of Appeals for the Seventh Circuit, filed February 8, 1957.

filed and entered among the records of the said Court in my office, on the dates indicated.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 8th day of February, 1957.

Roy H. Johnson, Clerk. By Gizella Butcher, Deputy Clerk.

[fol. 44] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Pursuant to the Order of this Court entered on the eighth day of March, 1957, I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, herewith certify and transmit to the Supreme Court of the United States the Original Transcript of Record, filed in this Court on the ninth day of February, 1957, in appeal.

No. 11971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of March A. D. 1957.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, By: R. Hays Blanchard, Chief Deputy Clerk.

[fol. 45] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Win G. Knoch, Trial Judge

MOTION TO CONSOLIDATE RECORD—Filed February 13, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order to consolidate the record heretofore filed in this cause with the printed record in the prior appeal in this cause, Docket No. 11575.

The record as so consolidated will provide the Court with the entire record in this cause, and will permit counsel for the parties hereto to make reference to such parts of the former record as may be necessary during the course of this appeal.

Respectfully submitted, Peter B. Atwood, Counsel for Defendant-Appellant.

Dated, February 12, 1957.

[File endorsement omitted.]

[fol. 46] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

MOTION—Filed February 13, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order granting leave to file the affidavit of Peter B. Atwood, duly sworn to on February 12, 1957, for the purpose of enlarging the grounds heretofore urged before the District Court in the above entitled cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, and the memorandum decision entered by the District Court herein on January 2, 1957, which imposed a one year imprisonment under the second and third counts of the indictment, to run concurrently and not consecutively, and a fine totaling $2,000,*000*, upon the grounds that such sentence was imposed in violation of the Constitution and the laws of the United States, and the Court was without jurisdiction to impose such sentence, and that such sentence was in excess of the maximum authorized by law.

Respectfully submitted, Peter B. Atwood, Counsel for Defendant-Appellant.

Dated, February 12, 1957.

[File endorsement omitted.]

[fol. 47] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

SAM ACHILLI, Defendant-Appellant

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Honorable Win G. Knoch, Trial Judge

AFFIDAVIT

STATE OF ILLINOIS,
County of Cook, ss:

Peter B. Atwood, being duly sworn, deposes and says:

I am the attorney for the above named defendant-appellant, Sam Achilli (hereinafter called "defendant"), and submit this affidavit in support of his motion for an order vacating, setting aside and correcting that part of the sentence entered by the District Court imposing a one year imprisonment and a fine totaling $2,000.00.

After a trial before The Honorable Win G. Knoch, United States District Judge, and a jury, the defendant was found guilty on the first, second and third counts of the indictment charging him with wilfully attempting to evade and defeat federal income taxes for the calendar years 1946, 1947 and 1948 by filing false and fraudulent income tax returns for such years. On June 16, 1955 the defendant was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000.00 on each count, the fines to be cumulative or a total of $6,000.00.

[fol. 48] Subsequently, on June 5, 1956, the United States Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed the judgment of conviction on the second and third counts (234 F. 2d 797). The effect of such decision was to reduce the alleged

tax deficiency to $43,892.51. The Supreme Court on November 19, 1956 denied certiorari, and the matter came on before The Honorable Win G. Knoch, District Judge, for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, then counsel for the defendant moved the District Court for the entry of an order for leave to file a motion and petition to correct or reduce the sentence and for a stay of mittimus. The grounds asserted in that motion were as follows:

> 1. The pertinent counts of the indictment herein whereupon the judgment of guilty was imposed are duplicit*ious.*
>
> 2. The sentence and fine are in excess of that authorized by law.
>
> 3. The equitable considerations occurring subsequent to sentence, and therefore, without the knowledge of the Court.

On December 27, 1956 the District Court heard argument of counsel with respect to said motion, and sentenced the defendant to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the defendant $1,000 on each count, or a total of $2,000.

The purpose of the present motion and of this affidavit in support of the motion is to enlarge the scope and purpose of the preceding motion to correct or reduce sentence, and to point out the invalidity of the sentence, as hereinafter set forth, thus presenting a proper and complete record for this Court upon which to resolve this appeal.

[fol. 49] The indictment was brought under the provisions of the Internal Revenue Code of 1939. Section 145(b) of the Internal Revenue Code of 1939 provided in part:

> "Any person . . . who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, Section 3616(a) provided in part that any person who

> "Delivers or discloses to the collector or deputy any false or fraudulent . . . return, . . . with intent to defeat or evade the . . . assessment intended to be made . . . shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Said Section 3616(a) has been amended under the Internal Revenue Act of 1954 by omitting the phrase "with intent to defeat or evade" from the present Section, which is now numbered 7207.

On April 30, 1956, the Supreme Court delivered its opinion in *Berra* v. *United States* (351 U. S. 131, 76 S. Ct. 685), a case involving the construction of Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939. The Court had granted certiorari limited to the question of whether it was error for the Trial Judge to refuse to give a requested instruction that the jury might return a verdict of guilty of the "lesser crime" under Section 3616(a) even though the indictment was specifically brought under Section 145(b). The Court affirmed, pointing out:

> "The only question before us is whether the jury should have been allowed to decide whether it would apply § 3616(a) rather than § 145(b), and that we hold was not for the jury. It was, therefore, not error to refuse the requested instruction."

[fol. 50] In the majority opinion, Mr. Justice Harlan stated:

> ". . . here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade taxes (§ 3616(a)). In this instance Sections 145(b) and 3616(a) covered precisely the same ground."

And Mr. Justice Harlan specifically noted:

> "No motions addressed to the validity of the indictment, judgment or conviction, or sentence under § 145(b) were made before, during or after trial."

Stating that the Supreme Court itself should "reverse this case or at least remand for resentencing under the misdemeanor statute, § 3616(a)," Mr. Justice Black, in a dissenting opinion in which Mr. Justice Douglas joined, pointed out that:

> "Although § 3616(a) unambiguously makes the conduct charged a misdemeanor punishable by no more than one year in prison, the trial judge apparently felt that he was compelled to treat the offense as a felony because of the statement in the indictment that the conduct charged was in violation of Section 145(b)."

and added the following footnote:

> "But see Williams v. United States, 168 U. S. 382, 389; United States v. Hutcheson, 312 U. S. 219, 229; Fed. Rules Crim. Proc., 7(c), which provides in part that: 'The indictment . . . shall state for each count the official or customary citation of the statute . . . which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment . . . or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.' Cf. Cole v. Arkansas, 333 U. S. 196."

Referring to the majority opinion, Mr. Justice Black, in a footnote, stated:

> "Apparently the Court means by this to leave open to petitioner the opportunity to challenge his sentence by a motion to correct it under 23 U. S. C. § 2255. Of course I agree that a motion under that section would be appropriate, but I think petitioner is entitled to have it settled now."

[fol. 51] Mr. Justice Black further stated:

> "The Government admits here and the Court assumes that filing a false and fraudulent income tax return is both a misdemeanor under § 3616(a) and a felony under § 145(b). The Government argues that the action of the trial judge must be upheld because 'the Government may choose to invoke either applicable law,' and "the prosecution may be for a felony even though the Government could have elected to prosecute for a misdemeanor.' Election by the Government of course means election by a prosecuting attorney or the Attorney General. I object to any such interpretation of §§ 145 and 3616. I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual —a result which seems to me to be wholly incompatible with our system of justice. Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of § 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Mr. Justice Black then pointed out a basic principle of American law:

> "A basic principle of our criminal law is that the Government only prosecutes people for crimes under statutes passed by Congress which fairly and clearly define the conduct made criminal and the punishment which can be administered. This basic principle is flouted if either of these statues can be selected as the controlling law at the whim of the prosecuting attorney or the Attorney General. 'For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.' Yick Wo v. Hopkins, 118 U. S. 356, 370.
>
> ". . . A judge and jury act under procedural rules carefully prescribed to protect the liberty of the in-

dividual. Their judgments and verdicts are reached after a public trial in which a defendant has the right to be represented by an attorney. No such protections are thrown around decisions by a prosecuting attorney. Substitution of the prosecutor's caprice for the adjudicatory process is an action I am not willing to attribute to Congress in the absence of clear command. Our system of justice rests on the conception of impersonality in the criminal law. This great protection to freedom is lost if the Government is right in its contention here."

[fol. 52] The Government itself, in its brief in the *Berra* case, admits that "Section 3616(a) has frequently been utilized by the Government in the prosecution of income tax cases" (page 23 of brief filed in the Supreme Court).

On January 28, 1957 the Supreme Court granted certiorari in the *Frank Costello* case, Docket No. 666 in the Supreme Court. The question there presented to the Supreme Court is identical to the question raised on the motion to correct or reduce sentence heretofore filed in the District Court on November 26, 1956, and as now presented by the present motion and the affidavit. In the Government's memorandum, in which the Government did not oppose the granting of the petition for certiorari, it is stated at page 2:

> "The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap."

The defendant here asserts that where Congress has made the specific offense of delivering or filing a false and

fraudulent income tax return, with intent to defeat or evade the assessment, a misdemeanor punishable by a $1,000 fine or imprisonment not exceeding one year, or both, neither the Court nor the prosecutor may resort to the general language of a felony statute in order to increase the punishment where the indictment alleges that the defendant filed a false and fraudulent income tax return with intent to evade and defeat taxes or assessments. Thus any sentence [fol. 53] of more than a $1,000 fine or imprisonment for more than one year is in violation of his constitutional rights, especially those rights granted him under the Fifth, Sixth and Eighth Amendments.

Indeed, it is the defendant's alternative position in this motion to vacate sentence and this affidavit, that no conviction under either provisions because of the overlap of Sections 145(b) and 3616(a) is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation (*United States* v. *Evans*, 333 U. S. 483.) If the two provisions may coexist, then only the less harsh of the two may be applied in this case.

The defendant now moves this Court for the entry of an order granting defendant leave to file this affidavit as part of the record in this cause, establishing the additional grounds here asserted for the invalidity of said sentence, this affidavit and motion to stand as a motion to vacate, set aside and correct that part of the sentence which imposed a one year imprisonment and a fine totaling $2,000.00, upon the grounds that such part of the sentence was imposed in violation of the Constitution and the laws of the United States, that the Court was without jurisdiction to impose such part of the sentence, and that such part of the sentence was in excess of the maximum authorized by law.

The motion now made is for the purpose of making clear the defendant's allegations as to the invalidity of the sentence originally imposed and of the sentence imposed on December 27, 1956, unless this Court shall determine in this appeal that the sentence was imposed under Section [fol. 54] 3616(a). In this latter case, there is left for decision the question of whether or not the District Court has jurisdiction to impose any sentence whatsoever, in view of

the inconsistency and overlap of the two sections as herein mentioned.

Peter B. Atwood.

Subscribed and sworn to before me this 12th day of February, 1957. Gladys M. Wolff, Notary Public, Cook County, Illinois. My Commission expires: May 21, 1959. (Seal.)

[fol. 55] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

GOVERNMENT'S OBJECTIONS TO DEFENDANT-APPELLANT'S MOTION TO ENLARGE GROUNDS HERETOFORE ASSERTED IN THE COURT BELOW—Filed February 21, 1957

The United States of America, Plaintiff-Appellee, by R. Tieken, United States Attorney, makes the following objections to Defendant-Appellant's motion to enlarge grounds heretofore asserted in the District Court to vacate sentence.

1. There is no jurisdiction to enlarge grounds upon which a motion is predicated after a notice of appeal is filed from an order thereon.

2. The appellate function does not encompass amendment or enlargement of grounds upon which a motion is predicated as at nisi prius.

3. To permit such enlargement would be in effect to grant Defendant-Appellant a trial de novo before the appeal is concluded.

4. The Defendant-Appellant's motion is based on sophisms and etiological refinements in a belated attempt to expand the grounds of his motion made below and now on appeal.

5. The doctrine of diminution of the record does not apply

to afterthoughts of counsel or to matters not presented to the Court below.

[fol. 56] 6. The Defendant-Appellant's motion as expanded by the affidavit attached thereto at most is but cumulative and proliferative of Defendant-Appellant's contention in the Court below.

Wherefore, it is respectfully submitted that the Defendant-Appellant's motion be stricken or alternatively that the relief sought thereunder be denied.

Respectfully submitted, R. Tieken, United States Attorney, John Peter Lulinski, Assistant United States Attorney, Vincent P. Russo, Special Attorney, Department of Justice.

JPL:ak

[File endorsement omitted.]

[fol. 57] Affidavit of mailing (omitted in printing).

[fol. 58] IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

NOTICE OF MOTION—Filed March 6, 1957

To: Hon. R. Tieken, Esq.
United States Attorney
450 United States Courthouse
Chicago 4, Illinois,
Attorney for Plaintiff-Appellee.

Sir:

Please take notice that I shall file in the Court of Appeals for the Seventh Circuit, 1212 Lake Shore Drive, Chicago, Illinois, on March 6, 1957, a motion for the entry of an

order directing the Clerk of said Court to certify the record in the above entitled cause now on appeal, as filed in said Court of Appeals from the District Court of the United States, and as supplemented by a motion to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, and by a further motion heretofore filed on February 12, 1957 to enlarge the grounds heretofore urged before the District Court in this cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, together with plaintiff-appellee's objections thereto.

Dated at Chicago, Illinois, March 5, 1957.

Peter B. Atwood, 10 South LaSalle Street, Chicago 3, Illinois, Attorney for Defendant-Appellant.

Received a copy of the above and foregoing notice, together with a copy of the motion therein mentioned, this —— day of March, 1957.

R. Tieken, United States Attorney, Attorney for Plaintiff-Appelee.

[File endorsement omitted.]

[fol. 59] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11971

[Title omitted]

EMERGENCY MOTION TO CERTIFY RECORD FOR PETITION FOR CERTIORARI BEFORE JUDGMENT—Filed March 6, 1957

Now comes Peter B. Atwood, counsel for Sam Achilli, defendant-appellant in the above entitled cause, and respectfully moves the Court for the entry of an order directing the Clerk of this Court to certify the record in the above entitled cause now on appeal, as filed in this Court from the

District Court of the United States and as supplemented by a motion to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, and by a further motion heretofore filed on February 12, 1957 to enlarge the grounds heretofore urged before the District Court in this cause for vacating, setting aside and correcting the sentence entered by the District Court on December 27, 1956, together with plaintiff-appellee's objections thereto; and in support thereof, states:

1. The United States Supreme Court on March 4, 1957 entered an order withdrawing its denial of certiorari in this cause on November 14, 1956, and at the same time placed this cause on its Summary Calendar.

[fol. 60] 2. Counsel for Sam Achilli has informed the Clerk of the Supreme Court of the United States that he will promptly file a new petition for certiorari, accompanied by a certified copy of the record as it now stands before this Court.

3. Rule 20 of the Rules of the Supreme Court of the United States provides for the filing of a petition for certiorari before judgment by a Court of Appeals, and the new petition for certiorari will be filed pursuant thereto.

Respectfully submitted, Peter B. Atwood, 10 South LaSalle Street, Chicago 3, Illinois, Attorney for Defendant-Appellant.

March 5, 1957.

[fol. 61] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Before Hon. Walter C. Lindley, Circuit Judge

[Title omitted]

ORDER DENYING MOTION TO ENLARGE GROUNDS, ETC.—March 8, 1957

It is ordered that the motion of counsel for defendant-appellant to enlarge grounds heretofore asserted in the Dis-

trict Court to vacate sentence, filed herein on February 13, 1957, be, and the same is hereby, denied.

It is further ordered that the motion of counsel for defendant-appellant, filed herein on February 13, 1957, to consolidate record, be granted; and it is ordered that the record heretofore filed in this appeal be consolidated with the printed record filed in the prior appeal in this cause, namely Docket No. 11575.

[fol. 62] IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Friday, March 8, 1957

Before Hon. Walter C. Lindley, Circuit Judge

ORDER CONTINUING CASE, ETC.—March 8, 1957

On consideration of the motion and affidavit of counsel for defendant-appellant, filed herein on February 19, 1957, it is ordered that the above entitled appeal be continued generally, and the time within which defendant-appellant may file his appendix and brief otherwise due, according to Rules of this Court, on March 11, 1957, be also continued generally.

On consideration of the emergency motion of counsel for defendant-appellant to certify record for petition for certiorari before judgment, filed herein on March 6, 1957, it is ordered that the Clerk of this Court be directed to certify the record in the above entitled cause, now on appeal, as filed in this Court from the District Court of the United States and as supplemented by order to consolidate the record in this appeal with the appeal heretofore filed as Docket No. 11575, to the Supreme Court of the United States.

[fol. 63] UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

I, Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing ———— pages contain a true copy of the Motion to Consolidate Record, filed February 13, 1957, Motion to Enlarge Grounds heretofore asserted in the District Court to Vacate Sentence, filed February 13, 1957, Government's Objections to Defendant-Appellant's Motion to Enlarge Grounds heretofore asserted in the Court below, filed February 21, 1957,

Emergency Motion to Certify Record for Petition for Certiorari before Judgment, filed March 6, 1957, and Orders, entered March 8, 1957, in

Cause No. 11971

THE UNITED STATES OF AMERICA, Plaintiff-Appellee

vs.

SAM ACHILLI, Defendant-Appellant

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this eighth day of March A. D. 1957.

Kenneth J. Carrick, Clerk of the United States Court of Appeals for the Seventh Circuit. By: R. Hays Blanchard, Chief Deputy Clerk.

[fol. 64] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 834

SAM ACHILLI, Petitioner

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI.—Filed March 25, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is consolidated with No. 430.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Whittaker took no part in the consideration or decision of this application.

(4637-5)

FILE COPY

Office Supreme Court, U.S.
FILED
SEP 17 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CARL J. BATTER
910 Seventeenth St., N. W.
Washington 6, D. C.

FRANK J. GAGEN, JR.
29 So. La Salle St.
Chicago 3, Ill.

ANNA R. LAVIN
1 North La Salle St.
Chicago 3, Ill.
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No.

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Sam Achilli, by his undersigned attorneys, respectfully prays for a writ of certiorari to The United States Court of Appeals for the Seventh Circuit in the foregoing cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit was rendered on June 5, 1956

(Pet. A-1 to A-16) and remains unreported as of this date. Said opinion is contained herein in the Appendix hereto, pages A-1 to A-16.

The petition for rehearing was denied by the Seventh Circuit Court of Appeals on July 31, 1956 (Pet. A-17 to A-20). The opinion denying said petition for rehearing is unreported as of this date. Said opinion is contained herein in the Appendix hereto, pages A-17 to A-20.

The order of the Seventh Circuit Court of Appeals denying the petitioner's motion for leave to proceed in the United States District Court for the Northern District of Illinois under Rule 35, Federal Rules of Criminal Procedure remains unreported as of this date. Said order is contained herein in the Appendix hereto, page A-24; and the motion, collateral motion and order appear herein in the Appendix, pages A-19-22, 23, 25.

JURISDICTION

The judgment of the Seventh Circuit sought to be reviewed is dated June 5, 1956 (Pet. App. p. A-1) and it was entered on that date.

The order denying rehearing is dated July 31, 1956 (Pet. App. p. A-17) and it was entered on that date.

The order denying the motion to proceed before the District Court pursuant to Rule 35 of the Federal Rules of Criminal Procedure is dated August 13th, 1956 (Pet. App. p. A-24) and it was entered on that date.

The order granting an extension to time to and including September 20, 1956 in which to file this petition for certiorari is dated August 23rd, 1956 and was granted by Mr. Justice Minton.

Jurisdiction is conferred upon the Supreme Court of the United States to review this cause by writ of certiorari by Section 1254 of the Judicial Code (Title 28, U.S.C.A.) as enacted June 25, 1948; and the petition is timely within the purview of Rule 37(b)(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED

1. Can the United States Attorney, in a criminal income tax evasion case, in adducing proof of his case-in-chief—as distinguished from corroboration—depart from the manner of determining taxable net income followed by the Commissioner of Internal Revenue, that is, by making specific adjustments to the items of income, revising items of income reported and disallowing claimed deductions; and proceed by proof of the Net Worth method; or, is the United States Attorney in adducing proof in his case-in-chief, required to adhere to the method that the Commissioner of Internal Revenue uses to clearly reflect the income?

2. Where the United States Attorney, in a criminal tax evasion case, departs from the manner of determining taxable net income pursued by the Commissioner of Internal Revenue in his audit of a taxpayer's return, and proceeds to prove his case-in-chief by the Net Worth method, is evidence of Net Worth admissible in the absence of it being grounded on evidence that the Commissioner of Internal Revenue, personally, is of the opinion that such Net Worth method does clearly reflect the income?

3. Is it proper and in accordance with due process for the Court below where it finds "conflicting testimony with respect to each of them" (Pet. A-9) respecting glaring discrepancies in the closing Net Worth

to nevertheless hold "there was sufficient evidence to submit to the jury upon each of these matters" (Pet. A-10) and fail to reverse the conviction; or, should the Court below—under circumstances where its more exacting and leisurely examination of the actual transcript as contracted with the jury's recollection of the testimony taken over a period of a month and covering three years of activity, as well as a jury's lesser ability to comprehend the import of a myriad of details of the transactions comprising such Net Worth—hold it lacks probative value and reverse the conviction?

4. Is proof of a "likely source" of income, standing alone, without proof of the use of such funds in the acquisition of assets or the liquidation of liabilities sufficient to support the increase in Net Worth computation adduced as proof of unreported taxable income in a criminal trial; or, is it necessary to prove that the increases in Net Worth are the result of the use of such "likely source" of funds?

5. Was the Court below correct in holding that a partner cannot embezzle funds from a partnership of which he is a member, and that he is accountable to his partner for only one-half of such funds; or, is a partnership under the laws of Illinois a separate entity in which the partners each hold an undivided interest in all the partnership assets, and, a fortiori the secret retention of such funds not condoned constitutes embezzlement and therefore not taxable income?

6. Where a remark during the trial by the prosecutor in the presence of the jury is immediately followed by a defense motion for a mistrial, said motion being denied; and where the prosecutor did in the final part of his summation to the jury make

eighteen remarks so grave as to cause defense counsel to object twice and to ask the Court to instruct the jury that such remarks were made at a time when, under the rules, the defendant could not respond, which instruction was given; and the Court below characterized three of the remaining sixteen instances in language as follows:

> "We do not condone the prosecutor's unqualified statement that all defense witnesses were unwilling witnesses, responding only to subpoena." (Pet. A-3)

and

> "Although counsel's reference to the capital stock was unwarranted, it was an invited response to defense counsel's assertion and argument to the jury that the value of the corporate stock had been omitted from defendant's opening net worth statement." (Pet. A-3)

and

> "Government counsel may, at times, have been an overzealous advocate." (Pet. A-5)

was the Court below correct in holding that absent specific objection in each of the sixteen instances at the time of utterance, claim of prejudicial misconduct comes too late; or, was the objection in the form of an instruction timely, and as a matter of public interest is it not a duty of a Court of its own motion to protect a defendant in his right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice?

7. Whether the factual allegations of the indictment, which state offenses provided for with articulate specificity under the provisions of Title 26 U.S.C., § 3616 (a) (Internal Revenue Code of 1939, Section

3616 (a)), are not excepted from operation of § 145(b) of Title 26 U.S.C. (Internal Revenue Code of 1939, Section 145 (b)), a statute which in the generality of its provisions may be said to encompass the same offenses?

8. Whether the Court of Appeals below may dismiss a jurisdictional attack relating to the sentence imposed in the proceedings before it, without making a determination of the merit of the attack, even though the attack in its present form was never raised before Petition for Rehearing?

9. Was the Court below correct in holding that the question of distinction between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 was not raised below and not relied on on appeal, until petition for rehearing; or, did the Motion to Dismiss (R. 7) which was denied (R. 12) and points "1" and "2" of "Statement of Points to be relied on upon appeal" (R. 1216), preserve the issue sufficiently to require the Court below to consider the issue properly before it; and, a fortiori, require a decision on the merits of the issue?

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1939 as amended, Title 26, U.S.C. (1989) are:

Section 41: GENERAL RULE.

> The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does

not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. * * * *.

Section 145: PENALTIES.

(a) * * * *

(b) *Failure to collect and pay over tax, or attempt to defeat or evade tax.* Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000. or imprisoned for not more than five years, or both, together with the costs of prosecution.

Section 3616: PENALTIES.

Whenever any person—

(a) FALSE RETURNS. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation enumeration, or assessment intended to be made; or,

(b) * * * *

he shall be fined not exceeding $1,000. or be imprisoned not exceeding one year, or both; at the discretion of the court, with costs of prosecution.

UNIFORM PARTNERSHIP ACT. (Chapter 106½ Illinois Revised Statutes):

Section 21:

"Every partner must account to the partnership for any benefit, and hold as trustee for it any

profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property."

Section 24:

"The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management."

Section 25:

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(A) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners."

EMBEZZLEMENT BY OFFICER, CLERK, AGENT, SERVANT, SOLICITOR, BROKER OR APPRENTICE (Section 210 of Title 38, Illinois Revised Statutes):

"Be it enacted by the People of the State of 2121 Illinois, represented in the General Assembly: if any officer, clerk, agent, servant, solicitor or broker of any incorporated company, or if any clerk, agent, servant, solicitor, broker, apprentice or officer of any person, co-partnership, society or association, receiving any money, substitute for money or thing of value whatsoever in his fiduciary capacity, shall embezzle or fraudulently convert or appropriate the same or any part thereof

to his own use, or with intent to embezzle, shall take, secrete or otherwise dispose of, or fraudulently withhold, appropriate, lend, invest or otherwise use or apply any money, substitute for money, or thing of value received by him in such fiduciary capacity, or the portion thereof, belonging to his principal, employer or fiduciary, without the consent of the company, person, co-partnership, society or association for or on account of which the same was received by him, he shall be deemed guilty of larceny and shall be punished as provided by the criminal statutes of this State for the punishment of larceny, irrespective, whether any apprentice has or claims to have any commission or interest in such money, substitute for money, or thing of value so received by him."

STATEMENT OF THE CASE

The petitioner was indicted by the March, 1953 Grand Jury for the Northern District of Illinois by filing with the Clerk of the District Court for said District of the indictment found. The petitioner was charged with filing false and fraudulent income tax returns with intent to defeat and evade a large part of the income tax due for the years 1946, 1947 and 1948 in violation of section 145(b) of the Internal Revenue Code of 1939. (R. 3-5)

Two trials were had, the first resulting in a mistrial ordered by the District Court, on motion of the defendant (R. 42) complaining of the conduct of the prosecutor (R. 43); the second trial resulted in a conviction of the petitioner for all three years (R. 1171-1172); and, the imposition of a sentence on each count of two years and a fine of two thousand dollars. The sentences were to run concurrently and the fines were cumulative. (R. 1212-1213)

On appeal to the Seventh Circuit Court of Appeals the conviction for the year 1946 was reversed (Pet. A-16); and the conviction for 1947 and 1948 was affirmed (Pet. A-16). A petition for rehearing was filed and denied (Pet. A-20).

Prior to the first trial the petitioner through his then Counsel filed a motion to dismiss the indictment on the grounds that section 145(b) of the Internal Revenue Code of 1939, upon which the indictment was brought when read together with section 3761(a) of said code and other statutes which are in pari materia therewith amounted to an unconstitutional delegation of authority to the executive branch of the Government (R. 7). This motion was denied (R. 12). The denial of this motion was included as errors in the points relied upon on appeal as points numbered "1" and "2" (R. 1216).

Prior to the first trial your petitioner by present Counsel filed a motion for judgment of acquittal on the grounds that the Government was committed to prove its case by the Net Worth method of determining net income; that the Commissioner of Internal Revenue had determined net income for each year without resort to the Net Worth method; and, that the prosecutor did not have the power to depart from the standard method by which the Commissioner determined the income (R. 12-40), therefore, any evidence adduced on the net worth method was inadmissible: This motion was denied (R. 42); renewed before the second trial and leave to file said motion denied (R. 44); again denied (R. 49); again denied after the opening statement by Government Counsel (R. 57); renewed after the Government rested (R. 1095) and denied (R. 1097); renewed after all the evidence was

adduced (R. 1099) again denied (R. 1114); renewed after verdict (R. 1172) and denied (R. 1210). The denial of this motion was included in the points relied upon on appeal as points numbered "5", "6" (R. 1216).

The Government, over a running objection by the defense (R. 124, 144, 946, 969-970) adduced testimony from over fifty witnesses that they had purchased automobiles from the partnership of which the petitioner was a member at prices alleged to be over the listed sales price; and the Government witness Weber testified that such excesses were not reflected on the books of the partnership and his construction of such testimony and the books was admitted in evidence as Gov. Exh. 279. Weber then testified to the financial transactions of the defendant and his conclusions were admitted in evidence as Gov. Exh. 280. In the testimony supporting Gov. Exh. 280 (the Net Worth Statement) the Government adduced no testimony to prove that the alleged withheld premiums found their way into the items composing the Net Worth. The Government *on page 13* of its main brief on appeal states:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

We contended that unless it was shown that the alleged withheld income did find its way into the Net Worth computation — by a showing of assets acquired, or liabilities liquidated — with cash from unexplained sources the Net Worth lacked probative value. The identical cash need not be traced; but, under the rule

of *Holland* v. *U. S.* (348 U.S. 121), the increase in Net Worth must be attributable to such "likely source"; and, a showing made that the increase in Net Worth was from such funds; such as assets paid for in currency, or the currency being deposited to supply the source for check payments.

Here the record is particularly clear that the increased Net Worth was not from unexplained sources. The record predominates with regular banking transactions, direct or through the lawyer partner—there is absent, the usual hordes of cash so prevalent in Net Worth cases. The issue was raised on appeal, but ignored by the Circuit Court; and, again raised on petition for rehearing but the Court decided that point added nothing to the appeal.

The Net Worth statement lacked a reasonably accurate beginning and end. The end was particularly flagrant in its defects. The Court below reversed as to 1946, and affirmed for 1947 and 1948.

The first trial was declared a mistrial as the result of the conduct of the prosecution. The second trial again was marred by misconduct, during trial and in summing up. The act during trial appears at R. 146, 147, 179-180, 183-4. The eighteen acts of misconduct during summing up appear at R. 1174-1182; and, the facts respecting them appear at R. 1182-1206. The defense moved for judgment of acquittal (R. 1172) which was denied (R. 1210). The issue was raised on appeal. The Court below, on appeal, in refusing to reverse on this issue; stated that it "did not condone the prosecutors' unqualified statement" (Pet. A-3); his reference "to the capital stock was unwarranted" (Pet. A-3); and "Government counsel may, at times,

have been an overzealous advocate" (Pet. A-5). Nevertheless, in refusing to reverse it grounded its decision on the curative effect of such objections as were made, and on the failure to specifically object in all other instances; despite the request by the defense—which was granted—that the jury be instructed that the defense had no opportunity to respond to the complained of statements to the jury.

Finally, the defense contended that, if in fact, the defendant did appropriate the alleged over premium receipts to his own use, it was embezzlement from the partnership and not income to the partnership or the defendant. The trial Court refused to instruct the jury on this issue and the Court below affirmed. Hence, from your petitioner's viewpoint, these are the

ARGUMENT AND REASONS FOR GRANTING THE WRIT

1. The first question presented, in substance is whether the prosecutor in a criminal tax evasion case —for the purposes of his case in chief as distinguished from corroboration—can ignore and depart from the determination of the Commissioner of Internal Revenue made in a statutory deficiency notice and rely as proof solely upon the Net Worth method of approximating and determining taxable net income. The Court below has decided he can, we maintain he cannot.

This question is one of first impression. It has not been decided by any Court and remains unanswered by the decision of this Court in *Holland* v. *U. S.*, 348 U.S. 121, and companion cases decided in December, 1954.

It is a question of the utmost importance to every taxpayer, and should be decided by this Court. The question arises, in practice, when the Commissioner of Internal Revenue makes a jeopardy assessment in a fraud case; which, is becoming quite an ordinary practice.

This Court in deciding *Holland* v. *U. S.*, 348 U.S. 121, and the other three cases decided at the same time —that is, *David Freidberg* v. *U. S.*, 348 U.S. 142, *Daniel Smith* v. *U. S.*, 348 U.S. 147, and *U. S.* v. *Calderon*, 348 U.S. 160—approved the use of the Net Worth method in criminal tax evasion cases. These four decisions appear to have given the Government and Courts a "green light" for the indiscriminate use of that method. It is time that its use be properly circumscribed. The abuses, inherent in the use of that method, and the ease of convincing a jury thereby, despite the restrictions and cautions imposed by this Court, are fast leading to a denial of justice to taxpayers. Instead of being a means of convicting fraud-practising taxpayers; it is fast becoming a trap for innocent taxpayers and leads to the conviction of innocent persons.

The determination of net income is a very intricate proceeding. The tax return is complex, and composed of items of income and deductions. The Commissioner maintains a well trained staff of experts to audit the returns made. Congress has very wisely, reposed in the Commissioner, without delegation under the 1939 Code, the responsibility of determining net income in a manner that in *his* opinion "clearly reflects the income". (Section 41). The Courts heretofore have been very careful not to disturb the method adopted

by the Commissioner, excepting by a clear showing that he is wrong.

What right then is there in a prosecutor to disregard the Commissioner's findings in this complex field and prove a fraud—primary proof, not as corroboration—by the Net Worth method.

To hold, as did the Court below, that Section 41 has no application to criminal cases—only to civil cases—is to destroy our entire tax structure; and is bound to result in abuse.

Where, as here, the Commissioner has made his findings by regular orthodox adjustments (R. 22-40); and the taxpayer, as is his right, contests such findings before the Tax Court of the United States; and the Commissioner during the four succeeding years does not change his position (R. 22-40); by what authority does a prosecutor during such four year period prosecute by the Net Worth method of proof. We believe, that under such circumstances—the circumstances of this case—the prosecutor should be required to make a showing as a premise for his departure from standard methods that the conditions surrounding the statutory deficiency notices are wrong or no longer exist; that the Commissioner has changed his mind and the Net Worth method does "clearly reflect the income"; and that income cannot otherwise be determined.

If the decision below is permitted to remain the law by failure of this Court to review this question no taxpayer will be safe from prosecution, no matter how honest his return, because some prosecutor decides he and a jury can better decide what a person's income is; whereas, the law (Section 41) restricts the right to

change to the Commissioner personally when, in his opinion another method more clearly reflects the income.

As Mr. Justice Black said in his dissenting opinion in which Mr. Justice Douglas joined in *Berra* v. *United States,* 76 S. Ct. 685, 690:

> "I think we should construe these sections so as not to place control over the liberty of citizens in the unreviewable discretion of one individual—a result which seems to me to be wholly incompatible with our system of justice. * * * Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

Here, we are dealing with taxable net income—a very complex matter. The law specifically charges the Commissioner with determining taxable net income. When he, with his vast trained organization, specialists in the field, determines taxable net income by making adjustments thereto; and, does not resort to the Net Worth method, there would appear to be no premise for a prosecutor to prove his case solely by the Net Worth method.

It is so easy to follow the line of least resistance, disregard the tax return items, throw out the experts findings and proceed by the Net Worth method to procure convictions based on Net Worth unsupported by proof of fraud.

We humbly submit that Net Worth evidence to be admissible at all, must be grounded on the statutory requirements that the Commissioner, personally, is of the opinion that the method used does not "clearly reflect the income" and the Net Worth method does "clearly reflect the income".

Prosecutors, juries, and for that matter Courts, cannot be expected to comprehend all the intricacies of a complicated income tax statute; and, where the Commissioner who is invested by Congress with quasi-judicial powers fails to use the Net Worth method, others should not be permitted to do so.

The Court below here is the Seventh Circuit, the same question has been raised in the Fifth Circuit in *Pinder* v. *United States,* Docket No. 15,784, by this Counsel (Carl J. Batter) and; a possible conflict may arise between the Circuits too late to provide a remedy in the case at bar.

We feel that there is a most pressing need for this Court to speak on that subject further and that certiorari should be granted.

2. The prosecutor did not as a foundation for his Net Worth proof offer any testimony that income could not be determined by the standard method of making adjustments to the income reported. The Commissioner, personally, is the only person authorized by law to ignore the return and resort to the Net Worth method, if, in his opinion the Net Worth method clearly reflects the income (Section 41). The defense made a running objection to the admission of testimony respecting Net Worth. Is such evidence admissible without a foundation that the Commissioner had recanted from his statutory determination and found the Net Worth method did clearly reflect income? The Court below held it was admissible; we think not.

This question, like number 1, is not covered by *Holland* v. *U. S.*, 348 U.S. 121, and should be decided by this Court. It is a case of first impression. All the

reasons set forth under "1" apply with equal force here, and counsel has raised the issue in *Pinder* v. *U. S.* pending in the Fifth Circuit, Docket No. 15,784; but, again the possible conflict between circuits will come too late to provide a remedy here.

We respectfully submit, that certiorari should issue.

3. The third question relates to the probative value of the Net Worth computation as here adduced. Here, the Net Worth evidence adduced shows glaring errors in the Net Worth computation at the end of the period. The Court below does find "conflicting testimony with respect to each of them" (Pet. A-9). The items are sufficiently large, to wipe out entirely the alleged increase in Net Worth.

This Court in *Holland* v. *U. S.*, 348 U.S. 121, stated at page 125:

> "Nevertheless, careful study indicates that it is so fraught with danger for the innocent that the courts must closely scrutinize its use."

and at page 129:

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

The Court below, despite its finding of conflict, held "there was sufficient evidence to submit to the jury upon each of these matters" (Pet. A-10). We submit that where, as here, the jury patiently listens to testimony over a period of thirty days, and upon retirement to the jury room depends on its recollection of the testimony, with only the Government Net Worth

Exhibit (No. 280) before it, we develop a situation referred to in *Holland* v. *U. S.*, 348 U.S. 121, 128, as

> "bare figures have a way of acquiring an existence of their own, independent of the evidence which gave rise to them."

and the appellate court should not be content, where it has the actual transcript before it and can reread and study it, and finds conflicts, be content to hold "there was sufficient evidence to submit to the jury upon each of these matters." (Pet. A-10) We submit it should resolve such conflicts and unless the proof is beyond a reasonable doubt it should reverse the judgment.

For the years 1947 and 1948 the Court below affirmed despite the fact that included in 1947 are items of Red Lion, Inc., about which the Court below states: (Pet. A-3)

> "We are directed to nothing of record which indicates when or by whom Red Lion, Inc., was incorporated, or who owned its corporate stock.
>
> The Red Lion transactions are silent in this respect."

Despite this finding by the Court below and the further fact that the 1947 Net Worth computation of the petitioner contains a number of items contracted for by Red Lion, Inc. (Exh. Vol. pp. 46, 47, 50, 52, Gov. Exh. 113, 114, 116, 117), the Court below approved the Net Worth method.

Again, at the end of the Net Worth period the Court below finds conflicting testimony respecting a number of items, that is $12,000. (Pet. A-9), $7,500. (Pet. A-10), and $15,000. (Pet. A-10). Instead of resolving these conflicts, it held that: (Pet. A-10)

> "There was substantial evidence which, if believed, supported the requisite finding that defendant willfully understated his income in both 1947 and 1948, and that black market receipts received by him in the sale of automobiles was the likely source of his enhanced net worth."

whereas, this Court in *Holland* v. *U. S.*, 348 U.S. 121, at 129, states:

> "Appellate courts should review the cases, bearing constantly in mind the difficulties that arise when circumstantial evidence as to guilt is the chief weapon of a method that is itself only an approximation."

We thereupon filed a petition for rehearing in which we analyzed the testimony respecting each asset and liability, clearly demonstrating the "black market receipts" did not form any part of the increased Net Worth. For the year 1947 only $2,750. was testified to as being cash (Pet. for Reh., p. 12-A); and for the year 1948 not one cent was shown to have been from "black market receipts" (Pet. for Reh., p. 26-A). It will also be noted that the Government in its Brief on Appeal admitted at page 13:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

Despite this Government confession and the analysis (Pet. for Reh., App. 1-A to 27-A) the Court below responded at page Pet. A-17 hereof.

> "We think nothing is added thereby to the points raised and argued on appeal. We adhere to our

judgment affirming the conviction as to the two counts."

By ignoring the facts of the analysis (Pet. for Reh., pp. 1-A to 27-A) it places upon the defendant the burden of proof; where in fact it remains with the prosecution throughout.

We submit that where a Court below so disregards the tests directed by this Court, it calls for the exercise of the power of supervision by this Court and certiorari should be granted.

4. The fourth question goes to the Court's failure to adhere to two requisites of the Net Worth method pronounced by this Court in *Holland* v. *U. S.*, 348 U.S. 121. Both appear at pages 137-138, and read:

> "'Increases in net worth, *standing alone*, cannot be assumed to be attributable to currently taxable income. But proof of *a likely source*, from which the jury could *reasonably find that the net worth increases sprang*, is sufficient. (Emphasis supplied)

Here the evidence is clear, that assuming arguendo the petitioner did withhold income from the partnership, such income did not find its way into the component items of the Net Worth computation.

An analysis was prepared for the Court below (App. to Pet. for Rehearing, pp. 2a-27a), clearly showing the proof where adduced to be that the increases were not attributable to such withheld income. The origin of the funds used in acquisition of assets or liquidation of liabilities appear throughout the record. They are straight banking transactions, conducted in the open, and there is a complete absence of purchases by cash.

If, the cash from premiums on automobile sales found its way into the defendant's bank account, so that source would have been available to meet the needs of purchases, the Government would have shown it.

With practically a complete severance between purported cash premiums supposedly unreported income, the Net Worth computation and its increases cannot be assumed to be "attributable to currently taxable income" and there can be no "likely source" that a jury can reasonably find to be what the Net Worth increases "sprang" from.

The Court below concluded that this analysis (App. to Pet. for Rehearing, pp. 2a-27a) "added nothing" to the cause.

Under these circumstances the Court below has not given proper effect to an applicable decision of this Court, and the failure to do so calls for an exercise of this Court's power of supervision.

We respectfully submit that certiorari should issue.

5. The fifth question relates to embezzlements from the partnership of which the petitioner was a member. The embezzlements were not condoned, but the subject of a suit by the other partner (Deft. Exh. 5, R. 1049-51) in 1951. Who embezzled the funds is uncertain. the Government in its brief to the Court below, stated at page 13:

> "Although all of this unrecorded income had been traced into the hands of Achilli and his sales manager, it was not possible to establish by direct proof whether Achilli retained this money for his personal use."

If the sales manager embezzled, such embezzlements cannot be income to the petitioner. If the petitioner embezzled, such embezzlement was not condoned—in

fact suit for restitution was instituted; the embezzlement comes squarely within the rule of *Wilcox* v. *Com. of Int. Rev.* (327 U.S. 404). Under the laws of Illinois (Sections 21, 24, 25, Uniform Partnership Act, Chapter 106½ Illinois Revised Statutes), a partner, who is an *agent* of the partnership appropriating funds is an embezzler (Sec. 210, Title 28, Ill. Revised Statutes).

Assuming arguendo, that the defendant did appropriate to his own use the proceeds of the premiums exacted on cars sold. The Court below finds (Pet. A-2):

> "The black market premium was not recorded or reported. These premium sales seem to have been concealed from defendant's co-partner, Gromer; they were not reported in his individual income tax returns."

The Court below then holds that a partner cannot embezzle from his partnership (App. A-13). We submit this is contrary to Illinois law. (See pages 8, 9 hereof). It further holds (Pet. A-16) that:

> "It was incumbent upon defendant to assert and prove such embezzlement if he wanted to rely upon such a defense. He is not entitled to instructions resting upon mere speculative assertions manufactured wholly from thin air."

We submit that the burden of proof rests with the prosecution at all times. The prosecution's own proof establishes embezzlement—it is not the burden of the defense to prove embezzlement. It is the burden of the prosecution to prove it was not embezzlement. Embezzled funds under *Com. of Int. Rev.* v. *Wilcox*, 327 U.S. 404, uncondoned is not income. The defense did establish (Def. Exh. 5) that it was not condoned.

Suit was instituted by the other partner in 1951 charging misappropriation of funds.

The Court below has decided a question of local law in conflict with applicable local law; and has not given proper effect to the decision of this Court in *Com. of Int. Rev.* v. *Wilcox*, 327 U.S. 404.

We submit that certiorari should issue.

6. The sixth question pertains to the conduct of the Government during trial and in his final summing up to the jury. We list nineteen different acts (R. 1174-1182) and our version of the record (R. 1182-1206). The Court below disposes of them as follows: one was cured (during trial) by the trial Court sustaining defense Counsel's objection to the remark which was stricken; one was invited by defense counsel's alleged incorrect statement to the jury; one to which objection was made, was overruled, but the error was inconsequential; and the other sixteen were not objected to by defense counsel at time of utterance.

The Court below does not excuse the remarks objected to; in fact makes three observations set forth in the question presented. The Court below holds, absent an objection made at the time, the petitioner may not now complain.

At the close of the final argument by Government Counsel, defense Counsel, addressed the Court as follows: (R. 1150-1151)

> "Mr. Batter: If the Court please, the statement of counsel in his closing argument this morning is so at variance with the truth and so at variance with the record, and bearing in mind that I am left in the position where I am unable to answer him before the jury, I would like an instruction

from the Court to the jury to the effect that the regular procedure is for Government counsel to open and close, and that I have no opportunity to speak again.

I don't think in justice the record should be left in the position where counsel takes net income as reported on the individual return, and tries to work from that with his deductions, ignoring the partnership returns as they were returned, taking items of $10,800, which is a receivable, and treating it as a disbursable item, and all the other items he went through, without letting the jury know that I am precluded from saying anything more.

I would like an instruction to the jury that I do not have a second opportunity to talk to them.

The Court: Well, I will instruct the jury accordingly then."

Considering defense counsel's position—his inability to respond; his fear of alienating the jury by numerous objections (two were made); and likely charges of harassing the prosecution, defense counsel did the best he could by immediately, at the conclusion of Government counsel's argument, addressing the Court as above.

We don't think we came too late, we were governed by the psychology of the drama before the jury, and made known the flagrant abuse. As was stated by this Court in *N.Y. Central R. Co. v. Johnson*, 279 U.S. 310 at 318:

> "The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice."

To hold against the petitioner on grounds of failure to object under these circumstances is a miscarriage of justice and a departure from the accepted and usual course of judicial proceedings, as to call for this court's power of supervision.

We respectfully submit that certiorari should issue.

7. The seventh question raises the point of exclusion from a general statute (Section 145(b) 1939 Int. Rev. Code) of an offense specifically dealt with in specific statute (Section 3616(a) 1939 Int. Rev. Code). The former pronounces a felony with heavy penalties; the latter pronounces a misdemeanor with corresponding lighter penalties. Both statutes pertain to an intent to defeat or evade income taxes. The question was not answered below—it should be decided.

This Court recently decided *Berra* v. *United States* (76 S. Ct. 687) and confined the issue to the propriety of the trial court's refusal to give the jury an instruction that it may choose between the misdemeanor statute and the felony statute. This Court held the refusal to give the instruction proper on the grounds that it was a question of law for the Court to decide and not a question of fact to be left to the jury.

This question is of the utmost importance in every criminal tax evasion case under the Internal Revenue Code of 1939. There are literally hundreds of criminal tax evasion cases pending in the District and Appellate Courts of this country. This Court considered it important enough to grant certiorari and decide *Berra* v. *United States*, 351 U.S. 131, 76 S. Ct. 685; however, there the issue was confined to was it or was it not error for the trial Court to refuse an instruction leaving to the jury the decision of whether the crime

was a misdemeanor or a felony. The question should be settled by this Court in the public interest, because, here the fundamental issue is raised—not a procedural question.

Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939, the first a felony, the latter a misdemeanor cover the same offense. Here the sentence was imposed as a felony and exceeds the maximum penalty of a misdemeanor. We contend the felony penalty is invalid and beyond the jurisdiction of the Court to impose. Being jurisdictional it can be raised at any stage of the proceeding.

The Court below declined to consider the issue on its merits on the ground that it had not been raised in the trial Court, nor on appeal until petition for rehearing. The Court below based its decision on its rationalization of *Berra* v. *United States*, 76 S. Ct. 685.

In *Berra* v. *United States*, 76 S. Ct. 685, this Court —for the purposes of that case—accepted arguendo— the position of both litigants, the Government and the taxpayer, that is, that the same proof was required for the misdemeanor and the felony; but decided the case solely on the right to the instruction to the jury.

Here that is not involved. Here the issue is properly raised as a question of law. It was raised before trial in the trial Court, preserved as error in the appeal, and renewed by petition for rehearing.

The issue of a misdemeanor versus a felony is of paramount importance in all criminal prosecutions brought under the Internal Revenue Code of 1939 and should be decided by this Court on the merits in this case and certiorari should issue.

8. The eighth question raises an issue springing from the action of the Court below in declining to review the judgment of the trial court on the grounds that the right was not preserved below.

The Court below, relying on this Court's decision in *Berra* v. *The United States of America* (76 S. Ct. 685), by analogy holds that: (R. A-18)

> "* * * the question * * * certainly cannot be raised on this appeal in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed."

We contend that our petition for rehearing goes to the jurisdiction of the trial court's imposing a sentence beyond its powers, if the crime is a misdemeanor. A question of jurisdiction can be raised at any time—whether preserved below or not. Nor can the appellate court dispose of the case without passing upon the merits of the jurisdictional question, even though not raised below. By by-passing the merits the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The defense first raised the issue by motion to dismiss (R. 7). This motion was denied (R. 11-12). It was preserved on appeal by points "1" and "2" of "Statement of Points to be relied on upon Appeal" (R. 1216). It was not argued on appeal—but that does not constitute a waiver. It was argued on petition for rehearing, and the Court below erred in by-passing the merits and holding the issue raised too late.

As a matter of law, the attack on the sentence, being jurisdictional, can be raised any time; therefore, even if the Court below was correct respecting the tardiness in raising the issue, it was required to decide the merits.

We respectfully submit that certiorari should issue.

9. The ninth question takes issue with the Court below on the sufficiency of the record to require a decision on the merits of the invalid sentence issue.

Before the first trial, the defense, by previous counsel made a motion to dismiss together with alternative motions. Paragraph 1 of that motion (R. 7) reads:

> "1. Moves that the indictment and each count thereof be dismissed, on the grounds (a) that the statute on which said indictment and each of said counts is founded, namely, Section 145(b) of the Internal Revenue Code, when read together with Section 3761(a) of the Internal Revenue Code and other statutes which are in pari materia therewith, amounts to an unconstitutional delegation of authority to the executive branch, in violation of Article 1, Section 1 of the Constitution of the United States manifesting the doctrine of separation of powers, and in violation of the due process clause of the Fifth Amendment of said Constitution; and (b) that the executive branch has employed unconstitutional practices and procedures in the enforcement of said Section 145(b), as applied to the defendant herein, in violation of the due process clause of the Fifth Amendment of said Constitution."

The aforesaid motion was denied (R. 12). It was renewed after verdict and before sentence (R. 1172) on May 25, 1955. It was denied on May 27, 1955

(R. 1210). On June 16th, 1955, the trial Court entered judgment reading in part as follows: (R. 1212)

> "It is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of 145(b), Int. Rev. Code; 26 U.S.C., Sec. 145(b) (Wilfully and knowingly attempting to defeat and evade large parts of the income tax due and owing by him to the U.S. by filing and causing to be filed with the Coll. of Int. Rev. false and fraudulent income tax returns.) as charged. * * *".

Thereupon the Court imposed a sentence in excess of that provided by section 3616 I.R.C. 1939. (R. 1212)

Thereafter on the 19th day of July, 1955, the defense filed its Statement of Points to be relied on upon appeal, points "1" and "2" of which read: (R. 1216)

> "1. The indictment failed to set out any crime in violation of the statutes of the United States.
>
> 2. The trial court erred in refusing to grant the defendant's motion to dismiss the indictment."

We submit that the record on appeal was sufficient to place the issue before the Court below; and it was error to decline to pass upon the merits of the issue.

By by-passing the merits the Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

We respectfully submit that certiorari should issue.

WHEREFORE, your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court on a day to be deter-

mined a full and complete transcript of the record of all the proceedings of such Court of Appeals had in this cause, to the end that the proceedings and decisions therein may be reviewed and determined by this Court; that the judgment of the Court of Appeals for the years 1947 and 1948 may be reversed; and that the petitioner be granted such other and further relief as may seem proper.

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 5, 1956.

Before MAJOR, LINDLEY and SWAIM, Circuit Judges.

LINDLEY, *Circuit Judge.* Defendant appeals from a judgment entered on a jury verdict finding him guilty on three counts of an indictment charging willful evasion of income taxes for the taxable years 1946, 1947 and 1948, in violation of Section 145 (b) of the Internal Revenue Code of 1939, 26 U.S.C.

The Government employed what is commonly referred to as the net worth method of establishing deficiencies, proceeding on the theory that increases in the taxpayer's net worth over that at the beginning of the taxable year, plus non-deductible expenditures, constituted income to the taxpayer during that period unless satisfactorily explained. Employing this procedure the Government calculated the amount of defendant's net taxable unreported income during the indictment periods at $13,803.94 in 1946, $36,958.63 in 1947 and $20,623.18 in 1948. It offered evidence tending to prove that the income was derived from over-ceiling charges for automobiles sold by a co-partnership composed of defendant and one Grömer, doing business under the name and style of Highland Motor Sales, and Barney's Snooker Hall, owned by defendant until the

latter part of 1946, and in interest on loans to various persons.

With respect to the operation of Highland, on the evidence the jury was justified in finding the following pertinent facts. During the three years, defendant, or his agents, made sales of automobiles at premium prices of about $600 per car above the OPA maximum price. The ceiling price of each car was entered upon the partnership books, and only this amount was reflected in the partnership returns. The black market premium was not recorded or reported. These premium sales seem to have been concealed from defendant's co-partner, Gromer; they were not reported in his individual income tax returns.

Defendant complains of some 19 remarks of counsel excerpted from the record, contending that misconduct of the United States Attorney requires a reversal of the judgment. The first was made during the course of reception of government testimony. Defendant's attorney objected to the use of certain records in the examination of a Government witness, asserting that they were admittedly false. The Government's attorney remarked, "And we are going to show they are false because you made them false." On objection, this remark was stricken.

The other 18 instances occurred during the course of final argument to the jury. Of these, objection was made to only two. "Counsel for the defense cannot as a rule remain silent, interpose no objections and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 238. That principle must govern the sixteen asserted instances of misconduct, unless the remaining contentions disclose misconduct of a flagrant nature resulting in a pattern of prejudicial impropriety. We think no such pattern is shown.

We do not condone the prosecutor's unqualified statement that all defense witnesses were unwilling witnesses, responding only to subpoena. However, defendant's objection to the remark was sustained and the remark was stricken. And in addition to such curative action, the court instructed the jury that oral summation was no part of the evidence and was not to be considered in arriving at a verdict.

The second remark to which objection was taken related to the terms of a purchase contract. The Government introduced evidence showing that defendant had bought the entire interest of one Turpin, including the realty, equipment and stock of goods in the Red Lion, a local restaurant and bar, in 1945. In his closing argument the United States Attorney, in summing up defendant's beginning net worth, referred to this transaction as including a transfer of the capital stock of Red Lion, Incorporated, when, in fact, the agreement between Turpin and defendant included no reference to capital stock. Defendant's objection to this statement was overruled.

Although counsel's reference to the capital stock was unwarranted, it was an invited response to defense counsel's assertion and argument to the jury that the value of the corporate stock had been omitted from defendant's opening net worth statement. The record discloses the existence of a corporation known as Red Lion, Inc., of which defendant was an officer, and shows that the board of directors, in February, 1948, authorized and directed the officers of the corporation to enter into a lease with defendant of the premises on which Red Lion was located. We are directed to nothing of record which indicates when or by whom Red Lion, Inc., was incorporated, or who owned its corporate stock.

The Red Lion transactions are silent in this respect. Defendant's purchase agreement of the property recited that the seller, Turpin, agreed to convey the real estate,

fixtures and stocks of liquors and goods to defendant in consideration of $18,400. In 1948, defendant transferred to one Fritzel an undivided ½ interest in all the chattels, fixtures, liquor and licenses. An attached schedule showed that the value of the stock of merchandise was $10,796.71 and that the sale price of ½ thereof was $5,398.30. Neither transaction alluded to corporate ownership of any of the property and each item was fully reflected in the Government's net worth computation.

Upon the capital gains schedule of defendant's 1948 tax return, notations as follows were entered with respect to an item listed as "Sales of stock in Red Lion": acquired 1945, at a cost basis of $4,673.18; sold 1948 at a sales price of $5,894.85. In cross-examination of Government's witness Weber, defense counsel interpolated "capital" into this entry immediately preceding the word "stock", and questioned him as to where the value of the "capital stock" was reflected upon the Government's computation of net worth at the beginning of the taxable periods. Counsel took the same approach in his summation to the jury, arguing that the cost base of this item, $4,673.18, should be set up as an asset omitted from the opening net worth computation. The context of the United States Attorney's argument shows conclusively that his reference to the value of the corporate stock as included in the $18,400 purchase price paid to Turpin was in response to the argument by defense counsel.

Each party was arguing for an inference not supported by the record. The accountant who prepared the 1948 return testified that the capital gains entries thereon were based upon the transaction between defendant and Fritzel. The word "stock" in that entry, therefore, takes its meaning from the contract of the parties to the transaction which, in this respect, purports to convey only a stock of merchandise in inventory. If counsel for the Government went outside the record in the respect noted, the excursion

was in response to an opposing venture *de hors* the record by the defense. The error, in overruling the objection was inconsequential, especially in view of the instructions to which allusion has previously been made that oral summation is no part of the evidence.

Government counsel may, at times, have been an overzealous advocate. In most of these instances, his remarks went in without objection, as we have noted. When his argument to the jury is considered as a whole, we think that the excerpts extracted from context for our attention present for the most part nothing more than zealous advocacy, see *Di Carlo* v. *United States*, 6 F. 2d 364, cert. denied 268 U.S. 706 (CA-2), and, in any event, that they can not be classified as misconduct requiring reversal. As we said in *United States* v. *Doyle*, No. 11528, decided May 23, 1956, quoting from *Malone* v. *United States*, 94 F. 2d 281, 288, cert. denied 304 U.S. 562 (CA-7): "Counsel have a right to make any argument based upon evidence proven in the case, or which may be reasonably inferred therefrom, and to make reply to that made by opposing counsel, and, in doing so, statements may be made which otherwise would be improper. Defendant's trial counsel evidently did not regard the argument as vicious or unfair as objection was made to one statement only * * *." We think the situation wholly unlike the instances of misconduct appearing in the cases relied upon by defendant. *Berger* v. *United States*, 295 U.S. 78; *N.Y. Central R. Co.* v. *Johnson*, 279 U.S. 310; *Pierce* v. *United States*, 86 F. 2d 949 (CA-6); *Volkmor* v. *United States*, 13 F. 2d 594 (CA-6).

Defendant's contention that the net worth evidence was incompetent and inadmissible misconceives the purpose of the provisions of Section 41 of the Internal Revenue Code of 1939, 26 U.S.C. (1952) § 41. He insists that, before the net worth method may be employed in any income tax case, Section 41 requires a determination by the Commissioner of Internal Revenue that use of that method "does

clearly reflect the income" of the accused taxpayer; that the Commissioner did determine defendant's income for the indictment years by adjustments to the income reported, and that therefore, the net worth method of proof may not be employed in this prosecution, absent proof that the Commissioner has made the alleged requisite determination.

We think it is clear that Section 41 has the limited purpose of insuring that, in an administrative deficiency assessment, the taxpayer's accounting method shall be employed by the Commissioner in the allocation of income and expense items between taxable years. *Holland* v. *United States*, 348 U.S. 121, 131. But that section can have no application in a criminal proceeding which is not based and does not depend upon an administrative determination. Therefore, the cases dealing with the validity of administrative orders upon which defendant relies are inapposite. See e.g., *Morgan* v. *United States*, 298 U.S. 468; *Brown* v. *Helvering*, 291 U.S. 193; *Lucas* v. *American Code Co.*, 280 U.S. 445; *Willapoint Oysters, Inc.*, v. *Ewing*, 174 F. 2d 676, cert. denied 338 U.S. 860 (CA-9); *Southern Garment Mfg. Assn.* v. *Fleming*, 122 F. 2d 622 (CA-DC).

These cases obviously have no application to this proceeding, based upon three counts of an indictment returned by a grand jury. It is wholly immaterial that the indictment was preceded by an administrative tax deficiency determination against defendant. Such proceeding was a civil matter, the validity of which must be determined civilly. Here the Government had the burden of proving the charges made in the indictment beyond a reasonable doubt, and, for this purpose, as in any other criminal prosecution, the admissibility of tendered evidence was to be determined by established rules of evidence. The question of admissibility is not affected by the fact, nature, or validity of a prior administrative determination touching the same subject matter.

The contention now made is not unlike that urged in *Holland* v. *United States*, 348 U.S. 121, that Section 41 restricts the Government's use of the net worth method of proof in criminal prosecutions to those cases where it is shown that the taxpayer has no books or that his books are inadequate, a contention rejected in this language at page 132: "To protect the revenue from those who do not 'render true accounts' the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history." The legality of the net worth evidence is not affected by what the Commissioner has, or has not, done in a civil matter. To read such a restriction into Section 41 would thwart the intent of Congress. "The existence of unreported income may be proved by any practical method available in the circumstances of the particular case." *United States* v. *Doyle*, No. 11528, decided May 23, 1956 (CA-7); *Davis* v. *United States*, 226 F. 2d 331, 336, cert. denied 350 U.S. 965 (CA-6).

Defendant argues also that the net worth method, as here employed, lacked probative value and should not have been presented to the jury. Government exhibit 280, the summary of the relevant net worth computations, showed an understatement of income for each of the taxable years as follows: for 1946, $13,803.94, for 1947, $36,958.63, and for 1948, $20,623.18. The probative value of this evidence is attacked, defendant asserting that certain specific assets were omitted by the Government in computing defendant's opening net worth and that other specific items were improperly included as assets in the net worth computations for the year 1948. To the extent that these contentions represent merely a suggestion that we weigh conflicting testimony, they fall within the postulate stated in *United States* v. *Winston*, 222 F. 2d 323, 325 (CA-7), that "we must consider the evidence in the light most favorable to the Government and in the light of all reasonable inferences which the [jury] might draw from the evidence."

United States v. *Iacullo*, 226 F. 2d 788, 795, cert. denied 350 U.S. 966 (CA-7); *United States* v. *Yager*, 220 F. 2d 795, cert. denied 349 U.S. 963 (CA-7). We can only conclude that the evidence supports the verdict; that we cannot say that the challenged evidence, as a matter of law, lacked probative weight sufficient to take the case to the jury.

The Government concedes the merit of defendant's contention that the value of a brick residence, which was sold by defendant in 1946, was errroneously omitted from the opening net worth computation. The capital gains schedule of defendant's tax return for the latter year states that that property was acquired by defendant in 1945 at a cost basis of $11,000. Since this is the only evidence of record with respect to the time when defendant acquired this property, the sum should, as the Government concedes, have been included as an asset in the computation of defendant's net worth as of December 31, 1945. This omission, however, affects only Count I. Since the total unreported income for the year 1946 by the computation most favorable to the Government is an amount of approximately $13,800, only, we feel that this omission must have resulted in serious prejudice to defendant as to the charges of Count I. When employing the net worth method, the Government must prove, beyond a reasonable doubt, "that a substantial amount of tax liability has been willfully evaded." *United States* v. *Doyle*, 11528, decided May 23, 1956 (CA-7); *Sasser* v. *United States*, 208 F. 2d 535 (CA-5). The result of this omission was to interject into the proof as to Count I an erroneous figure which would reduce the evidence tending to prove "a substantial" evasion of tax liability to that which would support a maximum finding of willful evasion in an amount only slightly exceeding $2,800. The error accounts for almost 80% of the deficit shown by the Government's computation. We can only speculate as to whether the jury would have found a substantial evasion for that year. We think an error of this magnitude in a computative total of less than

$14,000 necessarily prejudiced defendant. The judgment as to Count I is reversed.

The last mentioned item was fully reflected in the net worth computations going to the proof of the charges of Counts II and III; consequently, we think the other contentions of error in this respect are without merit.

Defendant asserts that certain oil well investments in the amount of $5,000, and the value of the capital stock of Red Lion, Inc., in the amount of $4,673.18 were erroneously omitted from the opening net worth computation. What we have said with respect to the Red Lion stock in reviewing the contention as to misconduct of Government counsel disposes of this item. The entries upon defendant's 1946 tax return which are said to support the assertion that defendant acquired "Capital stock" in 1945 were an obvious reference to a stock of goods in inventory. The record is silent as to the existence or ownership of Red Lion corporate shares. With respect to the oil well investments, the evidence is in conflict. The record contains positive testimony that defendant acquired these assets in 1947, and the jury could have resolved this question against defendant. The review of conflicting evidence is beyond the scope of our function.

Defendant also objects to items included as assets in the closing net worth whicl allegedly were liabilities. There is, however, conflicting testimony with respect to each of them. We might well conclude our review on this note, but we think it wise to refer briefly to the evidence as to these transactions.

The first is a $12,000 item which grew out of a $35,000 cashier's check held by defendant at the end of the taxable year 1948. This check, issued by the Union National Bank and Trust Company of Elgin, was payable to defendant, his wife and one Gordon. The named persons signed a promissory note payable to Union in the amount of $23,000.

In computing defendant's net worth at the close of 1948 the $35,000 check was included as an asset and the $23,000 note as a liability. Defendant contends that this computation does not reflect a related transaction in which defendant borrowed the $12,000 representing the difference between the Union note and the check from the First National Bank. The record includes positive testimony that Union issued the check on consideration of the $23,000 loan and $12,000 cash paid by defendant. Gordon testified that he supplied none of the funds for the purchase of the check and that the latter was used to relieve the obligation of the note. One witness testified that First National was a participant in this transaction to the extent of $12,000. The record clearly shows that Union recorded the transaction as a $23,000 obligation. Gordon testified that he had not executed a note in favor of First National, and no record of such transaction was produced.

There was also a conflict of testimony with respect to a $7,500 transaction between defendant and one Affeld and another in which Gromer purchased a $15,000 cashier's check payable to defendant, which the latter endorsed and delivered to Gordon as a loan. Both transactions occurred in 1948. With respect to the Affeld transaction, there was a dispute as to whether the $7,500 represented a loan actually made or whether it was a mere commitment to pay on Affeld's account sums to the extent of $7,500 upon proper demand. This figure was set up as a closing net worth asset without a corresponding liability. With respect to the $15,000 check Gromer testified that he purchased it for defendant and delivered it to him. Defendant insists that there is no evidence that the check was purchased with defendant's funds. We have examined the record and believe there was sufficient evidence to submit to the jury upon each of these matters. There was substantial evidence which, if believed, supported the requisite finding that defendant willfully understated his income by substantial amounts in both 1947 and 1948, and that black market

receipts received by him in the sale of automobiles was the likely source of his enhanced net worth.

Defendant insists further that the evidence obtained from the partnership books of Highland Motor Sales should have been excluded from evidence as illegally seized in violation of the Fourth Amendment. When the investigation began, Special Agent Weber and Revenue Agent Auld presented themselves at the office of Highland where they met defendant and asked that they be permitted to examine the partnership books. Defendant does not deny that he consented to their examination of the books, but argues that the evidence obtained should have been suppressed because Weber did not reveal that he was a Special Agent or disclose the purpose of the investigation. In this respect, Weber testified that when he met defendant at Highland, he identified himself as a Special Agent, displayed his credentials and asked to examine the books of the partnership; that defendant consented to the examination and directed his bookkeeper to supply any books and records which the agents wanted, and, that, thereafter, he sought and received the consent of defendant's co-partner that he might examine the books.

This argument is not essentially different from that advanced in *Turner* v. *United States*, 222 F. 2d 926, cert. denied 350 U. S. 831 (CA-4), wherein defendants contended that evidence obtained from their books and records should have been suppressed, despite their consent to an examination of the books, for the reason that the investigating agents had not warned them that the evidence might be used in a criminal prosecution. The court there aptly stated, 222 F. 2d at 931: "The agents made no investigation to which defendants did not consent. The bookkeeper was ordered by the defendants to show the books and records of the business to the agent; * * * The evidence is silent as to whether Agent Forbes began the investigation as a routine examination to ascertain the civil liability of the

defendants or intended from the beginning to search for evidence of crime. But even if the latter assumption be made, there was no violation of the taxpayer's constitutional rights. The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance." This principle is cited with approval in *Zacher* v. *United States*, 227 F. 2d 219, cert. denied 350 U. S. 993 (CA-8), and *Eggleton* v. *United States*, 227 F. 2d 493 (CA-6), both evasion cases.

We note briefly defendant's charge that the trial court erred in denying without a hearing, his motion to suppress this evidence, which was made prior to trial and supported by defendant's affidavit. We think, however, the duty of a trial court to afford a hearing upon such a motion is limited by the prayer of the motion. In this respect, defendant, in his affidavit, did not deny, but rather, at least tacitly, admitted that he consented to examination of the books, but says he did not know of Weber's official title of Special Agent. The only hearing requested was the production of manuals prescribing the duties of special agents. There was no showing to warrant the granting of a hearing, inasmuch as there was no offer to prove that the evidence was submitted to the agents other than with defendant's consent. Cf. *Smith* v. *United States*, 348 U. S. 147, 151.

The case is unlike *United States* v. *Wolrich*, 129 F. Supp. 528, in which there was evidence that the treasury agents secured defendant's consent upon the assurance that the investigation was merely routine, when in fact, they were seeking evidence of fraud for a criminal prosecution. There is no suggestion of deception such as the court condemned in *Gouled* v. *United States*, 255 U. S. 298. There is no suggestion of lack of consent as appeared in *Fitter* v. *United States*, 258 Fed. 567 (CA-2), and *United States* v. *Brasley*, 268 Fed. 59. The case of *In re Subpoena Duces Tecum*, 81 F. Supp. 418, involved compulsory acquisition of partnership records which were used in evidence against one of

the partners. Here, both partners consented to the examination. Upon this record, we must conclude the evidence obtained from Highland's books was properly admitted.

Defendant's remaining argument relates to the alleged defense of embezzlement. He contends that Gromer his co-partner, filed a suit in 1951 for dissolution of the Highland partnership charging that defendant had embezzled partnership funds arising out of overceiling sales of automobiles. He asserts that the court erred in refusing to admit in evidence the stipulation of the parties settling that suit and in refusing to give defendant's tendered instructions relative to the defense of embezzlement. Argument on this phase of the appeal rests on the decision in *Commissioner* v. *Wilcox*, 327 U. S. 404, that moneys obtained by embezzlement do not constitute income to the embezzler. We think that decision is inapplicable to the case at bar and that the rulings of the court below were correct both as to the admission of evidence and as to instructions.

Defendant sought to introduce the stipulation in the course of the cross-examination of plaintiff's witness Gromer, and to cross-examine the witness with respect to the 1951 lawsuit. The court ruled that this evidence was beyond the scope of proper cross-examination. Gromer was not called as a defense witness, and no attempt was made to introduce evidence as to a defense of embezzlement in defendant's case in chief. This, we believe, brings this question within our holding in *United States* v. *Bender*, 218 F. 2d 869, cert. denied 349 U. S. 920, that the control over the orderly presentation of evidence resides in the sound discretion of the trial judge.

In any event, the defense of embezzlement, under the Wilcox rule, has no application to the case at bar, since under Illinois law defendant cannot be guilty of the crime of embezzlement because of his wrongful conversion of partnership funds to his own use. I.R.S., c. 38, § 208. The postulate, supported by the Illinois decisions interpreting this statute;

is that one having a property interest in funds in his possession is not guilty of embezzlement if he wrongfully appropriates the whole fund to his own use. *People* v. *Ehle*, 273 Ill. 424, 112 N. E. 970; *People* v. *O'Farrell*, 247 Ill. 44, 93 N. E. 136; *McElroy* v. *People*, 202 Ill. 473, 66 N. E. 1058. A necessary element of the crime of embezzlement is the existence of an absolute property right in someone other than the alleged embezzler. *McElroy* v. *People*, *supra*.

Thus, in *McElroy*, defendant, a commission salesman, was convicted upon an indictment charging her with the embezzlement of the proceeds of certain sales. Inasmuch as it appeared from the evidence that defendant was entitled to deduct her commissions from the proceeds of such sales before paying over the balance to the prosecuting witness, the court reversed the conviction saying, 202 Ill. at 475-476: "By this statute, in order to constitute the crime of embezzlement the fraudulent conversion must be of the property of another. If the plaintiff had a right to deduct her commissions from the gross amount collected, then to that extent the money belonged to her,—that is, she and the company owned the gross sum jointly. The law is, that where a defendant has an interest in the property or money alleged to have been fraudulently converted to his or her own use there can be no conviction of the crime of embezzlement."

In *Ehle*, the conviction of embezzlement rested upon proof that defendant, as attorney for Burns had settled a claim possessed by the latter, had deposited the check therefor in his own bank account and had checked the sum out for his own personal use. The court stated the applicable rule as follows, 273 Ill. at 432: "* * * an agent would not be guilty of embezzlement if such agent had an interest in or part ownership of the funds involved, or until an accounting had been had and a demand and refusal to pay the amount due from such agent to his principal." The conviction was reversed, the court saying, 273 Ill. at 433: "If

he took the suit independently for himself he was clearly entitled to fees, and he was not liable to indictment for embezzlement of this money, or to disbarment, until after a demand had been made upon him for the amount and a tender made of his reasonable fees and expenses. But no demand was ever made."

People v. *O'Farrell*, 247 Ill. 44, 93 N. E. 136, furnishes a good illustration of the application of this principle. O'Farrell was agent for one Vickerage to collect the rents from a hotel and also to negotiate its sale. The indictment charged that O'Farrell had embezzled both the sums collected as rents and those received from one Colgrove, in effecting the sale of the real property. It appeared that O'Farrell's agency, in each instance, grew out of separate contracts. The first provided that he was to deduct his commissions from funds collected as rent and to remit the net fund to Vickerage. The agency contract for the sale of the hotel provided that O'Farrell was to receive a commission for the sale of the property, but made no provision for his retention of his commission out of the funds received for the sale. The court held there was no embezzlement of the rent funds since O'Farrell had an interest therein, but affirmed the conviction because of his conversion of the sale proceeds in which he had no interest.

Before embezzlement can arise, the funds in the hands of a fiduciary must be held under an absolute obligation to remit them to another, but taking of the whole of a fund cannot constitute embezzlement, if the fiduciary has an interest in it and a duty only to account to another for his distributive share thereof. This is a fair summary of the law of Illinois as established by the cases interpreting an act in all relevant respects identical to § 208. See also *People* v. *Becker*, 414 Ill. 291, 111 N. E. 2d 491.

Defendant had an undistributed one-half interest in the partnership funds in question. His duty to Gromer was that of accounting for the latter's distributive share, and

defendant could not be guilty of embezzlement, at least until an accounting had been sought by Gromer and refused. No accounting was sought until 1951.

Even if this were an embezzlement of Gromer's distributive share of such black-market partnership income, the Government took the precautionary measure of allowing one-half of this partnership income as a deduction from net worth. We do not understand defendant's contention to be that he embezzled his own distributive share. Unless such an absurd result were contended, embezzlement, in any event, is removed from the case.

A vague assertion is made that someone connected with Highland may have embezzled the black-market funds belonging to both partners. The difficulty with this argument is that the record is wholly devoid of any such evidence. Insofar as the instructions rejected by the trial court may have been grounded upon such a contention, they were properly refused. It was incumbent upon defendant to assert and prove such embezzlement if he wanted to rely upon such a defense. He is not entitled to instructions resting upon mere speculative assertions manufactured wholly from thin air.

As to Count I the judgment is reversed. As to Counts II and III it is affirmed. Inasmuch as identical prison sentences were imposed upon each count, and inasmuch as all sentences, expressly, are to be served concurrently, our reversal of the judgment of conviction upon a single count does not necessitate a new trial.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11575. OCTOBER TERM, 1955, APRIL SESSION 1956.

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant.*

Upon Petition for Rehearing

July 31, 1956

Before MAJOR, LINDLEY and SWAIM, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Upon defendant's conviction on three counts of an indictment charging attempts to evade the payment of income taxes for the taxable years 1946, 1947 and 1948 by filing, or causing to be filed, false and fraudulent income tax returns in violation of 26 U.S.C. § 145 (b), (I.R.C. 1939), he was sentenced, on each count, to serve two years in prison, the sentences to run concurrently.

On appeal, we reversed the conviction as to Count I and affirmed as to Counts II and III. Defendant's petition for a rehearing is based, *inter alia,* upon arguments addressed to the sufficiency of the evidence to prove his guilt upon the net worth theory of proof. We think nothing is added thereby to the points raised and argued on appeal. We adhere to our judgment affirming the conviction as to the two counts.

A rather troublesome question raised by the petition is one upon which defendant did not rely either in the trial court or before us on appeal, namely, that the sentence is invalid. As we have previously stated, the indictment charged three separate attempts to evade income taxes by

filing false and fraudulent returns, a charge which has been repeatedly held to allege the felony defined in Section 145 (b).[1] See *e.g. United States* v. *Beacon Brass Co.*, 344 U.S. 43; *United States* v. *Raub*, 177 F. 2d 312 (CA-7); *United States* v. *Rosenblum*, 176 F. 2d 321, cert. denied 338 U.S. 893 (CA-7). Defendant now contends, for the first time, that the charge contains the elements of the misdemeanor defined in 26 U.S.C. § 3616 (a), (I.R.C. 1939),[2] that those elements and those of the felony are in all respects identical and that, therefore, it was error for the trial court to impose a sentence greater than that prescribed for the misdemeanor by § 3616 (a).

The government admits that both § 145 (b) and § 3616 (a) apply to income tax returns and cover identical ground. It contends, however, that the government has the authority to elect under which statute it will proceed, or, alternatively, that the subsequent enactment, § 145 (b), repeals § 3616 (a) by implication.

Before reaching the merits of defendant's petition, we must determine whether the question can properly be raised at this late date. We think that it cannot. We say this advisedly, and do not purport to determine whether, were the question an open one, we would construe the conceded overlapping of the two statutes as a question of plain error "affecting substantial rights" and therefore

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1 "(b) * * *. Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

2 "Whenever any person

"(a) FALSE RETURNS. Delivers or discloses to the collector * * * any false or fraudulent list, return, * * *, with intent to defeat or evade the * * * assessment to be made;

* * *

"He shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

noticeable "although * * * not brought to the attention of the trial court." Fed. Rules Crim. Proc. 52 (b). We think that a determination that the question does not present such error is manifest in the recent pronouncements by the Supreme Court in *Berra* v. *United States*, 351 U.S. 131, which, at least, imply that the validity of a sentence under § 145 (b) must be challenged by an appropriate proceeding in the trial court.

The indictment in Berra was in all material respects identical to that before us. At the close of all the evidence Berra requested an instruction "that a verdict of guilty of the 'lesser crime' under § 3616 (a) would be permissible." 351 U.S. at 132. Although the Court's decision affirming Berra's sentence is restricted to the narrow question whether that requested instruction was properly refused, the Court concluding that the refusal did not constitute error, the intendments of the opinion are much broader. The Court assumed, *arguendo*, that both § 145 (b) and § 3616 (a) applied and "covered the same ground." 351 U.S. at 134. It held, however, that the implication of such overlapping was a question of law for the court which had not been raised in the trial court and that "no such questions are presented here." 351 U.S. at 135.

Mr. Justice Black filed a dissenting opinion, in which Mr. Justice Douglas joined, stating that he would reverse the judgment, or at least remand the case to the district court "for resentencing under the misdemeanor statute, § 3616 (a)." 351 U.S. at 140. The dissent is based upon the postulate that the case presented an issue of plain error affecting substantial rights.

We can only conclude that the majority opinion in Berra inherently impels a determination that the question before us does not reflect plain error. Rule 52 (b) was designed to reach errors of such a substantial nature that they would, if not corrected, result in a manifest miscarriage of justice. *Brotherhood of Carpenters* v. *United States*, 330

U.S. 395; *United States* v. *Vasen*, 222 F. 2d 3, cert. denied 350 U.S. 834 (CA-7). Inasmuch as errors within the comprehension of the provisions of this rule, are those of such a nature that they must be corrected to prevent a manifest injustice, it is incumbent upon a reviewing court to notice such error *sua sponte* although the issue presented is not raised on appeal. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Dressler*, 112 F. 2d 972 (CA-7); *Lash* v. *United States*, 221 F. 2d 237, cert. denied 350 U.S. 826 (CA-1); *Austin* v. *United States*, 208 F. 2d 420 (CA-5); *Simmons* v. *United States*, 206 F. 2d 427 (CA-DC); *United States* v. *Kemble*, 197 F. 2d 316 (CA-3). Cf. *United States* v. *Jonikas*, 187 F. 2d 240, cert. denied 344 U.S. 877 (CA-7).

In the face of this pronounced duty upon federal appellate courts, see *Screws* v. *United States*, *supra*, the Court in Berra took the position that the issue of the implication of the overlapping of §§ 145 (b) and 3616 (a) was not preserved because Berra had presented no proper challenge to the sentence to the trial court. As the dissenting Justices aptly observed, 351 U.S. at 137, the instruction which Berra requested advised the lower court of "petitioner's contention that the offense charged was not a felony but a misdemeanor." If the question was not preserved for review under the circumstances of that case, it certainly cannot be raised on this appeal in which there was no intimation of error below in the imposition of sentence or on appeal until the petition for rehearing was filed.

The petition is denied.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11575

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant.*

In the appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Motion

Now comes the Defendant-Appellant herein by his attorneys and moves this Honorable Court for leave to proceed in the United States District Court for the Northern District of Illinois for the limited purpose of filing therein a motion pursuant to Rule 35, Federal Rules of Criminal Procedure and as grounds therefor shows:

1. That this Honorable Court's opinion of July 30, 1956 on the Petition for Rehearing heretofore filed herein on June 20, 1956 has left undetermined a point raised therein which point was considered at length in the Court's opinion but decided adversely for another reason without direct ruling thereon.

2. That so multiplicity of appeals may be avoided such a motion in the trial court in the more proper sequence of proceedings should be made at this time in view of this Court's decision.

3. And Appellant further moves, that a stay be granted on the mandate of this Court pending the disposition of the motion in the trial court.

WHEREFORE, the Appellant respectfully moves this Honorable Court for leave to proceed in the United States District Court for the Northern District of Illinois, Eastern

Division for the sole and limited purpose of filing therein a motion pursuant to Rule 35, Federal Rules of Criminal Procedure, and that a stay of the mandate of this Court be granted pending the disposition of said motion.

/s/ C. J. Batter
Carl J. Batter
/s/ Frank J. Gagen, Jr.
Frank J. Gagen, Jr.
Attorney for Defendant-Appellant

Anna R. Lavin
Of Counsel

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11575

United States of America, *Plaintiff-Appellee,*

v.

Sam Achilli, *Defendant-Appellant.*

In the appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Amendment to Notice to Stay Mandate

Now comes the Defendant-Appellant herein by his attorneys which asks leave of this court to amend his motion for stay of mandate in the cause herein, which said motion has heretofore, on the 2nd day of August, 1956, filed in this Honorable Court, to pray the following relief in the alternative:

"Wherefore, the Appellant respectfully moves this Honorable Court for leave to amend in the United

States District Court for the Northern District of Illinois, Eastern Division, for the sole and limited purpose of filing therein a motion pursuant to rule 35 of the Federal Rules of Criminal Procedure, and that a stay of the mandate of this court be granted pending the disposition of said action.

"OR, IN THE ALTERNATIVE, that a stay of the mandate of this Court be granted to and involving the 30th day of August, 1956, pending petition by the Defendant-Appellant for Certiorari to the Supreme Court of The United States."

/s/ C. J. BATTER
Carl J. Batter
/s/ FRANK J. GAGEN, JR.
Frank J. Gagen, Jr.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, August 13, 1956

Before

Hon. J. EARL MAJOR, *Circuit Judge*
Hon. WALTER C. LINDLEY, *Circuit Judge*
Hon. H. NATHAN SWAIM, *Circuit Judge*

No. 11575

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of the Amendment to Motion of Defendant-Appellant to stay mandate, file on August 7, 1956,

It is ordered that that part of said Amendment to Motion which seeks leave of this Court to proceed in the United States District Court for the Northern District of Illinois, Eastern Division for the purpose of filing therein a Motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, be and the same is hereby, Denied.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Monday, August 13, 1956

Before

Hon. WALTER C. LINDLEY, *Circuit Judge*

No. 11575

THE UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

SAM ACHILLI, *Defendant-Appellant.*

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

On consideration of that part of the Amendment to Motion of Defendant-Appellant filed on August 7, 1956, which seeks a Stay of Mandate,

It is ordered that the issuance of the Mandate of this Court be stayed until August 30, 1956, subject to the provisions of Rule 28 of the revised Rules of this Court.

E COPY

No. 430

Office - Supreme Court, U.S.
FILED
OCT 17 1956
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals (Pet. A-1—A-20) are reported at 234 F. 2d 797.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1956 (Pet. A-16), a petition for rehearing was denied on July 31, 1956 (Pet. A-20), and a motion for leave to proceed in the trial court to file a motion to correct the sentence was denied on August 13, 1956 (Pet. A-24). On August 23, 1956, Mr. Justice Minton

extended the time for filing a petition for certiorari to September 20, 1956. The petition for a writ of certiorari was filed on September 17, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254. (Pet. 3.)

QUESTIONS PRESENTED

1. Whether a United States Attorney is required, in a criminal prosecution for income tax evasion, to reconstruct income by the same method used by the Commissioner in determining the civil tax liability.

2. Whether the Court of Appeals properly exercised its function in reviewing the record in order to determine whether there was substantial evidence to support the inclusion of certain assets in petitioner's closing net worth.

3. Whether the Government sustained its burden of showing that the petitioner's net worth increases arose from current taxable income.

4. Whether the trial court erred in refusing a tendered instruction relating to the defense that embezzled funds do not constitute taxable income.

5. Whether certain remarks made by the prosecutor on summation deprived petitioner of a fair trial.

6. Whether the trial court erred in imposing upon petitioner, under Section 145(b) of the Internal Revenue Code of 1939, a sentence in excess of that which could have been imposed under Section 3616(a) of the Code.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 41. GENERAL RULE.

The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.

(26 U.S.C. 1952 ed., Sec. 41.)

SEC. 145. PENALTIES.

* * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000,

or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(26 U.S.C. 1952 ed., Sec. 145(b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U.S.C. 1952 ed., Sec. 3616(a).)

STATEMENT

On March 4, 1953, a three-count indictment was filed against the petitioner in the United States District Court for the Northern District of Illinois. In counts one and two he was charged with wilfully attempting to evade a large part of his individual income taxes for the years 1946 and 1947, respectively, and in count three with wilfully attempting to evade a portion of his own and his wife's income tax for 1948, in violation of Section 145(b), Internal Revenue Code of 1939. The indictment charged that the means of evasion had been the filing of false and fraudulent returns understating his net income in each year. The amounts of net income and the taxes due on it, as reported in the returns and as charged, are as follows (R. 3-5):

	Reported		Corrected	
	Net Income	Tax	Net Income	Tax
Count I (1946)	$11,753.96	$2,780.15	$44,254.60	$20,856.74
Count II (1947)	16,785.52	4,620.98	70,785.75	39,454.76
Count III (1948)	34,053.12	8,968.52	52,805.05	17,997.25

A mistrial was declared on November 22, 1954 (R. 42) after a witness had testified to petitioner's previous imprisonment (R. 43). In the second trial, on May 11, 1955, after nineteen days of trial the jury found the petitioner guilty as charged. (R. 1171.) A motion for a judgment of acquittal or, in the alternative, for a new trial was denied on May 27, 1955. (R. 1210-1211.) On June 16, 1955, the petitioner was sentenced to concurrent two-year prison terms on each count and was fined $6,000. (R. 1212-1213.) The Court of Appeals affirmed the conviction as to counts two and three and reversed as to count one on the Government's concession that an asset of $11,000 had been omitted from the computation of petitioner's opening net worth for 1946. (Pet. A-8, A-16.)

The evidence to support the verdict may be summarized briefly as follows:

The Government's proof of unreported income consisted of (1) direct evidence of petitioner's receipt of substantial amounts of unreported income, and (2) evidence of net worth increases and expenditures substantially in excess of reported income.

(1) Late in 1944 petitioner and one Gromer, a practicing lawyer, formed a partnership known as Highland Motor Sales, each investing $6,000, and obtaining an $18,000 bank loan. The firm acquired a franchise for the sale of Chrysler automobiles. Petitioner

was the active head of the business and had supervision of the books and records. (R. 796-802.)

Fifty-three witnesses testified that they had purchased a total of 134 automobiles from Highland Motor Sales during the prosecution years. All of them had dealt either with petitioner or his sales manager. (R. 123-465.) In each instance the sale was either omitted from the books entirely or the selling price was understated on the books. (R. 925-944.) This unrecorded income, which was reported on neither the partnership return or petitioner's return (R. 83, 91-94, 802-806), totalled the following amounts (R. 944):

1946	$14,955.10
1947	36,131.55
1948	21,068.00

The Government's evidence also showed that petitioner had received interest income and income from the discounting of notes, none of which was reported on the returns. (R. 585-589, 776-781, 864-865; Ex. Vol., pp. 7-8, 11-12.)

(2) The net worth starting point evidence included proof that during the years 1930 through 1945 petitioner paid income taxes totalling $2,699.77 (R. 921-923); that he had received no gifts or inheritances but his wife had realized $720.10 from her mother's estate in 1943 (R. 877-878, 879-881, 917); that his visible net worth at the beginning of the prosecution years was $33,815.56 (Ex. Vol., pp. 70-71); and that he admitted that he had had no undeposited cash on hand (R. 959).

In view of the possibility that petitioner might be accountable to his inactive partner for one-half of the

unrecorded and unreported receipts from the sale of cars, the Government's computations of income on the net worth-expenditures method took into account a liability running from petitioner to the partner of 50% of such receipts. After this adjustment the net worth proof showed that petitioner had realized unreported income of $13,803.94 in 1946; $36,958.63 in 1947, and $20,623.18 in 1948. (R. 944-946, 957-959; Ex. Vol., pp. 70-74.)

ARGUMENT

1. Petitioner's main contention (Pet. 3, 13-18) is that the United States Attorney is bound, in a criminal prosecution for income tax evasion, by the "method of accounting" selected by the Commissioner of Internal Revenue in determining the civil tax liability; and that if the Commissioner does not use the net worth method for that purpose, all evidence of the defendant's net worth is inadmissible upon the criminal trial. The contention is plainly devoid of merit.

Petitioner relies upon Section 41 of the Internal Revenue Code of 1939 (*supra*, p. 3). He argues that the record shows that the Commissioner has not determined the civil liability by the net worth method but has made specific adjustments to items of income and deductions; that it must be assumed that he has found that these adjustments "clearly reflect the income"; and that the prosecutor has no right to "disregard the Commissioner's findings * * *." (Pet. 14-16.) Assuming, *arguendo*, that it appears that the civil liability has been determined by a method other than the net

worth method,[1] it does not follow that the prosecutor is thereby restricted in the kind of evidence he may offer at the trial of the indictment. Only recently, in *Holland* v. *United States*, 348 U.S. 121, this Court had occasion to reject a similar contention based on Section 41. The Court said (pp. 131-132):

> The provision that the "net income shall be computed * * * in accordance with the method of accounting regularly employed in keeping the books of such taxpayer," refers to methods such as the cash receipts or the accrual method, which allocate income and expenses between years. *United States* v. *American Can Co.*, 280 U.S. 412, 419. The net worth technique, as used in this case, is not a method of accounting different from the one employed by defendants. It is not a method of accounting at all, except insofar as it calls upon taxpayers to account for their unexplained income. * * * Certainly Congress never intended to make § 41 a set of blinders which prevents the Government from looking beyond the self-serving declarations in a taxpayer's books. * * * To protect the revenue from those who do not "render

[1] However, the record does not show that the civil tax determination here was based on a method other than the net worth method. True, the deficiency notices list specific disallowances of deductions and add specific items of unreported income (many of which do not properly lend themselves to a charge of criminal fraud), but with respect to the largest item in each year they show only a designation of "Other Income" with the explanation, e.g., that "It is determined that you received during the year of 1946 income in the amount of $100,963.99 which you did not include in the return you filed." (R. 23-24, 27-28, 31-32.) There is no reason to believe that this amount and the corresponding amounts for 1947 and 1948 ($95,000 and $23,704.94, respectively) were not determined on the basis of the agent's net worth computations.

true accounts," the Government must be free to use all legal evidence available to it in determining whether the story told by the taxpayer's books accurately reflects his financial history.

Petitioner's argument arises from a confusion of the civil and criminal aspects of the revenue laws.[2] Civil tax cases are disputes between the taxpayer and the Commissioner. The question is the exact amount of tax owed, and the burden of proof rests upon the taxpayer to show that the Commissioner's determination is erroneous. In criminal cases, of course, the burden of proof is on the Government, but the Government need only prove that the defendant fraudulently evaded some of the tax. Cf. *United States* v. *Johnson*, 319 U.S. 503, 517. There may well be cases, in view of these fundamental differences, in which the method of reconstructing income for criminal purposes is different from that which the Commissioner finds appropriate for the determination of the civil liability.[3] The United States Attorney "must be

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[2] Petitioner's argument is closely akin to the contention that in an income tax evasion prosecution the Government must put into evidence a determination of the defendant's civil tax liability by the Commissioner. See *Ford* v. *United States*, No. 180, this Term. This argument has long been discredited. *Guzik* v. *United States*, 54 F. 2d 618, 619 (C.A. 7th), certiorari denied, 285 U.S. 545; *Commerford* v. *United States*, 64 F. 2d 28, 30 (C.A. 2d), certiorari denied, 289 U.S. 759.

[3] The deficiency notices issued to petitioner reflect the disallowance of many deductions and losses claimed on the returns on the ground that petitioner had no records to substantiate them, as well as technical adjustments relating to such items as excessive depreciation and capital gains and losses. (R. 23-24, 27-28, 31-32.) Obviously, in the absence of proof of fraud, these items would be quite inappropriate for inclusion in the criminal case.

free to use all legal evidence available to" him. (*Holland* v. *United States*, *supra*, p. 132.)

2. Petitioner argues (Pet. 18-21) that there was conflicting testimony with respect to the propriety of including certain items in his closing net worth, and urges that the Court of Appeals, because it can undertake a "more exacting and leisurely examination" of the record than the jury could (Pet. 4), should have resolved such conflicts. This is not the function of an appellate court. *Taylor* v. *Mississippi*, 319 U.S. 583, 585-586; *Abrams* v. *United States*, 250 U.S. 616, 619; *Burton* v. *United States*, 202 U.S. 344, 373. Its function is to determine whether there is substantial evidence, taking the view most favorable to the Government, to support the verdict. *Glasser* v. *United States*, 315 U.S. 60, 80. The Court of Appeals reviewed the record in the light of petitioner's contentions and found them to be without merit. (Pet. A-9—A-11.) The record supports that conclusion.

Petitioner implies (Pet. 19) that the inclusion in his closing net worth of certain equipment purchased in 1947 was improper, because it was "contracted for by Red Lion, Inc.", a night club (Ex. Vol. pp. 46, 47, 50, 52). There was evidence, however, that petitioner purchased the equipment and signed the contracts; and that the words "Red Lion, Inc." were placed there not to fix liability but for the purpose of identifying the place of business in which the equipment was to be used. (R. 578-583.) Petitioner owned the real estate and spent substantial sums on its improvement. (R. 520-523, 945-946, 949.) It appears that he also

owned the equipment, for he claimed depreciation on it in both 1947 and 1948. (Ex. Vol., pp. 8, 12.)

With respect to three other items, as to which petitioner mentions only the amounts (Pet. 19), there was also substantial evidence in the record justifying their inclusion in his closing net worth (R. 541-542, 545, 644-647, 762-764, 865, 867, 1024-1027, 1032). The Court of Appeals correctly concluded that the Government's treatment of these items was entirely proper. (Pet. A-9—A-11.)

3. Petitioner contends (Pet. 21-22) that the Government did not sustain its burden of showing that his net worth increases arose from a "likely source, from which the jury could reasonably find that [they] sprang" (*Holland* v. *United States*, 348 U.S. 121, 137-138). He argues that the Government's case must fail because the disposition of the unreported income proved by direct evidence of specific automobile sales (*supra*, p. 6) was not traced into the acquisition of assets.[4] We think this argument, in the circumstances of this case, borders on the frivolous. There is no burden on the Government to prove the precise source

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[4] Petitioner argues (Pet. 21) that the evidence shows affirmatively that the unreported income from automobile sales did not find its way into his assets because such assets were all paid for by check rather than currency. Nothing in the record, however, obviates the likelihood that petitioner deposited the suppressed sales receipts into his bank accounts and [illegible] used them to acquire assets. If petitioner's argument ha[illegible] it, it seems clear that his true unreported income would h[illegible] co[illegible]prised of the total of the net worth increases and the rec[illegible]s from suppressed sales since, under his theory, the latter formed no part of the former. Of course the case was not submitted to the jury on any such theory.

of the funds reflected in increased net worth. The requirement is that the Government adduce "evidence supporting the inference that the defendant's net worth increases are attributable to currently taxable income." (*Holland* v. *United States, supra,* p. 137.) One way of doing that is to show evidence of a "likely source" of taxable income. Here the Government proved a positive source of a large part of the unreported income, and in addition adduced evidence (which was not present in the *Holland* case) tending to negative the receipt of gifts and inheritances. (*Supra,* p. 6.) Whatever the merits of petitioner's argument in the abstract, it can hardly be made in this case, where the record contains evidence overwhelmingly establishing that the funds in question dervied from current taxable sources.

4. The contention (Pet. 22-24) that the unreported income may have constituted embezzled, hence nontaxable, funds is clearly without merit.[5] Petitioner relies wholly upon *Commissioner* v. *Wilcox,* 327 U.S. 404. This Court has specifically limited the holding to the particular facts of that case. *Rutkin* v. *United States,* 343 U.S. 130, 138. Under the *Rutkin* case a gain is taxable "when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." (343 U.S. at 137.)

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[5] The point was raised in the trial court by petitioner's requesting two instructions on the subject, both of which were refused. (R. 1126, 1128.) We submit that the vague and misleading language of both instructions would in itself have been sufficient grounds for their rejection.

Moreover, as has been shown (*supra*, pp. 6-7), petitioner was credited in the net worth reconstruction with a liability in the amount of 50% of the suppressed receipts from car sales, *i.e.*, the amounts which he had wrongfully diverted from his partner's share. The obvious effect was to treat as petitioner's income only his share of the suppressed receipts.

5. Petitioner states (Pet. 24-26) that his right to a fair trial was prejudiced by nineteen remarks of the prosecutor during summation. He points to no particular incident, nor does he attempt to explain wherein he was prejudiced. Seventeen of the remarks were not objected to. The Court of Appeals carefully considered the most important of these contentions in the light of the whole record and found that they "present for the most part nothing more than zealous advocacy" and that "they cannot be classified as misconduct requiring reversal." (Pet. A-5.) The record amply justifies that conclusion. See *Malone* v. *United States*, 94 F. 2d 281, 288 (C.A. 7th), certiorari denied, 304 U.S. 562; *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (C.A. 2d).

6. Finally, petitioner raises questions (Pet. 26-31) as to the legality of his sentence and the validity of the indictment, pointing to the overlap between Sections 145(b) and 3616(a) of the Internal Revenue Code of 1939 (*supra*, pp. 3-4) as applied to the facts of this case. These contentions are similar to those made in *Doyle* v. *United States* and *Moran* v. *United States* (both pending on petitions for certiorari, Nos. 386 and 417, this Term). The points were not raised in

the trial court.[6] We agree that it is desirable that these questions (following in the wake of *Berra* v. *United States*, 351 U.S. 131) should be settled, but the Court may consider it appropriate to await the arrival of a case or cases in which they have been properly preserved. In the *Berra* case, where the defendant had called Section 3616(a) to the attention of the trial court by requesting an instruction to the jury, this Court (Justices Black and Douglas dissenting) found it unnecessary to decide whether the sentence was excessive. *A fortiori*, the question is not presented by the record in the instant case, on which it was not raised in the District Court in any manner. (Pet. A-17—A-20.)

CONCLUSION

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
RICHARD B. BUHRMAN,
MARVIN O. GRANATH,
Attorneys.

OCTOBER, 1956.

---

[6] Petitioner contends (Pet. 28) that he raised this issue by a pre-trial motion to dismiss. However, the Code provision there relied upon was not Section 3616(a) but Section 3761(a), relating to the compromise of civil tax liability. (R. 7.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 430

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR CERTIORARI.

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OPINIONS BELOW.

The District Court wrote no opinion. The opinion of the Court of Appeals for the Seventh Circuit (Pet. A-1 to A-10) affirming the judgment of the District Court has been reported as 234 F. 2d 797.

REPLY TO BRIEF IN OPPOSITION.

While your petitioner, necessarily, cannot agree with the conclusions espoused by the Government's Brief in Opposition to the Petition under points numbered 1 through 5, he does agree that the Government has demonstrated an effort to recognize the essence of the arguments made on such points and to fairly meet them. For that reason he will not address repetitious argument thereto. However, as to its argument on point 6 (Br. Opp. p. 13), it is respectfully submitted by your petitioner that the Government has contented itself with merely impressing upon the instant cause Facts and Law adopted from a former cause decided by this Court, (*Berra* v. *United States*, 351 U. S. 131) and with which we are not directly concerned. The employment of the seemingly expeditious package disposal of three Petitions for Certiorari (this, together with *Doyle* v. *United States* and *Moran* v. *United States*, Nos. 386 and 417, this Term) does violence to the factual circumstances of this cause and the legal propositions advanced.[1] Your petitioner is apprehensive that the Government's summary dismissal by its discussion in its point 6 may obscure the overriding error assigned.

1. The petitioner has requested this Court to accept this case for review, in part, because "We submit that the record on appeal was sufficient to place the issue before the Court (of Appeals) below; and it was error to decline to pass upon the merits of the issue." (Pet. 30).

---

[1] The Government's footnote 6 (Br. Opp. p. 14) is an incomplete and, therefore, inaccurate statement of the record of the petitioner's motion to dismiss. While not designated by specific code number, that motion was addressed to the conflict of code provisions with the Statute cited in the instant Indictment. (R. 7).

The Government, beginning at page 13 of its Brief in Opposition, states "Finally, the petitioner raises questions as to the legality of his sentence and the validity of the indictment * * *" and concludes "* * * *a fortiori*, the question is not presented by the record in the instant case, on which it was not raised in the District Court in any manner. (Pet. A-17-A-20)". The Government has ignored Point 8 of the questions presented (Pet. 28) relating to the jurisdictional issue raised in the Court of Appeals by the Petition for Rehearing and not decided by the general decision thereon (Pet. A-17-A-20).

The petitioner urges that the error was preserved for the record on appeal by the motion to dismiss on which the District Court ruled adversely. Further, this record shows a patent refusal by the United States Court of Appeals for the Seventh Circuit to rule on a claimed jurisdictional defect, or to grant appropriate relief in lieu thereof (Pet. A-21-A-25). The Government has neither adopted the rule of the Court of Appeals nor confessed its error, the Government simply does not comment.

2. The petitioner deems it significantly impressive to call to this Court's attention the Government's failure to urge upon your Honors the ruling of the Court of Appeals that sentences and fines in excess of that authorized by law are not "plain errors and defects affecting substantial rights (which) may be noticed although they were not brought to the attention of the court." (Rule 52(b), Federal Rules of Criminal Procedure).

Your petitioner does not believe the decision of this Court in *Berra* v. *United States*, 351 U.S. 131, was based upon a record such as is before this Court now.

While the Government recognizes the importance of the question presented (Br. Opp. 14), it would prefer it to be decided some other time. We immodestly submit that this Court will find legal and justiciable cause to act at this time.

Respectfully submitted,

FRANK J. GAGEN, JR. and
ANNA R. LAVIN,
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 834

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No.

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit prior to the entry of judgment by that Court upon an appeal there pending from an order of the United States District Court for the Northern District of Illinois, Eastern Division, on petitioner's motion for a correction of his sentence after conviction for filing false income tax returns with intent to evade taxes.

On March 4, 1957, this Court vacated its prior order in this cause (Docket 430) of November 19, 1956, denying a

petition for writ of certiorari to the Court of Appeals for the Seventh Circuit, and the petition was granted, limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also showed a violation of Section 3616(a) of the Internal Revenue Code of 1939.

Petitioner therefore respectfully asks this Court to issue the writ of certiorari for the purpose of bringing before the Court the entire record of the proceedings had subsequent to November 19, 1956.

(a) Opinion of the District Court.

The opinion of the District Court, not yet reported, appears in Appendix A.

(b) Jurisdiction.

1. The order of the District Court denying motion to correct and granting motion to reduce sentence was entered December 27, 1956, and the Court's memorandum filed January 2, 1957.

2. After notice of appeal and an amended notice of appeal, filed January 7, 1957, the record was filed in the Court of Appeals for the Seventh Circuit on February 8, 1957 and the appeal was perfected on that day.

3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

(c) Questions Presented for Review.

1. May a person be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939?

2. Does the overlap of Sections 145(b) and 3616(a) of the Internal Revenue Code pose an inconsistency so great as to preclude any valid sentence whatsoever?

This latter question was made explicit in the supplementary motion filed in the Court of Appeals.

(d) Statutes Involved.

Internal Revenue Code 1939, Title 26, U. S. C. (1939):

§ 145. Penalties—

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties—

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(e) Statement of the Case.

Petitioner was indicted on three counts charging that he "did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" in violation of Section 145(b) of the Internal Revenue Code (3-4).[1]

Two trials were had, the first resulting in a mistrial ordered by the District Court on motion of the defendant (42). The second trial resulted in a conviction on all three counts involving the calendar years 1946, 1947 and 1948. The petitioner was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000 on each count, the fines to be cumulative, or a total of $6,000.

On June 5, 1956, the United States Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed judgment of conviction on the second and third counts.[2] A petition for rehearing was filed and denied.[3]

This Court on November 19, 1956 denied certiorari, and the matter came on before the District Court for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, then counsel for petitioner moved the District Court for the entry of an order for leave to file a motion and petition to correct or reduce the sentence, relying partly upon the overlap of Sections 145(b) and 3616(a) of the 1939 Code.

1. Parenthetical references, unless otherwise indicated, are to the appendix in the Court of Appeals, filed with this Court as Docket 430.

2. App.-1 to petition for certiorari in Docket 430, 234 F. 2d 797.

3. App.-17 to petition for certiorari in Docket 430.

On December 27, 1956, the District Court denied the motion to correct the sentence, but reduced the sentence to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the petitioner $1,000 on each count, or a total of $2,000. While the District Court purported to deny the motion to correct the sentence on the ground of inconsistency between Sections 145(b) and 3616(a) of the Code, the Court stated, "I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done."[4]

Thereafter, counsel for petitioner moved in the Court of Appeals to enlarge the grounds for correction of sentence by raising the issue of the validity of any sentence in view of the conflict between Sections 145(b) and 3616(a) of the Code. Question 2 as set forth in the Questions Presented by this petition falls within the scope of that motion. The Court of Appeals denied the motion to enlarge.

(g) Reasons for Granting the Writ.

The trial court refused to resolve the questions necessarily presented by the overlap of Sections 145(b) and 3616(a), stating, "That matter has never been finally adjudicated by our Supreme Court. I can conceive that there is quite a diversity of opinion on that question. I

4. Page 20, transcript of record filed with this petition. This seemingly inconsistent action of the District Court reducing the sentence to a misdemeanor level does not render the case moot. There is still left the implication that sentence was imposed under the felony counts. As this Court most recently stated on February 25, 1957, in *Thomas E. Pollard* v. *United States*, Docket 38, this Term, "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." Here, as in the *Pollard* case, the petitioner is challenging the legality, not of any determination of guilt, but instead, of the sentence imposed.

am, therefore, taking that into consideration in my final judgment in this case.'"[5]

There is thus left open for decision an important question of federal criminal law. This Court on January 28, 1957 granted certiorari in the *Frank Costello* case, Docket 666, which presents the identical issue set out in Question 1 of the Questions Presented by this petition. Subsequently, on March 4, 1957, this Court vacated its prior denial of certiorari in this cause, Docket 430, and granted the writ, limited to the question set out in Question 1 of the Questions Presented by this petition. Accordingly, the allowance of the writ in this petition will bring before this Court the full record of the proceedings had subsequent to November 19, 1956.

We respectfully submit that both the District Court and the Court of Appeals misconceived the implications of this Court's decision in *Berra* v. *United States*, 351 U. S. 131. That case did not involve the direct question as to the validity of a sentence under Section 145(b), or the validity of a sentence under either Sections 145(b) or 3616(a). These questions were appropriately raised in the District Court and in the Court of Appeals by motions under Rules 35 and 52(b) of the Federal Rules of Criminal Procedure. These motions are the equivalent of a motion presented under Section 2255, Title 28 U. S. C., where the prisoner is in custody. The question thus left open for decision in the *Berra* case is raised by this petition.

In the Government's memorandum, in which it did not oppose the granting of the petition for certiorari in the *Frank Costello* case (Docket 666), it is admitted that the filing of a false and fraudulent return with intent to evade tax is made both a felony and a misdemenor in the 1939 Revenue Code. The Government also states that, "indeed,

5. Page 19, transcript of record filed with this petition.

[in] almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return, is identical with that required to prove that he filed a false return with intent to evade taxes in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap.'"[6]

Where, as it is admitted here, Congress has proscribed a course of conduct by two separate sections of the same statute but has imposed different penalties, and the proof required in each case is identical, petitioner asserts that the section imposing the lesser penalty must control. *Rosenberg* v. *United States*, 346 U. S. 273, 312. This Court has stated that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304. And, of course, "where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *United States* v. *Noveck*, 273 U. S. 202; *Gavieres* v. *United States*, 220 U. S. 338; *Pereira* v. *United States*, 347 U. S. 1.

In *Berra* v. *United States*, 351 U. S. 131, 134, this Court specifically held that "it is apparent that the facts necessary to prove that petitioner 'wilfully' attempted to evade taxes by filing a false return, § 145(b), were identical with those required to prove that he delivered a false return with 'intent' to evade taxes, § 3616(a). In this instance §§ 145(b) and 3616(a) covered precisely the same ground."

In that situation, neither the district attorney nor the Attorney General has the power to select the particular statute under which a person shall be prosecuted, either for a felony or for a misdemeanor.

6. Page 2, Memorandum for the United States, *Frank Costello* v. *United States*, Docket 666, this Term.

This was pointed out by Mr. Justice Black, with whom Mr. Justice Douglas joined, dissenting in the *Berra* case, 351 U. S. 131, 139. And in *Rosenberg* v. *United States*, 346 U. S. 273, 306, Mr. Justice Frankfurter decisively limited the roll of a prosecutor when he said,

> "... it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise in self-stultification. The indorsement of an indictment, the theory under which the prosecutor is operating, his belief or error as to the statute which supports an indictment or under which sentences may be imposed, are all wholly immaterial. *Williams* v. *United States*, 168 U. S. 382, 389, 18 S. Ct. 92, 94, 42 L. Ed. 509."

As to the petitioner's second contention, that the overlap of Sections 145(b) and 3616(a) of the Code present an inconsistency so great as to preclude any valid sentence whatsoever, the question arises as to whether or not the Congress has sufficiently exercised its constitutional power to declare criminal penalties. Does the conflict between these sections present simply a question of judicial interpretation, or does it go beyond the scope of interpretation and present a situation such as this Court was confronted with in *United States* v. *Evans*, 333 U. S. 483. There, this Court refused to invade the legislative function, and, in effect, fix the penalty by a process of speculation as to the penalty Congress there intended. The Court stated:

> "The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government

asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all."

The statement is broadly made in *Holmes* v. *United States*, (CA 5, 1920), 267 F. 529, 531, cert. den. 254 U. S. 640, that, "In a criminal statute the citizen must not be left in uncertainty or to speculation or argument as to what acts constitute a violation, or what punishment, if any, is visited upon a violation when the terms are definite."

This statement of the rule is repeated in *Smith* v. *United States* (CA 10, 1944), 145 F. 2d 643, 644, cert. den. 323 U. S. 803. The Court there said, "A criminal statute must be definite and certain in respect to the punishment it is intended to impose. (Citing cases.) And a statute which, by reference to another, leaves the sentencing in doubt as to the punishment it may impose for the described offense, is void and inoperative." See also, *State* v. *Fair Lawn Service Center* (1956), 20 N. J. 468, 120 A. (2) 233.

Both the *Smith* and *Holmes* decisions were concerned with Sections 35 and 36 of the Criminal Code. (Secs. 87, 88, Title 18 U. S. C. A.). A violation of one of these sections provided that the punishment should be that provided in the other section. However, the section to which reference was made contained alternative punishment, depending upon the seriousness of the offense.

Much the same situation is presented by this petition. The Court is left to conjecture as to which of the alternative punishments Congress intended for the identical offense.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PETER B. ATWOOD,
10 South LaSalle Street,
Chicago 3, Illinois,
Attorney for Petitioner.

March 9, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT.
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
vs.
SAM ACHILLI. } No. 53 CR 154

MEMORANDUM.

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceiv-

able aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved nonpayment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1,000, and one year under the Third Count of the indictment together with a fine of $1,000, unless sooner released by due process of law, the sentence under the Third Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

/s/ Wm G. Knoch.

Date: January 2, 1957.

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No. 834

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
CHARLES H. RICE,
Assistant Attorney General,
Department of Justice, Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 834

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The petition for certiorari states two questions: (1) whether a person indicted and convicted under Section 145 (b)[1] of the Internal Revenue Code of 1939 must be sentenced under Section 3616 (a)[2] of

[1] "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter [dealing with the income tax] or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

[2] "Whenever any person * * * [d]elivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

the Code, where the facts show a violation of both sections; (2) whether there is such an overlap between Sections 145 (b) and 3616 (a) as to preclude imposition of any valid sentence whatsoever.

The assumption on which these questions are framed is that Section 3616 (a) applies to *income* tax returns. However, the validity of that assumption lies at the threshold of the case. If the assumption is invalid, there would be no overlap in the scope of the two provisions, and the Court would not reach the questions raised by the petition for certiorari.

That Section 3616 (a) applies to all returns, including income tax returns, has been the view of the Government, frequently stated both in this Court and in the lower courts, in recent years.[3] This interpretation was accepted mainly because the language of that section is general and unqualified, and in terms appears to embrace every type of federal tax return without exception. In addition, the Government was influenced by the fact that Section 3616 (a) had been invoked, beginning in 1952, in the prosecution of numerous income tax cases,[4] and prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F.

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[3] However, in its brief on the merits in *United States* v. *Noveck*, 273 U. S. 202 (No. 395, Oct. Term 1926), pp. 16-19, the Government contended that the immediate precursor of Section 3616 (a) (Section 3179 of the Revised Statutes of 1874) was "undoubtedly repealed * * * *pro tanto*" as to the income tax by the various specific penalty provisions contained in the successive income tax statutes beginning with the Revenue Act of 1909.

[4] Section 3616 (a) was used in income tax cases where the Government was reluctant to bring felony charges because the offense was deemed to be of minor proportions, e. g., where a taxpayer evaded a very small portion of his income tax by claiming a false dependent in his return. Even if it should

2d 97, decided January 5, 1955, there had been no judicial holdings or intimations that the section could not be so applied. The correctness of this interpretation of Section 3616 (a) was also assumed by the Court in *Berra* v. *United States*, 351 U. S. 131, 133. In that case the Eighth Circuit, following its earlier decision in the *Dillon* case, had affirmed a conviction and sentence under Section 145 (b), on the ground that Section 3616 (a) did not apply to income tax returns. Since both parties agreed that Section 3616 (a) *was* applicable to income tax returns, the Court's opinion in the *Berra* case assumed, *arguendo*, the correctness of that interpretation of the statute. (351 U. S. at 133.) The dissenting opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, similarly considered the case on the basis of the same assumption. (351 U. S. at 138.)

The purpose of this memorandum is to lay before the Court materials bearing on the question whether Section 3616 (a) was in fact intended by Congress to apply to income tax returns. These materials, relating principally to the genesis and history of Section 3616 (a), and its relationship to Section 145 (b) and other specific penal provisions contained in the Internal Revenue Code of 1939, were not brought to the attention of the Court in the *Berra* case because no issue was there tendered as to the proper construction of Section 3616 (a). However, as already noted, the

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be held that the offenses in these cases were laid under the wrong statute (Section 3616 (a)), they were of course cognizable under Section 145 (b). Cf. *Williams* v. *United States*, 168 U. S. 382, 389; Rule 7 (c), Federal R[illegible] of Criminal Procedure.

petition for certiorari in this case squarely presents the question whether Sections 145 (b) and 3616 (a) overlap as to income tax evasions by filing false returns, and the whole basis of petitioner's argument disappears if Section 3616 (a) does not apply to income tax returns. Hence, we consider it essential to the Court's consideration and decision of the case to present a comprehensive review of the relevant legislative materials bearing on the scope and effect of Section 3616 (a), particularly in relation to Section 145 (b).

These materials indicate that the latter section was intended by Congress to be the specific and comprehensive provision dealing with attempted income tax evasion "in any manner," including the filing of a false or fraudulent return; and that to the extent that there may be any inconsistency in the application of the two sections to income tax evasions, such inconsistency must be resolved by the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions are to be treated as felonies, not misdemeanors. In short, in a case like this, involving a conviction of income tax evasion under Section 145 (b), the validity of the sentence is to be determined by reference to that statute alone, not to Section 3616 (a). It is clear, we believe, that Congress intended that every attempt to evade income taxes, whatever the form such attempt might take, should be punishable as a felony under Section 145 (b).

Section 145 (b) in express terms makes it a felony for any person to attempt willful evasion of his in-

come tax liability. It was the statute cited by the grand jury in petitioner's indictment (R. 3–5) and by the trial judge in the judgment of conviction (R. 1212). If regard be had solely to Section 145 (b), there could be no doubt that petitioner's conviction and sentence were lawful in all respects. His sole reliance is upon a statute not cited in the indictment or in the judgment of conviction—Section 3616 (a)—which, he contends, should be construed as precluding the imposition of more than misdemeanor penalties in any case of violation of Section 145 (b) where the facts also show the filing of a false return in violation of Section 3616 (a).

Section 3616 (a) is derived from a penal provision originally enacted in 1798, when there was no federal income tax and when the principal sources of revenue for the Federal Government were excise taxes and customs duties. In that year Congress enacted a statute making it a misdemeanor for "any person * * * [to] deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made."[5] Similar provisions appeared in various later revenue acts, including the first act (1861) imposing an income tax.[6] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[7] and in the 1864 act to include a "list, re-

[5] Sec. 11, c. 70, 1 Stat. 580, 586.

[6] Secs. 16, 49–51, c. 45, 12 Stat. 292, 298, 309.

[7] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432, 435.

turn, account or statement."[8] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. However, so far as we can discover, there were no prosecutions under that provision for income tax violations. But cf. *United States* v. *Penz*, 24 Fed. Cas. No. 14,576 (N. D. Ill. 1868).

In 1870 Congress repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths, then required in connection with other revenue returns, under the penalties of perjury.[9] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes.[10] Since there was no income tax law in effect in 1874, Section 3179 could not at that time apply to the income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same

[8] Act of June 30, 1864, as amended, Secs. 15, 116–123, c. 173, 13 Stat. 223, 227, 281. This Act added the word "assessment" to valuation and "enumeration."

[9] Secs. 6, 11, 37, c. 255, 16 Stat. 256, 257, 259, 271.

[10] Section 3179 read as follows:

"Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

civil penalties that had been imposed by the 1870 act—50 per cent of the tax for a willful failure to file and 100 per cent for the wiliful filing of a false or fraudulent return.[11] In omitting any mention of criminal sanctions in the 1894 act, Congress presumably intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257, and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

In 1909, however, Congress for the first time enacted a specific penal provision applicable to the income tax. The 1909 corporation income tax law specifically imposed maximum criminal penalties of one year in prison and a $1,000 fine for willfully making a false or fraudulent return with intent to defeat or evade the assessment,[12] the same penalties contained in Section 3179. The necessary result was, therefore, that in relation to the income tax the general provision of Section 3179 was superseded *pro tanto* by the specific penal provision in the 1909 act. *United States* v. *Chase*, 135 U. S. 255, 260; *Kepner* v. *United States*, 195 U. S. 100, 125; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208. As the subsequent history detailed below will show, the 1909 act established the pattern for the later income tax penal provisions: Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for violations thereof.

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[11] Compare Sec. 29, c. 349, 28 Stat. 509, 554, with Sec. 11, c. 255, 16 Stat. 256, 259.

[12] Sec. 38 (8), c. 6, 36 Stat. 11, 117.

Four years later, Section II of the Revenue Act of 1913, levying an income tax, imposed maximum criminal penalties of one year in prison and a fine of $2,000 for that same offense.[13] This involved a patent inconsistency with Section 3179, which limited the fine to $1,000, and to that extent implicitly qualified the latter provision.[14] *United States* v. *Tynen*, 11 Wall. 88, 92-93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *United States* v. *Barnes*, 222 U. S. 513, 520.

The Revenue Act of 1917, which provided for an income tax, after the usual prohibition against false or fraudulent returns, added the new misdemeanor of "evad[ing] or attempt[ing] to evade any tax" imposed by the act.[15] The Revenue Act of 1918 enlarged this offense to proscribe an attempt to evade the tax "in any manner," and raised the maximum fine to $10,000, at the same time retaining the one-year maximum prison sentence.[16] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[17] The Revenue

[13] Sec. II (F), c. 16, 38 Stat. 114, 171.

[14] The Revenue Act of 1916 (Sec. 18, c. 463, 39 Stat. 756, 775) provided the same penalties as that of 1913.

[15] Sec. 1004, c. 63, 40 Stat. 300, 325.

[16] Sec. 253, c. 18, 40 Stat. 1057, 1085.

[17] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Sec. 1017 (b), c. 27, 43 Stat. 253, 344. Revenue Act of 1926, Sec. 1114 (b), c. 234, 44 Stat. 9, 116. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791,

Act of 1924 made attempted evasion of income tax a *felony*, punishable by a maximum fine of $10,000 and a five-year maximum prison term.[18] The more severe penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[19] and were incorporated into the Internal Revenue Code of 1939 as Section 145 (b).

Section 3616 (a) of the Internal Revenue Code of 1939 re-enacted Section 3179 of the Revised Statues, making only minor changes in phraseology. The committee reports stated that the 1939 Code was intended to be merely a restatement of existing law.[20] It may

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835. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169, 217. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680, 725. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652, 1703. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452, 513.

[18] Sec. 1017 (b), c. 234, 43 Stat. 253, 344. The House bill contained the old penalties but the Senate bill classified attempted evasion as a felony and increased the penalty. The Senate prevailed in conference. See Senate Report No. 398, 68th Cong., 1st Sess., p. 45, and Conference Report in House Report No. 844 68th Cong., 1st Sess., p. 32.

[19] For citations, see fn. 17, *supra*.

[20] The Chairman of the House Ways and Means Committee reported that the purpose of the bill was to enact into absolute law all the internal revenue laws then in force (84 Cong. Rec. 646). A member of the Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistencies into some form," the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever." (84 Cong. Rec. 646, 647.) Another member of the Committee stated that although the bill might contain "a few minor mistakes" this was bound to occur in the achievement of the broad purpose to "simplify the law for the benefit of the businessmen and the taxpayers of the country." (84 Cong. Rec. 782.) Although there was some protest in the House

be added that the Internal Revenue Code of 1954 made a substantial change in Section 3616 (a) (re-enacted as Section 7207) in that an "intent to defeat or evade" taxes, required to be proved under Section 3616 (a) of the 1939 Code, is not an element of the offense of violating Section 7207 of the 1954 Code. See *Berra* v. *United States*, 351 U. S. 131, 134, footnote 5.

In sum, Congress has, in eight separate statutes enacted between 1924 and 1939, repeatedly declared that the offense of willfully attempting to evade income taxes shall be punishable as a felony: For at least 30 years prior to enactment of the 1939 Code, i. e., from 1909 to 1939, Section 3179 of the Revised Statutes of 1874 apparently did not apply to the income tax. When Congress re-enacted Section 3179 as Section 3616 (a) of the 1939 Code, it was, according to the committee reports, making no changes in existing law. Hence, it can be argued that Section 3616 (a) has the same scope as Section 3179, and no greater. Against this background, it is not reasonable to attribute to Congress a purpose, by re-enacting Section 3179 as Section 3616 (a) of the 1939 Code, to reduce the offense of income tax evasion by filing a fraudulent return, specifically defined in Section 145 (b) of the

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that "no one has read the bill" and that there had been no hearings (84 Cong. Rec. 786–787, 788), the bill was passed in reliance upon the work of "as fine a lot of experts as can be found" and the care and time which had been spent in compiling the Code. (84 Cong. Rec. 788.)

The Senate Committee on Finance and the House Committee on Ways and Means reported that the bill made "no changes in existing law." Sen. Rep. No. 20, 76th Cong., 1st Sess., p. 1; H. Rep. No. 6, 76th Cong., 1st Sess., p. 3.

same Code as a felony, to the status of a misdemeanor.

The leading case in this Court on the scope of Section 145 (b) is *Spies* v. *United States*, 317 U. S. 492, decided in 1943. Speaking for a unanimous Court, Mr. Justice Jackson characterized the "felony" proscribed by Section 145 (b) "as the capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax * * *." (317 U. S. at 497.) In the *Spies* case the particular question was whether "Congress by the felony defined in § 145 (b) meant no more than the same derelictions it had just defined in § 145 (a) as a misdemeanor" (*ibid.*). The Court stated that such an interpretation "would be unusual and we would not readily assume that Congress" so intended (*ibid.*). Similarly, we believe it would be no less unusual, and should no more readily be assumed, that Congress intended the felony of Section 145 (b), where it takes the form of filing a false and fraudulent return, to be reduced to the misdemeanor proscribed by Section 3616 (a).

In the *Spies* case the Court emphasized the comprehensive, all-embracing scope of Section 145 (b) as applied to attempted income tax evasions: "Congress did not define or limit the methods by which a willful attempt to defeat and evade might be accomplished and perhaps did not define lest its effort to do so result in some unexpected limitation." (317 U. S. at 499.)

The filing of a false or fraudulent income tax return is only one, although the most common, of the ways in which Section 145 (b) can be violated. The *Spies*

opinion gave other examples. "By way of illustration, and not by way of limitation," the opinion stated, "we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal." (317 U. S. at 499.) Indeed, the filing of a false return is not an essential ingredient of the offense of violating Section 145 (b). *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887.[21]

We have concluded, therefore, that Congress could not have intended that a violation of Section 145 (b) based upon proof of willful attempted evasion of income tax is to be treated and punished only as a misdemeanor, simply because in a particular case the facts show that a false and fraudulent return was filed. In such a case Section 145 (b) is clearly applicable. It is also arguable that, despite the generality of its language, Section 3616 (a) has been superseded with respect to income tax violations and is *pro tanto* inapplicable. Such a construction could derive further support from various established canons

[21] Accordingly, omission of an allegation, like that in the instant case (R. 3–5), that the "manner" of attempted evasion was the filing of a false return does not affect the validity of an indictment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7).

of statutory interpretation: (1) that in "construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty." *United States* v. *Yuginovich*, 256 U. S. 450, 463; *United States* v. *Tynen*, 11 Wall. 88, 93; (2) that criminal statutes should be construed to avoid uncertainty or doubt as to the punishment, *United States* v. *Evans*, 333 U. S. 483; and (3) that any statute should be interpreted, wherever reasonably possible, to avoid raising questions as to its constitutionality.

We may add that if Section 3616 (a) is construed to preclude imposition of felony sanctions in a Section 145 (b) case, the effect would not be limited to the income tax. Congress has provided many new forms of taxation since 1798. Its general practice has been, as in the case of the income tax, to establish a new offense, usually a felony, for attempted evasion of each such tax. Thus, the Internal Revenue Code of 1939 is replete with numerous other sections, worded almost identically like Section 145 (b), making it a felony to evade or defeat the admissions and dues tax (Section 1718 (b)); the estate tax (Section 894 (b) (2) (c)); the gift tax (Section 1024 (b)); the narcotics tax (Section 2557 (b) (3)); the firearms tax (Section 2707 (c)); the documents tax (Section 1821 (a) (2)); the tobacco tax (Section 2156 (b)).

A holding that Section 3616 (a) reduces the penalties provided by Section 145 (b) to those of a misdemeanor would be equally applicable to these various specific felony provisions. It is inconceivable that

Congress could have intended or anticipated so drastic a negation of the penalties provided in all these provisions.

CONCLUSION

The Government has presented in this memorandum materials which would support a conclusion that Section 3616 (a) is inapplicable to the income tax, and that as to the latter Congress has specifically and comprehensively legislated in Section 145 (b). If the Court accepts the construction of Section 3616 (a) as inapplicable to the income tax, it does not overlap Section 145 (b) and the Court would not reach the questions raised by the petition for certiorari. However, in view of the Court's actions in granting certiorari in Nos. 430 and 666, and of the obvious importance of settling the issues involved, the Government does not oppose issuance of the writ.[22]

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.

MARCH 1957.

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[22] In view of the uncertainty surrounding the question whether Section 3616 (a) applies to income tax violations, the Attorney General has directed that, pending definitive adjudication of the question by this Court, no prosecutions for income tax violations be instituted under that section.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

Nos. 430 and 834

SAM ACHILLI,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 234 F. 2d 797. The opinion of the District Court, not yet reported, entered following the mandate of the Court of Appeals, appears in the Appendix.

JURISDICTION.

The judgment of the Court of Appeals was entered June 5, 1956. (R. 1223.) Rehearing was denied July 31, 1956. (R. 1268.) The petition for certiorari in Docket 430 was filed September 17, 1956. On March 4, 1957, this Court vacated its prior order in Docket 430 of November 19,

1956, and granted the petition, limited to the question of whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also showed a violation of Section 3616(a) of the Internal Revenue Code of 1939. (R. 1276.) On March 25, 1957, this Court granted the petition for certiorari in Docket 834, theretofore filed on March 13, 1957.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254(1).

STATUTES INVOLVED

Internal Revenue Code 1939, Title 26, U. S. C. (1939):

§ 145. Penalties—

(b) Failure to collect and pay over tax, or attempt to defeat or evade tax.

Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

§ 3616. Penalties—

Whenever any person—

(a) False returns. Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made;

* * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

QUESTIONS PRESENTED.

1. May a person be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939, where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939?

2. Does the overlap of Sections 145(b) and 3616(a) of the Internal Revenue Code pose an inconsistency so great as to preclude any valid sentence whatsoever?

STATEMENT OF THE CASE.

Petitioner was indicted on three counts charging that he "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America * * * by filing and causing to be filed * * * a false and fraudulent income tax return * * *" in violation of Section 145(b) of the Internal Revenue Code. (R. 3-5.)

Two trials were had, the first resulting in a mistrial ordered by the District Court on petitioner's motion. (R. 42.) The second trial resulted in a conviction on all three counts involving the calendar years 1946, 1947 and 1948. The petitioner was sentenced to two years imprisonment on each count, to run concurrently, and to pay a fine of $2,000 on each count, the fines to be cumulative, or a total of $6,000.

On June 5, 1956, the Court of Appeals for the Seventh Circuit reversed the judgment of conviction on the first count and affirmed judgment of conviction on the second and third counts. (R. 1223, 1236.) A petition for rehearing was filed and denied. (R. 1268-1272.)

This Court on November 19, 1956 denied certiorari, and

the matter came on before the District Court for sentencing under the mandate of the Court of Appeals.

On November 26, 1956, petitioner filed a motion to correct or reduce the sentence, relying partly upon the overlap of Sections 145(b) and 3616(a) of the 1939 Code. (R. 6)

On December 27, 1956, the District Court denied the motion to correct the sentence, but reduced the sentence to one year under counts 2 and 3 of the indictment, to run concurrently, and fined the petitioner $1,000 on each count, or a total of $2,000. While the District Court purported to deny the motion to correct the sentence on the ground of inconsistency between Sections 145(b) and 3616(a) of the Code, the Court stated, "I also feel that a sentence of this kind will ultimately do as much good as the former sentence under the felony counts would have done". (R. 10)[1]

Thereafter, petitioner moved in the Court of Appeals to enlarge the grounds for correction of sentence by raising the issue of the validity of any sentence in view of the conflict between Sections 145(b) and 3616(a) of the Code. (R. 24) The Court of Appeals denied the motion to enlarge. (R. 35) Nevertheless, that question is implicit in Question 1 as set forth in the Questions Presented.

1. This seemingly inconsistent action of the District Court, while reducing the sentence to a misdemeanor level, does not render the case moot. There is still left the implication that sentence was imposed under the felony counts. As this Court most recently stated on February 25, 1957, in *Thomas E. Pollard* v. *United States*, Docket 38, this Term, 25 L. W. 4174, "The possibility of consequences collateral to the imposition of sentence is sufficiently substantial to justify our dealing with the merits." Here, as in the *Pollard* case, the "consequences collateral to the imposition of sentence" also justify dealing with the merits.

NOTE: Record references here are to record in No. 344

SUMMARY OF ARGUMENT.

Section 145(b) makes it a felony for a person to wilfully fail to truthfully account for or to attempt in any manner to evade or defeat the tax imposed. This identical conduct is also made a misdemeanor under Section 3616(a) of the 1939 Code. Admittedly, both sections cover income taxes and require the same proof. *Berra* v. *United States*, 351 U. S. 131. Petitioner asserts that Congress has failed to establish any criteria to resolve this inconsistency as to the penalties prescribed for the identical offense, and accordingly the statute is unconstitutional. Neither the court nor the prosecutor has the power to determine the measure of punishment in such cases, for only Congress has the power to declare criminal penalties.

The Government asserts that the court may fix the penalty under Section 145(b) simply if the proof supports the charge under that section. This certainly begs the question, for it is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment. That argument in effect asserts that the Government has the right to elect under which statute it will proceed in these tax cases. The power so asserted cannot be tolerated; it is at war with common concepts of equality under the law. Certainly the district attorney cannot decide who shall be charged with a felony and who shall be charged with a misdemeanor. Congress alone is vested with that responsibility. If, however, these two sections may coexist, then the section imposing the lesser penalty must control.

ARGUMENT.

I.

THE OVERLAP OF SECTIONS 145(b) AND 3616(a) PRECLUDES ANY VALID SENTENCE WHATSOEVER.

Both sections interdict the filing of a false return for the purpose of defeating or evading the tax imposed. Both sections cover income taxes.[2] This Court so assumed, *arguendo*, in *Berra* v. *United States*, 351 U. S. 131, 133. Cf. Government's brief in *Berra* case at page 24, n. 9.

Proof that petitioner filed a false income tax return under Section 145(b) would also prove a violation of Section 3616(a).[3] This Court expressly so held in *Berra* v. *United States*, 351 U. S. 131. There, the Court upheld the

2. The Government so conceded in its memorandum filed in response to the petition for certiorari in *Frank Costello*, No. 666, this Term. It is there stated:

> "The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax."

The Government now asserts in a memorandum filed in Docket 834 that Section 3616(a) does not apply to income taxes. For the purpose of the argument under this heading, it is assumed that Section 3616(a) applies to income taxes. See Section 61 of the 1939 Internal Revenue Code.

3. This is conceded in the memorandum filed by the Government in response to the petition for certiorari in the *Costello* case (No. 666), where it is stated at page 2:

> "In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed, almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap."

denial of an instruction which would permit the jury to convict under either Section 145(b) or under the "lesser crime" provided for in Section 3616(a). This requested instruction was bottomed on Rule 31(c) of the Federal Rules of Criminal Procedure, 18 U. S. C. A., providing that a defendant may be found guilty of an offense "necessarily included in the offense charged". In rejecting this contention, Mr. Justice Harlan, speaking for the majority, stated:

> "In a case where some of the elements of the crime charged themselves constitute a lesser crime, the defendant, if the evidence justified it, would no doubt be entitled to an instruction which would permit a finding of guilt of the lesser offense. See *Stevenson v. United States*, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 980. But this is not such a case. For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return, §145(b), were identical with those required to prove that he delivered a false return with 'intent' to evade taxes, §3616 (a). In this instance §§145 (b) and 3616 (a) covered precisely the same ground."

While the Government admits that Sections 145(b) and 3616(a) overlap in a false income tax return case,[4] it is urged that the filing of a false return was not the only "manner" of attempted evasion, citing Costello's bookkeeping practices, failure to keep records, concealment of assets, etc. These, however, are but steps leading to the end result. And these practices by themselves are innocent unless they finally result in a "false return" as stated in Section 3616(a), or failure to "truthfully account" as provided in Section 145(b). If the full

4. N. 3, *supra*; page 2 of Government's memorandum re petition for certiorari in *Costello* case. The Government now urges in this case that Section 3616(a) does not apply to income taxes. That subject is discussed later in this brief.

tax is paid, the interest of the Government is set at rest. There can be no evasion of tax if the tax is paid in full.

In this case, as in *Costello*, petitioner was indicted for "filing a false return". The elements of proof which go to make up that offense must necessarily be the same as in the case of a "false return" under Section 3616(a). Common sense suggests that it is the "return" which is the crux of the case, and the "manner" in which a proper return is evaded is limited only by the evasive genius of each taxpayer. Proof in each case is identical in end result. It is therefore incongruous to assert, as the Government does,[6] that Section 145(b) "punishes wilful attempted evasion of income tax in any manner, without necessarily filing a false return". There can be no civil penalty for fraud without a deficiency in tax, and if there is no deficiency there can be no fraud—criminal or civil.

It is apparent that only one offense is involved where

5. The "attempt" at evasion which is adverted to in Section 145(b) does not have the common law significance of "attempt" as applied to ordinary criminal attempts. In the latter case the crime was intended or recklessly set in motion, but the end frustrated. Here, the connotation of the word "attempt" must mean an effort to "get by" with something; but the "attempt" is frustrated by the Revenue Service's diligence in examining the return. In this sense the "attempt" is the same as an "intent to evade" covered by Section 3616(a). As stated in *Prince* v. *United States* (1957), 352 U. S. ....., 77 S. Ct. 403, 407, "* * * the heart of the crime is the intent to steal. This mental element merges into the completed crime, if the robbery is consummated." Any "attempts" at evasion which culminate in a false return merge in the final act. Of course there may be "attempts" which are punishable as such under Section 145(b), such as false testimony before an internal revenue agent, or the use of deceptive devices in bookkeeping, hiding assets, etc., where no return is filed: *United States* v. *Kafes* (C. A. 3, 1954), 214 F. 2d 887, cert. den. 348 U. S. 887; *Smith* v. *United States* (C. A. 3, 1953), 206 F. 2d 905.

6. Memorandum re No. 834, page 4; also Government's memorandum re *Costello*, at page 3, n. 6.

the evidence which would suffice to prove one is the same as that which proves the other.[7]

The question than arises as to whether these sections pose an inconsistency so great as to preclude any valid sentence whatsoever. Certainly the prosecutor has no right of election.[8] This was pointed out by Mr. Justice Black, with whom Mr. Justice Douglas joined, dissenting in the *Berra* case, 351 U.S. 131, 139. And in *Rosenberg* v. *United States*, 346 U. S. 273, 306, Mr. Justice Frankfurter decisively limited the role of a prosecutor when he said,

> "* * * it cannot be left within the discretion of a prosecutor whether the judge may impose the death sentence wholly on his own authority or whether he may do so only upon recommendation of the jury. Nothing can rest on the prosecutor's caprice in placing on the indictment the label of the 1917 Act or of the 1946 Act. To seek demonstration of such an absurdity, in defiance of our whole conception of impersonality in the criminal law, would be an exercise of self-stultification. The indorsement of an indictment, the theory under which the prosecutor is operating, his belief or error as to the statute which supports an indictment or under which sentences may be imposed, are all wholly immaterial. *Williams* v. *United States*, 168 U.S. 382, 389, 18 S. Ct. 92, 94, 42 L. Ed. 509."

State courts have not hesitated to strike down criminal statutes which violate or by necessary implication may violate the rule of uniform application. In *State* v. *Fowler*

7. *United States* v. *Chiarella* (C. A. 2, 1950), 184 F. 2d 903. The "test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304. The rule has been announced in many cases. *Gavieres* v. *United States*, 220 U. S. 338; *Morgan* v. *Devine*, 237 U. S. 632; *United States* v. *Noveck*, 273 U. S. 202; *Albrecht* v. *United States*, 273 U. S. 1; *Pereira* v. *United States*, 347 U. S. 1.

8. This privilege was baldly asserted before the Court of Appeals in this case. 234 F. 2d 797, 809.

(1927), 193 N. C. 299, 136 S. E. 709, the court held invalid the provisions of a statute imposing harsher penalties for a second offender, where such penalties could not be applied in five counties in the state because of local option rules relating to intoxicating liquors. Thus the same offense would not be punished uniformly throughout the state.

This right of equal protection and equal enforcement of the law was also recognized in *Mitchell* v. *State* (1946), 157 Fla. 121, 25 So. 2d 73. There the court held that it was not competent "for the legislature to fix the time within which the prosecution may be commenced if the prosecution is commenced by indictment, and a different time if the prosecution be commenced by information. To hold otherwise would be tantamount to allowing the prosecuting officer to determine whether or not the statute of limitations should or should not be applicable." The court went on to say:

> "This right of equal protection may not be taken away by the State choosing to proceed with the prosecution by some method which will deprive him of the benefit of the statute of limitations while others guilty of the like offense may have the benefit of the statute of limitations because the State has chosen to proceed with the prosecution by a different method."

In *Ex Parte Garrett* (1934), 335 Mo. 1113, 75 S. W. 2d 577, the court held invalid a limitation on the City Court of St. Louis to impose sentences for misdemeanors of not more than six months, whereas the general state statute covering the same offenses provided for a greater punishment.

More recently the Supreme Courts of Oregon and Washington have had occasion to confirm this rule. *State* v. *Pirkey* (1955), 203 Ore. 697, 281 P. 2d 698; *State* v. *Cory* (1953), 204 Ore. 235, 282 P. 2d 1054; and *In Re Olsen* v. *Delmore* (1956), 48 Wash. 2d 545, 295 P. 2d 324.

In *State* v. *Pirkey*, the Supreme Court of Oregon declared unconstitutional a statute making it a crime to wilfully and fraudulently make, draw, utter or deliver an n.s.f. check, and authorizing the grand jury or the magistrate before whom a complaint is made to proceed, in their discretion, against violators either as for a misdemeanor or as for a felony. The Court there said:

> "The Fourteenth Amendment operates to forbid discrimination by the states against persons or classes in criminal cases. *Ughbanks* v. *Armstrong*, 208 U. S. 481, 28 S. Ct. 372, 52 L. Ed. 582. And it has been held that a statute which prescribes different punishments or different degrees of punishment for the same acts committed under the same circumstances by persons in like situation is violative of the Equal Protection Clause. * * *
>
> "The statute in question here defines and prohibits a specific act and provides punishment therefor, but there is no semblance of a classification which would enable one to ascertain under what circumstances he may be guilty of a felonious crime, or under what *circumstances* he may be guilty only of a misdemeanor. So far as the statute is concerned, the same identical act, under the same circumstances, may constitute a felonious crime when committed by one person, and a misdemeanor when committed by another. It might be said that this statute classifies punishments, but does not classify the circumstances to which the diverse punishments are to be applied. This is not legal classification. It is legal chaos."

The Court further observed that:

> "It would be monstrous to uphold and enforce a statute which authorized a grand jury or magistrate to determine finally whether an accused should receive a fine or a jail sentence, on the one hand, or a penitentiary sentence, on the other, and to make that decision before trial. * * * In our opinion, such a statute so construed would not only violate the Equal Protection Clause and constitute an unauthorized del-

> egation of discretionary power, but it would constitute an invalid encroachment upon the function of the courts whose prerogative and duty it is to determine, not only guilt, but punishment, upon judicial inquiry, after public trial and within the maximum and minimum limits prescribed by the legislature."

In *State* v. *Cory*, the Court held invalid the provisions of the Habitual Criminal Statute which authorized the prosecuting attorney in his discretion to file an information against the accused setting forth the previous convictions. This exercise of an absolute discretion vested in the district attorney in such circumstances was held unconstitutional.

In *Olsen* v. *Delmore*, the Court also held unconstitutional similar discretionary power in the prosecuting officials to charge violation of the Uniform Firearms Act either as a gross misdemeanor or as a felony.

This Court has expressly held that the equal protection clause does not prevent the states from recognizing "degrees of evil" in the classification of crimes. *Truax* v. *Raich* 239 U. S. 33, 43; *Moore* v. *Missouri*, 159 U. S. 673; *Finley* v. *California*, 222 U. S. 28; *Pennsylvania* v. *Ashe*, 302 U. S. 51. But, "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense * * * it has made as an invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment." *Skinner* v. *Oklahoma*, 316 U. S. 535, 541.

This concept of equal protection in the sense of freedom from unjustifiable discrimination applies with equal force under the Fifth Amendment, *Bolling* v. *Sharpe*, 347 U. S. 497; *Chas. C. Steward Mach. Co.* v. *Davis*, 301 U. S. 548; *Communist Party of U. S. A.* v. *Moysey*, 141 F. Supp. 332.

Mr. Justice Black in his dissenting opinion in the *Berra* case made that eminently clear when he observed (351 U. S. 131, 140):

> "The Government's contention here also challenges our concept that all people must be treated alike under the law. This principle means that no different or higher punishment should be imposed upon one than upon another if the offense and the circumstances are the same."

The Inconsistent Penalties Create an Ambiguity Which Cannot Be Resolved.

There exists here an irreconcilable dilemma. Either Congress has unconstitutionally delegated its power to declare crimes to the prosecutor, as mentioned above, or these inconsistent penalties present an ambiguity which cannot be resolved by interpretation. In either case, the sections are void. Congress alone, of course, has the power to establish crimes and fix penalties,[9] but in exercising that power it must provide a reasonably definite standard so that people may measure their conduct accordingly.[10] As Mr. Justice Frankfurter, speaking for the Court in *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218, 229, so aptly stated, "We should not derive criminal outlawry from some ambiguous implication."

The court in *State* v. *Hall* (1931), 24 Ala. App. 336, 134 So. 898, assumed that where a statute failed to designate the crime as a felony or as a misdemeanor, it would be unconstitutional for the reason that the defendant is not apprised of the nature or character of the accusation

9. *Viereck* v. *United States*, 318 U. S. 236, 241; *United States* v. *Hall*, 98 U. S. 343; *United States* v. *Evans*, 333 U. S. 483.

10. Cf.: *Winters* v. *New York*, 333 U. S. 507; *United States* v. *Harriss*, 347 U. S. 612; *Pierce* v. *United States*, 314 U. S. 306; *United States* v. *Petrillo*, 332 U. S. 1.

against him, for he cannot know whether he is charged with a misdemeanor or a felony. The court there said, "If it should be held that the statute by its terms is both a felony and a misdemeanor * * * the statute must fall."

Again, in *Redding* v. *State* (1928), 109 Tex. Cr. R. 550, 6 S. W. 2d 361, the court held that a statute making it a felony or a misdemeanor to fraudulently take any chicken or turkey is void, stating:

> "Manifestly the act denounced cannot be both a felony and a misdemeanor. * * * The taking of a chicken, if an offense *eo nomine*, must everywhere in Texas be either a felony or it must everywhere be a misdemeanor."

In *Moran* v. *State* (1938), 135 Tex. Cr. 645, 122 S. W. 2d 318, the court on its own motion held that where the penalty for possession of distilled spirits on unlicensed premises was covered by two different statutes, each providing a different penalty, that the proper rule was not to assert the lesser punishment, but the entire statute was void.

We suggest that this conflict in the two sections of the Code goes beyond the scope of judicial interpretation and presents a situation such as this Court was confronted with in *United States* v. *Evans*, 333 U. S. 483. There, this Court refused to invade the legislative function, and, in effect, fix the penalty by a process of speculation as to the penalty Congress there intended. The Court stated (at p. 486):

> "The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all."

Congress has utterly failed to supply any criteria in

Sections 145(b) and 3616(a) which would guide in the determination of what constitutes a felony and what constitutes a misdemeanor under these identical offenses. In the *Evans* case the Court found that uncertainty in the statute extended not only to the inconsistent penalties, but also to the statute's reach to bring in very different acts which conceivably might be held to be concealing or harboring of an alien not duly admitted. "This is a task," the Court observed, "outside the bounds of judicial interpretation. * * * We could do no more than make speculation law." (at p. 495)

The Government has informed the Court[11] that Section 3616(a) has been invoked, beginning in 1952, in the prosecution of numerous income tax cases where the Government was reluctant to bring felony charges because the offense was deemed to be of minor proportions. No such guide of course exists in the statute, and this is but another expression of the Government's position that it has authority to select under which section it will prosecute an alleged offender. This Court has flatly rejected such a solution to the dilemma.

A similar problem arose in *Holmes* v. *United States* (C. A. 5, 1920), 267 F. 529, 531, cert. den. 254 U. S. 640, and *Smith* v. *United States* (C. A. 10, 1944), 145 F. 2d 643, 644, cert. den. 323 U. S. 803. Both the *Smith* and *Holmes* decisions were concerned with Sections 35 and 36 of the Criminal Code. (Secs. 87, 88, Title 18 U. S. C. A.) A violation of one of these sections provided that the punishment should be that provided in the other section. However, the section to which reference was made contained alternative punishment, depending upon the seriousness of the offense. In holding these sections void for uncertainty, the Court in the *Smith* case said:

11. Memorandum re No. 834, page 2, n. 4.

> "A criminal statute must be definite and certain in respect to the punishment it is intended to impose. (Citing cases.) And a statute which, by reference to another, leaves the sentencing in doubt as to the punishment it may impose for the described offense, is void and inoperative."[12]

We are confronted with the same situation in the present case. The Court is left to conjecture as to which of the alternative punishments Congress intended for the identical offense. That would appear to be "a task outside the bounds of judicial interpretation".

II.

SECTION 3616(a) APPLIES TO INCOME TAXES.

In the Government's memorandum in response to the petition in No. 834, it is asserted for the first time that Section 3616(a) does not apply to income taxes. To support this position extensive historical research has been supplied. It was admitted in *Berra*, 351 U. S. 131, and in *Costello* (No. 666, this Term) as it was in the court below (234 F. (2) at 809) that Section 3616(a) would apply to income taxes, thus confessing error in *United States* v. *Dillon* (C. A. 8, 1955), 218 F. 2d 97 and *United States* v. *Moran* (C. A. 2, 1956), 236 F. 2d 361, cert. den. 352 U. S. 909.

This latest position of the Government purports to revitalize the corpse with a blood transfusion.

From this history it appears that Congress considered the misdemeanor statute,[13] originally enacted in 1798, to apply to income taxes imposed in 1861, inasmuch as the Revenue Act of 1861 contained no separate criminal statute

12. See also, *State* v. *Fair Lawn Service Center* (1956), 20 N. J. 468, 120 A. (2) 233.

13. Sec. 11, c. 70, 1 Stat. 580, 586.

relative to income taxes. In 1874, the criminal provisions of the 1864 Revenue Act became Section 3179 of Revised Statutes.[14] But there was no income tax law in effect then (Congress having repealed it in 1871), so that Section 3179 still carried its full general effect as to any "false list, return, account or statement" over into the Income Tax Act enacted in 1894, there being no separate criminal penalties.

In 1909, Congress for the first time enacted a separate penal provision applicable to income taxes, by providing maximum criminal penalties of one year in prison or a $1,000 fine, or both, for "willfully making a false or fraudulent return with intent to defeat or evade the assessment,"[15] the same penalties contained in Section 3179. In 1913 Congress imposed maximum criminal penalties of one year in prison or a fine not exceeding $2,000, or both.[16] This created for the first time a conflict as to the penalty provided in Section 3179 Revised Statutes.

The Revenue Act of 1917[17] removed this discrepancy by

14. Sec. 3179 derives from sec. 15, c. 173, 13 Stat. 227.

15. Sec. 38(8), c. 6, 36 Stat. 11, 117.

16. Sec. II F, 38 Stat. 114, 171, Tariff Act of 1913: "That if any person * * * liable to make the return or pay the tax aforesaid shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, such person shall be liable to a penalty of not less than $20.00 nor more than $1,000.00. Any person * * * required by law to make, render, sign or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000.00 or be imprisoned not exceeding one year, or both, * * *."

17. 40 Stat. 300, 325, Sec. 1004: "That whoever fails to make any return required by this Act or regulations made under the authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000.00, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded, or not collected, or

again providing that a violation of the Act by the filing of a false or fraudulent return shall be punished by fine not exceeding $1,000, or imprisonment for not more than one year, or both. It is possible that Congress at this juncture recognized that the two statutes covered the same subject matter, and wanted to avoid any arguable conflict. At least, the net effect was to remove the inconsistency. And this seems entirely consonant with the past history of Section 3179 Revised Statutes, indicating that it applied to income taxes in those prior years when no penalties were provided in the income tax legislation. Thus, the two sections covered identical ground, at least through 1918.

On February 24, 1919 the Revenue Act of 1918 was approved. Section 253 of that Act retained the $1,000 fine or one year imprisonment provision for failure to file a return or to collect or to pay the tax, or supply information, but entirely changed the wording of the "false return" provision of the 1917 Act. The language of the 1918 Act, quoted below,[18] indicates that Congress was concerned with asserting the larger penalty for anyone who "willfully attempts in any manner to defeat or evade the tax". There was no language in this Act relating to the filing

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accounted for and paid over, to be assessed and collected in the same manner as taxes are assessed and collected, in any case in which the punishment is not otherwise specifically provided."

18. 40 Stat. 1057, 1085. "*Sec. 253.* That any individual, corporation, or partnership required under this title to pay or collect any tax, to make a return or to supply information, who fails to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, shall be liable to a penalty of not more than $1,000. Any individual, corporation, or partnership, or any officer or employee of any corporation or member or employee of a partnership, who willfully refuses to pay or collect such tax, to make such return, or to supply such information at the time or times required under this title, or who willfully attempts in any manner to defeat or evade the tax imposed by this title, shall be guilty of a misdemeanor and shall be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

of a "false and fraudulent return" or to failure to "truthfully account", as provided in the 1917 Act. It seems to us, therefore, that Congress was still retaining the misdemeanor provisions of Section 3179 Revised Statutes as to the filing of a "false and fraudulent" return with intent to evade, and making "attempts in any manner" punishable with a higher fine. This conclusion is supported by the provisions of Section 1305 of the 1918 Act, providing that "all administrative, special, or stamp provisions of law, including the law relating to the assessment of taxes, so far as applicable, are hereby extended to and made a part of this Act, and every person liable to any tax imposed by this Act, or for the collection thereof, shall keep such records and render, under oath, such statements and returns, and shall comply with such regulations as the Commissioner, with the approval of the Secretary, may from time to time prescribe."[19]

Also, Congress by Section 1317 of the Act, amended several other criminal and administrative sections of Revised Statutes (Sections 3164, 3165, 3167, 3172, 3173 and 3176), but retained without comment Section 3179. Congress at that time was not aware of the identity of these two offenses as urged in *Berra*. In fact, until this Court decided the *Berra* case, the Government was also of the opinion that Section 3616(a) (R. S. 3179) applied to income taxes. But the inevitable consequences of that position have led the Government now to urge that Congress was aware of this nicety of legal implication and acted in full recognition of it as far back as 1918.

But it would seem to us that if Congress saw any incongruity between Section 253 of the Revenue Act of 1918 and 3179 Revised Statutes, it would have met that situation by clarifying the subject in Section 1305 of the Act. All that Congress did by the 1918 Act was to make "attempts,"

19. Section 1305, 40 Stat. 1142.

as such, punishable by a higher fine. In other words, sharp bookkeeping practices, double sets of books, hiding transactions, etc., constituted in themselves a higher offense, regardless of the "false return" provisions of Section 3179. So construed, the two statutes complement each other. This Court in *Spies* v. *United States*, 317 U. S. 492, clearly characterized this distinction, indicating that in the case of "attempts," affirmative action is implied.

In later years, however, Congress combined the "attempts" provision of the 1918 Act with the failure to "truthfully account" for the tax as contained for the first time in the 1917 Act. Thus, Congress in the 1924 Act[20] took the language of the 1917 Act and made two sections out of it (Sections 1017(a) and (b)). The first subsection related to the wilful failure "to pay such tax, make such return, keep such records, or supply such information," which was made a misdemeanor. Section (b) made it a felony to wilfully fail to "collect or truthfully account for and pay over such tax", and to attempt "in any manner to evade or defeat any tax imposed by this Act".

It is important to observe that these criminal penalties were contained in Title X of the 1924 Act under the heading, "General Administrative Provisions," and applied to all taxes imposed by that Act. There is thus presented for the first time a clear-cut impact between the provisions of Section 1017(b) of the Revenue Act of 1924, and Section 3179 Revised Statutes. In substance, this would mean that Section 3179 was repealed in its entirety by implication, as it would overlap Section 1017(b). However, that conclusion cannot be supported by anything which Congress did in 1924 or in the later Acts, including the retention of that section as Section 3616(a) of the 1939 Code.

In the 1924 Act (Section 1018) Congress again amended

20. 43 Stat. 253, 343-344, Sec. 1017 (a) and (b).

several sections of Revised Statutes relating to taxes (Sections 3164, 3165, 3167, 3172 and 3173), but left intact Section 3179. It would seem, therefore, that the inconsistency between Section 3179 R. S. and Section 1017(b) of the 1924 Act did not occur to Congress. Clearly, Section 3179 through 1924 applied to both income taxes and other taxes, and as just mentioned, Section 1017(b) of the 1924 Act applied to all taxes.

With the exception of the Revenue Act of 1932, which contained a separate penalty provision in the case of gift taxes (Section 525), none of the Revenue Acts from 1926 through 1938 contained any separate criminal penalty provisions in the case of taxes other than income taxes. A separate criminal penalty for excise taxes, originally contained in Section 614 of the Revenue Act of 1932 as first introduced in Congress, did not become law. Thus, the criminal penalty provisions contained in the Revenue Act of 1924 (Section 1017(a) and (b)), which were followed through in identical language in the succeeding Revenue Acts until codified in the 1939 Code, continued in full force and effect. Congress was simply duplicating these criminal provisions in Section 146 of the 1926 Revenue Act and Section 145 of the later Revenue Acts and in the 1939 Code. This would not affect the full impact of Section 3179 Revised Statutes, which applied to all taxes.

If, as the Government's research indicates,[21] the 1939 Code was intended only to codify existing law, then the codifiers must have felt that Section 3179 Revised Statutes, which became Section 3616(a) of the Code, related to all taxes, including income taxes. This conclusion stems from the following analysis of the 1939 Code:

Section 61 of the Code extends to the income tax revisions "all administrative, special, or stamp provisions of

21. Memorandum in response to petition for certiorari in No. 834, n. 20, at page 9.

law, including the law relating to the assessment of taxes, so far as applicable."[22] These administrative provisions appear as Chapters 34 to 48 of the 1939 Code, subtitles D, E and F.

Section 3600 of the Code clearly applies to all taxes, including income taxes, by the specific reference to "any internal revenue tax".

Section 3601 of the Code, and certainly Section 3601(c), applies with equal force to income taxes.

Section 3602, relating to search warrants, has been consistently applied to income tax proceedings. Sections 3603 and 3604 are of course applicable to income taxes.

Section 3611, by the provisions of Section 3611(b)(2), applies to income taxes.

Section 3612(a) has been used by the Internal Revenue Service over the years in income tax proceedings. The specific penalties provided in Section 3612(d) are covered in Sections 291 and 293 in the case of income taxes, where it is provided that these additions to the tax are "in lieu of" the provisions of Section 3612(d).

Section 3614, authorizing examination of books, papers and records, has been consistently applied by the Internal Revenue Service to income tax matters. This is also true of Section 3615.

The provisions of Section 3616(a), relating to "list, return, account, or statement" referred to in the preceding sections, seemingly applies income taxes as well as other taxes.

Section 3616(b), relating to neglect to obey summons, clearly applies to income taxes, and there appears to be no

22. This language appears in the 1916 Revenue Act, Section 22, Title I, 39 Stat. 776. See also, Section 1001, Title X, Revenue Act of 1917, 40 Stat. 325; Section 1305, Title XIII, Revenue Act of 1918, 40 Stat. 1142.

good reason for considering the previous subsection as applying to taxes other than income taxes.

Section 3617 relates to liability for tax on income from illegally produced petroleum, and provides a specific civil penalty.

Section 3630 applies to income taxes as well as other taxes.

Section 3631, relating to restrictions on unnecessary examinations or investigations, has been applied over the years to income tax proceedings by the Internal Revenue Service.

The authority to administer oaths under Section 3632 has been consistently applied over the years to income tax proceedings. Section 3633, providing jurisdiction in the district courts to enforce summons, has most certainly been applied in income tax proceedings.

Section 3634 specifically excludes income tax. Interestingly enough, no other section in Chapter 34 specifically excludes application to internal revenue tax proceedings. If such exclusion were intended, the codifiers of the 1939 Code would have found it equally easy to make such express provision.

All of the provisions contained in Sections 3640 through 3814 apply with equal force to income tax proceedings. In some cases these sections apply only to income taxes.

Absent the detailed historical analysis of the internal revenue laws, we suggest that no one would have had the temerity to argue that Section 3616(a) does not apply to income tax proceedings. That it has been so applied in prior years is admitted by the Government. The foregoing analysis of the Revenue Acts does not indicate that Congress intended to repeal Section 3179 Revised Statutes as applied to income taxes. Nothing in the Revenue Act of 1924 so indicates. Indeed, Section 3748(a) of the Code

preserves a distinction between a false income tax return and attempts to evade or defeat any tax.[23] And, in the case of the offense of wilfully aiding or assisting in, etc., the preparation or presentation under the internal revenue laws of a false or fraudulent return, Section 3748(c) carries a six year statute of limitations. Clearly, the six year statute of limitations would apply in the case of a person wilfully aiding or abetting in the filing of a false or fraudulent income tax return under Section 3616(a).

It occurs to us that the Government's research into the antecedents of Sections 3616(a) and 145(b) of the Code would have been persuasive considerations for the Congress in 1939 and as assistance to the codifiers of the 1939 Code. The Congress, however, did not give particular consideration to the work of the codifiers, and in fact some protests were raised in the House that "no one has read the bill," and that there had been no hearings. (84 Cong. Record 786, 787, 788). The analysis here submitted indicates that Congress intended both statutes to apply, not giving any consideration to their possible conflict first made evident by this Court's decision in *Berra*, 351 U. S. 131.

We are confronted with a situation here much the same as that presented to the Court in *United States v. Harriss*, 347 U. S. 612, where the Court was called upon to determine whether the Lobbying Act was too vague to support criminal penalties. Mr. Justice Jackson, dissenting, felt that the clearest feature of the "vagueness" argument was the fact that "the Government charged with its enforcement does not understand it, for some of its important assumptions are rejected by the Court's interpretation".

In these income tax fraud cases the Government has seesawed in their interpretation of the relevant sections with the proverbial "greatest of ease". Admittedly, they have

23. This was assumed in *United States v. Beacon Brass Co.*, 344 U. S. 43, 44.

not hesitated to apply Section 3616(a) to income taxes which involve "minor" infractions of the income tax law. They have admitted in this and in other cases that Section 3616 (a) applies to income taxes. Now, at the very threshold of this Court's consideration of the case, we are asked to go back to 1798, and by a process of mental gymnastics learn that possibly Congress did not intend Section 3616(a) to apply to income taxes. We do not believe that criminal responsibility rests upon such vague and tenuous analysis.

Time has not permitted us to research this subject beyond what is here presented. There may be other factors which will warrant consideration by the Court, especially with reference to the enactment of the 1954 Code. Such additional considerations will be presented in our reply brief.

Section 7201 of the 1954 Code makes it a felony for any person to wilfully attempt "in any manner to evade or defeat any tax imposed by this title". This is the identical language contained for the first time in the 1918 Revenue Act (fn. 18). Section 7202 of the 1954 Code makes it a felony for any person to wilfully fail "to collect or truthfully account" for any such tax. This language derives from the 1924 Revenue Act. Section 7207 of the 1954 Code provides that, "Any person who wilfully delivers or discloses to the Secretary, or his delegate, any list, return, account, statement or other document, known by him to be fraudulent or to be false in any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both." This section derives from Section 3616(a) of the 1939 Code, except that it no longer requires the element of "intent to defeat or evade". It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b). The precise question presented in this case will therefore not arise under the 1954 Code. It indicates, also, that Congress

for the first time met this problem directly by the three sections of the 1954 Code just mentioned.

III.

IF SECTIONS 145(b) AND 3616(a) MAY CO-EXIST, THEN THE LESSER PENALTY MUST APPLY.

In Mr. Justice Black's dissent in the *Berra* case, this alternative disposition of the case was suggested:

> "Since Congress has specifically made the conduct charged in the indictment a misdemeanor, I would not permit prosecution for a felony under the broad language of Section 145(b). Criminal statutes, which forfeit life, liberty or property, should be construed narrowly, not broadly."

The opinion concludes with the statement, "I would reverse this case or at least remand for resentencing under the misdemeanor statute, Section 3616(a)."

The principle that courts will resolve vague criminal statutes favorably to the accused, or apply the less harsh punishment, has been expressed many times by this Court.

Mr. Justice Frankfurter, speaking for the Court in *United States v. Universal C.I.T. Credit Corp.*, 344 U. S. 218, 221-222, said:

> "But when choice has to be made between two readings on what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

The Court accordingly rejected the Government's position that separate violations of the Fair Labor Standards Act arose as to each employee with respect to wages, overtime and record keeping provisions. This Court held that the offense made punishable under the Act was a course of conduct constituting a violation of the Act, and not each single deviation as to each employee.

In *Bell* v. *United States*, 349 U. S. 81, the defendant was indicted for violation of the Mann Act, on two counts for the transportation of two women on the same trip and in the same vehicle. The district court rejected the argument that this constituted a single offense so as to preclude cumulative punishment under the two counts. This Court reversed, on the ground that Congress had not clearly expressed its will as to whether this conduct constituted a single unit of prosecution or whether the transportation of each woman constituted an offense. The Court said:

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this is not out of any sentimental consideration or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. * * * It merely means that if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses." (349 U. S. 81, 83-84.)

Mr. Justice Douglas, dissenting in *Rosenberg* v. *United States*, 346 U. S. 273, 312, observed:

> "But it is law too elemental for citation of authority that where two penal statutes may apply—one carrying death, the other imprisonment—the Court has no choice but to impose the less harsh sentence."

This principle was confirmed most recently in *Prince* v. *United States*, No. 132, this Term, decided February 25, 1957, 77 S. Ct. 403, 407. The Court there held that the crime of entering or attempting "to enter any bank with intent to commit * * * any felony or larceny" merged into the completed crime upon consummation of the robbery. This conclusion the Court found to be consistent with its "policy of not attributing to Congress, in the enactment of criminal statutes, an intention to punish more severely than the language of its laws clearly imports in the light of pertinent legislative history."

CONCLUSION.

For the reasons herein set forth, petitioner respectfully submits that the sentence imposed upon the petitioner herein is illegal and void, and that the judgment of the Court of Appeals in No. 430, and the judgment of the District Court below in No. 834, should be reversed and set aside, with directions to release petitioner. In the alternative, petitioner respectfully submits that the sentence imposed upon him requires correction, in that only the penalty provisions of Section 3616(a) of the 1939 Code apply, and that the judgment of the Court of Appeals below and of the District Court below should be reversed and the cause remanded with directions to correct the sentence accordingly.

Respectfully submitted,

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March, 1957.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

UNITED STATES OF AMERICA,
vs.
SAM ACHILLI.
} No. 53 CR 154

MEMORANDUM.

This matter came on to be heard on motion to correct and on motion to reduce the sentence heretofore imposed herein.

The Court has had the benefit of argument of counsel on briefs, has studied the authorities to which the Court's attention has been invited, has reviewed the entire record in this matter and is fully advised in the premises.

The Court has weighed the arguments advanced in support of the motion to correct which is based on the theory that the indictment in effect charges not felonies but misdemeanors only. The point has never been finally adjudicated by the United States Supreme Court and there would appear to be a diversity of opinion concerning it.

It is the considered opinion of this Court that there is insufficient basis here to warrant granting a motion to correct, and motion to correct has accordingly been denied.

With respect to the motion for reduction of sentence, the Court has given very thorough attention to every conceiv-

able aspect of this matter, among others, the fact that there has been a reversal by the Court of Appeals for the Seventh Circuit with respect to the First Count which involved non-payment of a sizable tax sum, now eliminated from this case; and giving the defendant the benefit of every doubt, this Court's own belief that a sentence of the kind now imposed will ultimately serve the same good purpose as the former sentence herein.

Therefore, a sentence has been imposed for a period of one year under the Second Count of the indictment together with a fine of $1,000, and one year under the Third Count of the indictment together with a fine of $1,000, unless sooner released by due process of law, the sentence under the Third Count to run concurrently with that under the Second Count, and the fines to be cumulative, or in the total sum of $2,000.

It is hardly necessary to say that the Court has devoted a great deal of time and thought to this case over the last two years, and, with studied reflection on the long road we have traveled, it is my present conviction that this determination represents a sound and proper disposition of the case, and that the ends of justice have been met.

/s/ WIN G. KNOCH.

Date: January 2, 1957.

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JOHN T. FEY, Clerk

Nos. 430 and 834.

In the Supreme Court of the United States

OCTOBER TERM, 1956

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834

SAM ACHILLI, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (No. 430, R. 1223–1236, 1268–1271) is reported at 234 F. 2d 797. The opinion of the district court denying petitioner's motion to correct the sentence and granting his motion to reduce the sentence (No. 834, R. 15–16) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered June 5, 1956, and the petition for rehearing was denied July 31, 1956. (No. 430, R. 1223, 1268.) The petition for certiorari in No. 430 was filed on September 17, 1956 (the time for filing having been extended by Mr. Justice Minton), and was denied on November 19,

1956. On March 4, 1957, the denial was vacated and certiorari was granted, limited to the question of the legality of the sentence. (No. 430, R. 1276.) The petition for certiorari in No. 834, seeking review of the district court's order denying petitioner's motion for correction of sentence, was filed on March 13, 1957, and was granted on March 25, 1957. The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

Petitioner was indicted, found guilty, and sentenced under Section 145 (b) of the Internal Revenue Code of 1939 for the offense of wilfully attempting to evade income taxes by filing false and fraudulent returns. The principal question is whether the sentence, though authorized by Section 145 (b), is unlawful because it was not imposed under Section 3616 (a) of the Code. A subsidiary question is raised by petitioner's contention that there is such an overlap between Sections 145 (b) and 3616 (a) as to preclude the imposition of any valid sentence whatsoever.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter

or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145 (b).)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.*—Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made

* * * * *

he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616 (a).)

STATEMENT

On March 9, 1953, a three-count indictment was filed against petitioner in the United States District Court for the Northern District of Illinois. Count one alleged that, "on or about the 10th day of March, 1947", petitioner "did wilfully and knowingly attempt to defeat and evade a large part of the income tax due and owing by him to the United States of America for the calendar year 1946, by filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return" understating his net income and his tax liability, "[i]n violation of Section 145 (b), Internal Revenue Code; Title 26, United

States Code." (No. 430, R. 3–4.) Counts two and three charged, in similar language, violation of the same statute with respect to income taxes for the years 1947 and 1948. (No. 430, R. 4–5.) The amounts of net income and tax liability, as reported in the returns and as corrected, were alleged to be as follows (No. 430, R. 3–5):

	Net Income		Income Tax	
	Reported	Corrected	Reported	Corrected
Count I (1946)	$11,753.96	$44,254.60	$2,780.15	$20,856.74
Count II (1947)	16,785.52	70,785.75	4,620.98	39,454.76
Count III (1948)	34,053.12	52,805.05	8,968.52	17,997.25
Totals	$62,592.60	$167,845.40	$16,369.65	$78,308.75

The first trial ended in a mistrial in 1954. (No. 430, R. 42.) On May 11, 1955, after a second trial, the jury found the petitioner guilty as charged. (No. 430, R. 1171.) A motion for judgment of acquittal or for a new trial was denied on May 27, 1955. (No. 430, R. 1210–1211.) On June 16, 1955, petitioner was sentenced to concurrent two-year prison terms on each of the three counts and was fined $2,000 on each count. (No. 430, 1212–1213.) On appeal, the Court of Appeals affirmed the conviction as to counts two and three, but reversed as to count one. *United States* v. *Achilli*, 234 F. 2d 797. (No. 430, 1223–1236.) On November 19, 1956, this Court denied certiorari.

On November 26, 1956, petitioner filed a motion in the district court to correct or reduce the sentence, relying upon Rule 35 of the Federal Rules of Criminal Procedure. (No. 834, R. 6.) On February 6, 1957, the district court denied the motion to correct sentence

but reduced the sentence on the two affirmed counts from two-year concurrent sentences and $2,000 fine on each count to one-year concurrent sentences and $1,000 fine on each count. (No. 834, R. 9–10, 14.) An appeal was taken to the Court of Appeals on March 1, 1957. On March 4, 1957, this Court vacated its prior order denying certiorari, and granted the petition in No. 430, limited to the question of the legality of the sentence. On March 25, 1957, the Court granted the petition for certiorari in No. 834, seeking review of the district court's order denying the motion for correction of sentence.

The evidence to support the verdict may be summarized briefly as follows:

The Government's proof of unreported income consisted of (1) direct evidence of petitioner's receipt of substantial amounts of unreported income, and (2) evidence of net worth increases and expenditures substantially in excess of reported income.

(1) Late in 1944 petitioner and one Gromer, a practicing lawyer, formed a partnership known as Highland Motor Sales, each investing $6,000 and obtaining an $18,000 loan. The firm acquired a franchise for the sale of Chrysler automobiles.

Fifty-three witnesses testified that they had purchased a total of 134 automobiles from Highland Motor Sales during the prosecution years. All of them had dealt either with petitioner or his sales manager. (No. 430, R. 123–465.) In each instance the sale was either omitted from the books entirely or the selling price was understated on the books. (No. 430, R. 925–944.) This unrecorded income, which

was reported on neither the partnership return nor petitioner's return (No. 430, R. 83, 91–94, 802–806), totalled the following amounts (No. 430, R. 944):

1946	$14,955.10
1947	36,131.53
1948	21,068.00

Petitioner was the active head of Highland Motor Sales and had supervision of the books and records. (No. 430, R. 796–802.)

The Government's evidence also showed that petitioner had received interest income and income from the discounting of notes, none of which was reported on the returns. (No. 430, R. 585–589, 776–781, 864–865.)

(2) The Government's computations of income on the net worth-expenditures method took into account a liability running from petitioner to his inactive partner of 50% of the unrecorded and unreported receipts from the sale of cars, in view of the possibility that petitioner might be accountable to him for such amounts. After this adjustment the net worth proof showed that petitioner had realized unreported income of $13,803.94 in 1946, $36,958.63 in 1947 and $22,623.18 in 1948. (No. 430, R. 944–946, 957–959.)

SUMMARY OF ARGUMENT

I

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony to "wilfully attempt * * * in any manner to evade or defeat" the income tax. This section prescribes the same penalties, and is phrased in substantially the same language, as each of its

seven predecessors in the revenue acts enacted between 1924 and 1938. The legislative history clearly demonstrates that Section 145 (b) was intended by Congress to be the specific, primary, and perhaps exclusive, provision punishing income tax evasion attempted in any manner, including the most flagrant and by far the most common method of evasion, the filing of a false or fraudulent return.

If the Court should find it necessary to decide whether Section 3616 (a) applies to income tax returns, the legislative history would support a conclusion that neither that statute nor its immediate predecessor, R. S. § 3179, was ever intended by Congress after 1913 to so apply, for beginning in that year every revenue act levying an income tax contained specific penal provisions applicable to violations of that particular act. The 1939 Code is not a revision but a compilation, and it was the manifest intention of Congress that it should make no change in existing law. R. S. § 3179 was reenacted as Section 3616 (a) of the Code because it had never been expressly repealed. However, that provision, by 1939, had been so thoroughly superseded by later, specific legislation that it probably applied only to three obscure kinds of taxes, not including the income tax, for which there appeared to have been no evasion or false returns provisions in the acts themselves. To argue that its re-enactment as Section 3616 (a) enlarged its preexisting scope is to contend that Congress failed in its purpose of making no change in existing law.

To the extent that there may be inconsistency or overlap between Sections 145 (b) and 3616 (a), we

believe the problem must be resolved by giving effect to the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions are to be treated as felonies, not misdemeanors. If Section 3616 (a) is so applied as to preclude the imposition of felony sanctions in an income tax evasion case where the filing of a false return is charged and proved, the result would be the virtual invalidation not only of Section 145 (b) but of its twenty-one counterparts in the 1939 Code which punish as felonies any willful attempt to defeat or evade in any manner various taxes other than the income tax. Finally, such a construction of Section 3616 (a) would, in the light of the relationship between that provision and other statutes *in pari materia,* produce absurd and incongruous results which could not have been intended by Congress.

II

If it be assumed that Section 3616 (a) applies to income tax returns, the sentence imposed on petitioner was nevertheless authorized by Section 145 (b). It has been repeatedly recognized by this Court that the filing of a false or fraudulent return in a willful attempt to evade income taxes violates Section 145 (b). In the overwhelming majority of cases the attempt takes the form of such a filing. Deletion of such conduct from the ambit of Section 145 (b) would construe the phrase proscribing attempted evasion "in any manner" to read "in any manner except filing a false or fraudulent return", a plain frustration of the Congressional design. There is nothing unusual or improper in the overlapping of criminal statutes. In-

deed, it is commonplace that a single act or transaction may violate more than one statute. Assuming that petitioner could properly have been sentenced under Section 3616 (a), there is no merit in the contention that the trial court lacked power to impose sentence under Section 145 (b). The maximum penalties there prescribed provide "a range for judicial sentences according to the circumstances and gravity of particular violations." See *United States* v. *Gilliland*, 312 U. S. 86, 95. In the final analysis, it was for the court to determine the degree of punishment, within the limits provided by Congress. The court, had it so desired, could have imposed a *de minimis* sentence or a very severe one—and its authority in either event derives from Congress.

The cases petitioner relies upon for the argument that Section 145 (b) as here applied deprives him of the equal protection of the laws are clearly distinguishable, for the statutes there involved infringed upon the discretionary sentencing power of the judiciary. A statute may be unconstitutional if it vests in the prosecuting authorities discretionary power which properly belongs to the courts, but plainly that is not this case.

The contention that the trial court was required to impose sentence under Section 3616 (a) because it is the less harsh statute is also without merit. We can find no federal case holding that punishment may be imposed only under the less harsh of two overlapping criminal statutes. The decisive question in every instance must be the intent of Con-

gress, which has here been repeatedly manifested, namely, that income tax evasions attempted in *any* manner, including the filing of false returns, should be punished as felonies. Even if one accepts petitioner's argument that only one statute may apply, there is the further answer that it is Section 145 (b) which governs. A later enacted provision controls over an earlier, for it "expresses the will of the government as to the manner in which the offences shall be subsequently treated." *United States* v. *Tynen,* 11 Wall. 88, 93; *United States* v. *Yuginovich,* 256 U. S. 450, 463.

ARGUMENT

I

SECTION 145 (b) IS THE PRIMARY, SPECIFIC, AND PERHAPS EXCLUSIVE, PENAL SANCTION PROVIDED BY CONGRESS FOR INCOME TAX EVASION ATTEMPTED "IN ANY MANNER", INCLUDING THE FILING OF A FALSE OR FRAUDULENT RETURN

Introductory

The principal question presented is whether a person indicted and convicted of evading income taxes by filing false and fraudulent returns, in violation of Section 145 (b) of the Internal Revenue Code of 1939, may receive a sentence which, though authorized by Section 145 (b), is in excess of that permitted by Section 3616 (a) of the Code.[1] The assumption on which

[1] Petitioner was originally sentenced to concurrent two-year prison terms on each of the three counts and was fined $2,000 on each count. (R. No. 430, 1212–1213.) That sentence plainly depended upon Section 145 (b) for its validity. However, on February 6, 1957, the district court reduced the sentence on the two counts affirmed by the Court of Appeals to one-year concurrent sentences and a $1,000 fine on each count. (No. 834, R.

this question is framed is that Section 3616 (a) applies to *income* tax returns. The validity of that assumption lies, however, at the very threshold of the case. If the assumption is invalid, there is no overlap in the scope of Sections 145 (b) and 3616 (a).

In the first section of this brief, the Government will present legislative materials, relating principally to the genesis and history of Section 3616 (a), and its relationship to Section 145 (b) and other specific provisions contained in the Internal Revenue Code of 1939, which clearly demonstrate that Section 145 (b) was intended by Congress to be the specific, primary, and comprehensive provision punishing income tax evasion attempted "in any manner", including the filing of a false or fraudulent return. To the extent that there may be any inconsistency or overlap in the penalties applicable to income tax evasions, we believe the problem must be resolved by giving effect to the dominant Congressional intent, expressed in eight successive statutes, that income tax evasions, including those involving the filing of false returns, are to be treated as felonies, not misdemeanors.

Moreover, if the Court should find it necessary in this case to reach the question whether Section 3616 (a) applies to income tax returns, these materials

9-10, 14.) Petitioner argues that the reduced sentence is not valid, for the record shows that he has been sentenced for commission of a felony and not a misdemeanor and hence there is a "possibility of consequences collateral to the imposition of sentence," *Pollard* v. *United States*, 352 U. S. 354, 358, sufficiently substantial to justify review. Although the question is not free from doubt, the Government assumes, *arguendo*, that petitioner's reduced sentence is in excess of the maximum permitted by Section 3616 (a).

would support a conclusion that Section 3616 (a) is entirely inapplicable to income tax evasions; and that as to the latter, the penal sanction provided in Section 145 (b) applies to the exclusion of Section 3616 (a). In short, the Government's position is that in a case like this, involving a conviction of income tax evasion under Section 145 (b), the validity of the sentence is to be determined by reference to that statute alone, not to Section 3616 (a). It is clear, we submit, that Congress intended that every attempt to evade income taxes, whatever form such attempt might take, should be punishable as a felony under Section 145 (b). If the Court should agree with this conclusion, it need go no further in considering whether Section 3616 (a) may properly be invoked as a basis for prosecution in income tax cases. For, regardless of the validity or invalidity of Section 3616 (a) as so applied, it could not be a basis for negating the unequivocally expressed intent of Congress that the felony sanctions of Section 145 (b) are applicable to *all* income tax evasions falling within its ambit.

The use of Section 3616 (a) in income tax cases

In the instant case, Section 145 (b) was the statute cited by the grand jury in the indictment and by the trial judge in the judgment of conviction (No. 430, R. 3–5, 1212.) If regard be had solely to Section 145 (b), there could be no doubt that petitioner's indictment, conviction, and sentence were lawful in all respects, since that section in express terms makes it a felony for any person to attempt wilful evasion of his income tax liability. Petitioner was charged with

A holding that Section 3616 (a) reduces the penalties provided by Section 145 (b) to those of a misdemeanor would be equally applicable to these various specific felony provisions. It is inconceivable that Congress could have intended or anticipated so drastic a negation of the penalties provided in all these sections.

Long before Section 3179 of the Revised Statutes was re-enacted as Section 3616 of the 1939 Code, it had been so thoroughly superseded by later specific legislation that in large part it had ceased to have effect. It was incorporated into the Code, however, because it had never been expressly repealed. It had been mentioned by Congress only once in revenue legislation enacted between 1874 and 1939. That was in 1912, when it was made applicable to the excise tax on white phosphorus matches.[25] It appears that, as of January 1939, Section 3616 probably applied to only three taxes, for which there appeared to be no evasion or false returns provisions in the acts themselves: (1) the excise tax on certain fish, animal and vegetable oils (26 U. S. C. 2490–2494); (2) the tax on the average amount of circulation issued by certain banks (26 U. S. C. 1900–1907); and (3) the excise tax on certain transfers of stock or securities to avoid income tax (26 U. S. C. 1250–1253, note particularly Sec. 1253 (c)). The existence of these three areas of applicability, areas in which without Section 3616 there would apparently have been no criminal sanction available within the internal revenue laws, indicates that Con-

[25] 37 Stat. 83, 84.

that offense, and there is no question that it was amply proved by the evidence. Petitioner's attack upon the sentence is based solely upon a statute (Section 3616 (a)) cited neither in the indictment nor in the judgment of conviction which, he contends, should be construed as precluding the imposition of more than misdemeanor penalties to any case under Section 145 (b) where the facts also show the filing of a false return in violation of Section 3616 (a).

If one looks solely at the face of Section 3616 (a), it is possible to conclude that it applies to income tax returns as well as to all other federal tax returns. The language of the section (quoted *supra*, p. 3) is general and unqualified, and in terms it appears to embrace every type of federal tax return without exception. In view of the broad scope of the statutory language, the Government has in recent years (i.e., from October 1952 to March 1957)[*] proceeded on the assumption that Section 3616 (a) may properly be invoked as a basis for prosecution in income tax cases where the facts so warrant. The instant case, as well as the other cases before the Court presenting identical contentions, have brought into question the soundness of that assumption.

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[*] However, in its brief on the merits in *United States* v. *Novick*, 273 U. S. 262 (No. 395, Oct. Term, 1926), pp. 16-19, the Government contended that the immediate precursor of Section 3616 (a) (Section 3179 of the Revised Statutes of 1874) was "undoubtedly repealed * * * *pro tanto*" as to the income tax by the various specific penalty provisions contained in the subsequent income tax statutes.

gress intended the section to be effective as a residual provision covering offenses for which no other sanction was provided.

Comparison with other statutes in pari materia.

Since Congress clearly intended that Section 3616 should have exactly the same force that Section 3179 of the Revised Statutes had in December 1938, there is substantial basis for the view that it does not apply to the income tax. If it is so applied as to preclude the imposition of felony sanctions in an income tax evasion case where the filing of a false return is charged and proved, Section 3616 (a) would produce absurd and incongruous results which could not have been intended by Congress. In this connection, we refer to Sections 145 (a), 3793 (b) (1) and 3809 (a) of the Internal Revenue Code of 1939, and to Section 1001 of the Criminal Code.

Section 3616 prescribes maximum penalties of $1,000 fine and one year in prison. Section 145 (a), which proscribes mere acts of omission such as failing to file a return, pay a tax or supply information, provides maximum penalties of $10,000 fine and one year in prison. Thus, under petitioner's theory, the punishment applicable to the commission of the affirmative act of evasion (i. e., willfully filing a fraudulent return) is less severe than that applicable to mere acts of omission. But, as this Court has long recognized, the affirmative act is a graver offense against the revenue than a mere act of omission. *Spies* v. *United States*, 317 U. S. 492, 497–499.

Again, Section 3793 (b) (1) provides maximum penalties of $10,000 fine and five years' imprisonment

Section 3616 (a) is derived from a penal provision which was originally enacted in 1798, 1 Stat. 580, 586, and was reenacted in 1874 as Section 3179 of the Revised Statutes. However, so far as we can discover, there were no prosecutions for income tax violations under that section prior to October 1, 1952. On the latter date there was filed in the Southern District of Florida a three-count information against one Mary Evelyn Jones, alleging that "with intent to defeat and evade the assessment of income tax[es] against her" for the years 1947, 1948 and 1949, she "did deliver and disclose to the Collector of Internal Revenue * * * false and fraudulent income tax return[s]" in that she had claimed credit for fictitious dependents "in violation of Title 26 U. S. Code, Section 3616" (*United States* v. *Jones*, S. D. Fla., No. 636, Ocala, Criminal). In the *Jones* case, the Department of Justice had authorized the United States Attorney to proceed under Section 3616 (a) because it was reluctant to prosecute such a minor evasion of income tax (totalling $430 over the three years) as a felony under Section 145 (b).

During the four and one-half year period between October 1, 1952, when the *Jones* case was initiated, and March 1957, when the Attorney General directed that no prosecutions for income tax violations be instituted under Section 3616 (a) pending definitive adjudication of its scope by this Court, the Government invoked Section 3616 (a) in 177 cases of alleged income tax evasion,[3] confining it exclusively to taxpayers like

[3] Fifty of these 177 cases remain undisposed of. Of the 127 closed cases, 111 resulted in pleas of guilty and seven in pleas

Miss Jones who attempted to evade very small amounts of tax. In such cases the Government was reluctant to bring felony charges under Section 145

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of *nolo contendere*. Six defendants went to trial, of whom four were acquitted and two convicted. Of the 120 convicted persons, 95 were fined or given probation or suspended sentences, and 25 were sentenced to terms of imprisonment ranging between 30 days and one year. Among those 25 were the two persons who were convicted after trial, one of whom was sentenced to 60 days and the other, four months. Both sentences have been served. Of the 23 persons who were sentenced to imprisonment after pleas of guilty or *nolo contendere*, 16 have served their sentences and seven are still incarcerated. Three of the 127 closed cases were rendered moot by reason of the deaths of the defendants before sentence.

Since October 1952, the Government has invoked Section 3616 (a) as the basis for prosecution in less than 7% of the criminal income tax evasion cases involving the filing of a false return. A holding now that Section 3616 (a) does not apply to income tax returns would undoubtedly cast a cloud upon the legality of the convictions secured under that section. In this connection, it should also be pointed out that the consequences of holding, as petitioner urges, that Section 3616 (a) applies in such cases to the exclusion of Section 145 (b), would be infinitely more serious. Since the Revenue Act of 1924, Section 145 (b) has been the basis for prosecution in literally thousands of criminal income tax evasion cases. As appears *infra*, pp. 32-33, its applicability to such cases has been sustained by this Court and by the courts of appeals in a host of decisions extending over a period of three decades. A ruling now that the sentences imposed in all these cases are illegal if they exceed the limits permitted by Section 3616 (a) would create legal and practical difficulties of an obviously grave nature. We point this out, not as a reason for holding Section 145 (b) to be applicable in the instant case, but solely to meet the argument that results of a most unfortunate nature would flow from a holding that Section 3616 (a) is inapplicable to income tax offenses.

(b) since the offense was deemed to be of minor proportions, and since Section 3616 (a) appeared to be available as a basis for prosecuting the offense as a misdemeanor. The Government felt that in such cases, considering the lesser degree of gravity of the offense; it was appropriate, and more commensurate with the offense, to prosecute the defendant, not for a felony under Section 145 (b), but for a misdemeanor under Section 3616 (a). Prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F. 2d 97 (1955), there were no judicial holdings or intimations that Section 3616 (a) could not be so applied. In *Berra* v. *United States*, 221 F. 2d 590, affirmed on other grounds, 351 U. S. 131, the Eighth Circuit, following its earlier decision in the *Dillon* case, had affirmed a conviction and sentence under Section 145 (b), on the ground that Section 3616 (a) did not apply to income tax returns. Since both the Government and the petitioner in the *Berra* case agreed that Section 3616 (a) was applicable to income tax returns, this Court's opinion assumed, *arguendo*, the correctness of that interpretation of the statute. (351 U. S. at 133.) The dissenting opinion of Mr. Justice Black, in which Mr. Justice Douglas joined, considered the case on the basis of the same assumption. (351 U. S. at 138.)

Early this year, however, the Government undertook to make a fresh, comprehensive review of the legislative history of Section 3616 (a), with a view towards reexamining the correctness of the interpretation that it applies to income tax returns. This action was taken

for several reasons: (1) the concern that, if Section 3616 (a) is properly to be construed as inapplicable to the income tax, the Department of Justice should not continue to invoke it in any income tax evasion case; (2) in deference to the views expressed by Justices Black and Douglas in the *Berra* case, namely, that if Sections 145 (b) and 3616 (a) are construed to overlap, serious constitutional questions would arise; and (3) because of the new and more serious dimensions which the problem had assumed as a result of the number of cases following *Berra* in which the issue of overlap was being raised. As a result of such review, the Government has now concluded that there is at least a serious question whether Section 3616 (a), despite the generality of its language, was intended by Congress, when it enacted the Internal Revenue Code of 1939, to apply to income tax returns.

Legislative history of Sections 3616 (a) and 145 (b)

As already stated, the oldest ancestor of Section 3616 (a) is a penal provision originally enacted in 1798 when there was no federal income tax and when the principal sources of revenue for the Federal Government were excise taxes and customs duties. In that year Congess enacted a statute making it a misdemeanor for "any person * * * [to] deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made * * *."[1] Similar provisions appeared in various later revenue acts, including the first

[1] Sec. 11, c. 70, 1 Stat. 580, 586.

act (1861) imposing an income tax.[5] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[6] and in the 1864 act to include a "list, return, account, or statement."[7] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. However, so far as we can discover, there were no prosecutions under that provision for income tax violations. But *cf. United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N. D. Ill. 1868).

In 1870, Congress repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths (oaths being required in connection with other revenue returns) under the penalties of perjury.[8] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes.[9] Since

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[5] Secs. 16, 49–51, c. 45, 12 Stat. 292, 298, 309.

[6] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432, 435.

[7] Act of June 30, 1864, as amended, Secs. 15, 116–123, c. 173, 13 Stat. 223, 227, 281. This Act added the word "assessment" to valuation and "enumeration."

[8] Secs. 6, 11, 37, c. 255, 16 Stat. 256, 257, 259, 271.

[9] Section 3179 reads as follows:

> Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

there was no income tax law in effect in 1874, Section 3179 could not at that time apply to the income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same civil penalties that had been imposed by the 1870 act—50 percent of the tax for a willful failure to file and 100 percent for the willful filing of a false or fraudulent return.[10] In omitting mention of criminal sanctions in the 1894 act, Congress presumably intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257, and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

It appears that Section 3179 continued unimpaired until the War Revenue Act of 1898 (30 Stat. 448, c. 448). Although that act levied no income tax, it is important here because it marked the resumption of a Congressional policy which (though it had not been in effect since 1874) has been followed ever since, of incorporating into each revenue act specific criminal penalties applicable to violations of that act. Incorporated in Section 23 of the 1898 Act was the provision that

> * * * if any such manufacturer or maker * * * shall make any false or untrue declaration such [person] shall be deemed guilty of a misdemeanor, and upon conviction shall pay a fine of not more than $500, or be imprisoned not more than six months, or both, at the discretion of the court.

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[10] Compare Sec. 29, c. 349, 28 Stat. 509, 554, with Sec. 11, c. 255, 16 Stat. 256, 259.

The necessary result of this specific provision was that the general, earlier provision of Section 3179 was superseded *pro tanto*. *Kepner* v. *United States*, 195 U. S. 100, 125; *Ginsberg & Sons* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Yuginovich*, 256 U. S. 450, 463.

In 1909, when Congress imposed an excise tax on corporations, measured by corporate income, it followed the same policy. It provided maximum criminal penalties of one year in prison and a $1,000 fine for willfully making a false or fraudulent return with intent to defeat or evade the assessment,[11] the same penalties contained in Section 3179. The 1909 act set the pattern for the later penal provisions relating to income tax. Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for violations thereof.

Four years later, Section II of the Revenue Act of 1913, levying an income tax, provided that (Sec. II (F), c. 16, 38 Stat. 114, 171):

> Any person * * * who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000 or be imprisoned not exceeding one year, or both * * *.

This section was patently inconsistent with Section 3179, which limited the fine to $1,000, and to that

[11] Sec. 38 (8), c. 6, 36 Stat. 11, 117.

extent superseded the latter provision. *United States* v. *Tynen*, 11 Wall. 88, 92–93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Ginsberg & Sons* v. *Popkin*, *supra*, p. 208. Further evidence that Congress did not intend Section 3179 to apply to the 1913 income tax is found in the fact that Sections 3167, 3172, 3173, and 3176 of the Revised Statutes were incorporated with amendments into the Act, but Section 3179 was not.[13] True, the Act provided (in Section II (L)):

> That all administrative, special, and general provisions of law, including the laws in relation to the assessment, remission, collection, and refund of internal-revenue taxes not heretofore specifically repealed and not inconsistent with the provisions of this section, are hereby extended and made applicable to all the provisions of this section and to the tax herein imposed . . .

but Section 3179 was not included in this definition, for it was *not* consistent with the specific provision in the Act itself. Clearly, Congress did not intend that Section 3179 should apply to violations of the 1913 Act.[12]

The Revenue Act of 1917, which provided for an income tax, after the usual prohibition against false or fraudulent returns, added the new misdemeanor of "evad(ing) or attempt(ing) to evade any tax" im-

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[12] The Revenue Act of 1916 (Sec. 18, c. 463, 39 Stat. 756, 775) provided the same penalties as that of 1913.

[13] Sec. II (I), c. 16, 38 Stat. 114, 177–179.

posed by the act.[14] The Revenue Act of 1918 enlarged this offense to proscribe an attempt to evade the tax "in any manner," and raised the maximum fine to $10,000, at the same time retaining the one-year maximum prison sentence.[15] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[16] The broadening of the definition of the crime, as reflected in the 1917 and 1918 acts, apparently indicates Congressional recognition that it is possible to evade the income tax without filing a fraudulent return (see *Spies* v. *United States*, 317 U. S. 492, 499).[17]

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[14] Sec. 1004, c. 63, 40 Stat. 300, 325.

[15] Sec. 253, c. 18, 40 Stat. 1057, 1085. During the debate in the Senate on the Revenue Act of 1918, Senator Penrose, a member of the Senate Finance Committee, which reported out the bill, stated that the Act was intended to be a "complete codification" of internal revenue laws: "* * * the existing law is now codified and reenacted with the additional increased taxes and amendments, so that the old law is, for all practical purposes, to be disregarded * * *." 57 Cong. Rec. 544.

[16] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Sec. 1017 (b), c. 234, 43 Stat. 253, 344. Revenue Act of 1926, Sec. 1114 (b), c. 27, 44 Stat. 9, 116. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791, 835. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169, 217. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680, 725. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652, 1703. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452, 513.

[17] The changes in definition of the crime made in 1917 and 1918 were discussed in the Government's brief in *United*

Before 1924, when attempted income tax evasion was made a felony, there existed the anomaly that the filing of a false return willfully understating the tax was only a misdemeanor, but if the return was sworn to (as it was usually required to be) the false swearing constituted perjury which could be punished as a felony under the Criminal Code. *United States* v. *Noveck*, 273 U. S. 202, 206; *Levin* v. *United States*, 5 F. 2d 598 (C. A. 9), certiorari denied, 269 U. S. 562; *United States* v. *Smith*, 27 Fed. Cas. No. 16,341, D. Ore. (1870) at p. 1184. This may have been one of the factors which motivated Congress in drastically increasing the punishment for attempted income tax evasion in the Revenue Act of 1924, making it a felony. The House bill had made no changes in the penalties, treating tax evasion as a misdemeanor, as previous legislation had always done.[18] The Senate bill, however, made any

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States v. *Noveck*, 273 U. S. 202, No. 395, Oct. Term, 1926. It was said there (pp. 17–18):

> This general [1917] provision made the first notable departure from the form of Section 3179 of the Revised Statutes in that, after prohibiting the making of "any false or fraudulent return" (the same language of Section 3179) it also punished "whoever evades or attempts to evade any tax" imposed by the Act. This modification of the Revenue Act of 1918 (c. 18, 40 Stat. 1057), both in Section 253 (p. 1085), relating to income taxes, and in Section 1308 (b) (p. 1143), relating generally to other taxes, adopted and further enlarged to include an attempt at the evasion of the tax "in any manner." This enlargement eliminated the necessity of the specific provision against filing "any false and fraudulent return," which was accordingly dropped.

[18] H. Rep. No. 179, 68th Cong., 1st Sess., pp. 71–72 (1939–1 Cum. Bull. (Part 2) 265).

willful attempt to evade any kind of tax a felony punishable by a fine of not over $10,000, or imprisonment for not over five years, or both, and incorporated other important changes. (S. Rep. No. 398, 68th Cong., 1st Sess., p. 45 (1939–1 Cum. Bull. (Part 2) 297). In conference, the new and more severe penalties provided in the Senate bill were adopted. (H. Conference Rep. No. 844, 68th Cong., 1st Sess., p. 32 (1939–1 Cum. Bull. (Part 2) 313).

The felony penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[19] and were incorporated into the Internal Revenue Code of 1939 as Section 145 (b). These re-enactments of the felony provision admit of no doubt that Congress intended that any attempt to evade the income tax in any manner should be so punished.

The legislative history of the Revenue Acts of 1926, 1928, 1932, 1934, 1936 and 1938 sheds virtually no light on the problem, except insofar as they all re-enacted the felony provision and omitted the misdemeanor.

We come now to the crux of this phase of the case, the enactment of Section 3616 (a) as part of the Internal Revenue Code of 1939. Section 4 of the enacting clause provides that "The Internal Revenue Title, as hereinafter set forth, is intended to include all general laws of the United States and parts of such laws, relating exclusively to internal revenue, in force on the 2d day of January 1939 * * *."

The Code was the result of ten years work by the staff of the Joint Committee on Internal

[19] For citations see fn. 16, *supra*.

Revenue Taxation (established in 1926, see 44 Stat. 127) in cooperation with the Treasury Department and the Department of Justice. The staff was instructed to codify all the internal revenue laws except those which had been expressly repealed.[20] Great care was taken to prevent any change in existing law, the Code being intended as a compilation and not as a revision. The Senate Committee on Finance and the House Committee on Ways and Means reported that the bill made "no changes in existing law."[21] In introducing the bill in the House, Chairman Doughton of the Joint Committee on Internal Revenue Taxation stated (84 Cong. Rec. 646):

> * * * It does not change existing law in any particular. It brings into consolidated form, into one compact volume, about 150 separate acts of Congress, beginning with the Revised Statutes, enacted in 1874. There are so many laws contained in so many volumes of the Statutes at Large that it is very confusing and it is difficult even for lawyers to determine what the law actually is, and the ordinary taxpayer cannot do it at all.
>
> This bill makes no change whatever in existing law, but consolidates and codifies the existing law, and brings it all into one volume so that it is immediately and conveniently available.

From the language of the enacting clause, the committee reports and the debates, it is apparent that Congress not only intended to make no change in the

[20] Hearing before the Senate Committee on Finance, 76th Cong., 1st Sess., Jan. 30, 1939, p. 1; 84 Cong. Rec. 781.

[21] Sen. Rep. No. 20, 76th Cong., 1st Sess., p. 1; H. Rep. No. 6, 76th Cong., 1st Sess., p. 3.

law but had done everything reasonably possible to guard against any such occurrence. Indeed, most of the debate on the floor of the House[22] consisted of fears expressed by individual members that some unintended change or omission might in fact be made, and of the allaying of those fears by the sponsors of the Code.[23]

It is apparent, therefore, that it was the intention of Congress that Section 3616 of the 1939 Code should have exactly the same meaning that its predecessor, Section 3179 of the Revised Statutes, had at the time the Code was enacted. And, we submit, there is ample basis for the conclusion that Section 3179 did not apply to the income tax at that critical date.

Between 1874 and 1938, an elaborate system of specific sanctions had been built up in the internal revenue laws, punishing any kind of crime against the revenue. In the income tax field, the provision, first appearing in the 1924 Act, that "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall * * * be guilty of a felony" was the "capstone of a system of sanctions which singly or in combination were calculated to induce prompt and forthright fulfillment of every duty under the income tax law and

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[22] 84 Cong. Rec. 780-789.

[23] A member of the House Ways and Means Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistences into some form," the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever, * * *." (84 Cong. Rec. 646, 647.)

to provide a penalty suitable to every degree of delinquency." *Spies* v. *United States*, 317 U. S. 492, 497. Identically, or almost identically, worded provisions constituted the "capstone" of the systems of sanctions enacted with respect to many other kinds of taxes. Thus, the 1939 Code is replete with counterparts of Section 145 (b), making it a felony to attempt to evade or defeat the admissions and dues tax (Section 1718 (b)); the estate tax (Section 894 (b) (2) (c)); the gift tax (Section 1024 (b)); the narcotics tax (Section 2557 (b) (3)); the firearms tax (Section 2707 (c)); the documents tax (Section 1821 (a) (2)); the tobacco tax (Section 2156 (b)) and fourteen other kinds of taxes.[24]

[24] The sections and chapters are as follows: Chapter 2, Subchapter A, Section 508 incorporates by reference Section 145 (b); Subchapter C, Section 651 incorporates by reference the penalties in Title I of the Revenue Act of 1934 (Section 145 (b) of the 1934 Act, 48 Stat. 725, is identical with that section in the 1939 Code); Subchapter D, Section 702 (a) incorporates by reference Section 145 (b); Chapter 6 (repealed Nov. 8, 1945), Section 1207 incorporated by reference Section 2707 (c); Chapter 9, Section 1610 incorporates by reference Section 2707 (c); Sections 1536, 1430, and 1627 incorporates by reference both Sections 2707 (c) and 1821 (a) (2); Chapter 12, Section 1856 incorporates by reference Section 1718 (b); Chapter 19, Section 2408 incorporates by reference Section 2707 (c); Chapter 20, Section 2454 incorporates by reference Section 2707 (c); Chapter 21, Section 2479 incorporates by reference Section 2707 (c); Chapter 27A, Section 3287 incorporates by reference Section 2707 (c); Chapter 29, Section 3449 incorporates by reference Section 2707 (c); Chapter 30, Section 3473 incorporates by reference Section 1718 (b); Chapter 31, Section 3483 incorporates by reference Section 1821 (a) (2); Chapter 32, Section 3496 incorporates by reference the penalty provisions applicable to taxes imposed under Subchapter A of Chapter 29, i. e., Section 2707 (c); Chapter 33, Section 3524 (expired May 21, 1943) incorporated by reference the penalty provisions applicable to taxes imposed under Subchapter A of Chapter 29, i. e., Section 2707 (c).

for "Any person who willfully aids or assists in, or procures, counsels, or advises the preparation or presentation * * * of a false or fraudulent return * * *." The acceptance of petitioner's argument would mean that a person assisting or counselling him in the preparation of his false returns would be punishable as for a felony, while petitioner, who perpetrated the attempted evasion by filing the return, and who stood to profit handsomely in the event the attempt went undetected, could be punished only as for a misdemeanor.

Section 3809 (a) punishes by maxima of $2,000 fine and five years imprisonment "Any person who willfully makes and subscribes any return * * * which he does not believe to be true and correct as to every material matter * * *." Thus, under petitioner's theory, he committed felonies when he made and subscribed the false returns but only misdemeanors when he filed them in a willful attempt to evade his taxes. Cf. *United States* v. *Novcek*, 273 U. S. 202, 206–207; *Taylor* v. *United States*, 179 F. 2d 640, 643, (C. A. 9).

The final anomaly is reached when Section 3616 is compared with Section 1001 of the Criminal Code (18 U. S. C. 1001). The latter statute provides that any person who "in any matter within the jurisdiction of any department or agency of the United States * * * makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both." It has been

held that this offense, being but an "incidental step in the consummation of the completed offense of attempted defeat or evasion of tax by means of a false and fraudulent return", is an offense included within the crime charged by the standard Section 145 (b) indictment form used in the instant case.[28] *Gaunt* v. *United States*, 184 F. 2d 284, 289–290 (C. A. 1), certiorari denied, 340 U. S. 917; cf. *Ekberg* v. *United States*, 167 F. 2d 380, 385 (C. A. 1). If petitioner's argument be adopted, it would mean that for the greater offense the punishment would be limited to $1,000 and one year but for the lesser included offense the punishment could be as much as $10,000 and five years. See *Ex parte Berkoff*, 65 F. Supp. 976, 981 (D. Minn.); cf. *Cohen* v. *United States*, 201 F. 2d 386, 393 (C. A. 9).

We submit, therefore, that the sanctions permitted by Section 145 (b) are wholly consistent with those prescribed by other statutes *in pari materia*, and that

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[28] The determination of whether one offense is included in another rests upon a comparison of the elements of the two crimes. *Berra* v. *United States*, 351 U. S. 131, 133-134; cf. *Stevenson* v. *United States*, 162 U. S. 313. Here the allegation that petitioner filed a false and fraudulent return with the Collector of Internal Revenue (obviously a matter "within the jurisdiction of [a] department or agency of the United States") charges a violation of Section 1001. The aggravating ingredient present in Section 145 (b) but lacking in Section 1001, is the willful attempt to evade the tax.

The sentence in the instant case, even if it were not sustainable under Section 145 (b), would be sustainable under Section 1001 except for the fact that the general three-year statute of limitations had barred prosecution under the latter provision before the indictment was returned. Cf. *Williams* v. *United States*, 168 U. S. 382, 389.

all the materials summarized above show that Congress intended cases like the one at bar to be governed by Section 145 (b) without reference to Section 3616.

II

ASSUMING SECTION 3616 (a) TO BE APPLICABLE TO INCOME TAX RETURNS, THE SENTENCE IMPOSED ON PETITIONER WAS AUTHORIZED BY SECTION 145 (b). OVERLAP OF THE TWO PROVISIONS WOULD NOT REQUIRE NEGATION OF THE SPECIFIC FELONY PENALTIES PROVIDED BY SECTION 145 (b) IN A CASE EMBRACED WITHIN ITS TERMS, EVEN THOUGH THE ACTS CHARGED AND PROVED WOULD ALSO VIOLATE SECTION 3616 (a)

Section 145 (b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, "in addition to other penalties provided by law," to attempt wilfully "in any manner to evade or defeat" the *income* tax. In the overwhelming majority of cases prosecuted under Section 145 (b), the "manner" of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145 (b) has been uniformly and repeatedly recognized by this Court (*United States* v. *Beacon Brass Co.*, 344 U. S. 43, 46; *United States* v. *Troy*, 293 U. S. 58; *Spies* v. *United States*, 317 U. S. 492, 499; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 159), and by the courts of appeals (e. g., *Cage* v. *United States*, 159 F. 2d 464, 466 (C. A. 8); *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1); *United States* v. *Rosenblum*, 176 F. 2d 321, 329–330 (C. A. 7); *United States* v. *Croessant*, 178 F. 2d 96 (C. A.

3), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7); *Rick* v. *United States*, 461 F. 2d 897, 898–899 (C. A. D. C.)).

The filing of a false or fraudulent return with intent to evade any tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616 (a) of the 1939 Code. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145 (b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616 (a), assuming that the latter section is construed to apply to income tax returns.

On the basis of the assumed overlap between Sections 145 (b) and 3616 (a), petitioner argues that wherever, as here, the method of evasion charged in the indictment is the filing of a false return, Section 3616 (a), in effect, supersedes Section 145 (b), and no punishment can be imposed in excess of that authorized by the former provision. Petitioner's argument, if accepted, would in effect repeal Section 145 (b) as applied to filing false returns with intent to evade the income tax. Under his view, the phrase in Section 145 (b) proscribing attempted evasion "*in any manner*" would be construed as if it read "*in any manner except filing a false or fraudulent return*". The result would be to delete from Section 145 (b) "the most common and also the most flagrant method of willfully attempting to defeat or evade an income

tax" (*Rick* v. *United States*, 161 F. 2d 897, 898 (C. A. D. C.))—a plain frustration of the Congressional design. It would also require the overruling of *Beacon Brass* and countless other cases decided by this Court and the lower courts (*supra*, pp. 32–33) holding that the willful filing of a false or fraudulent income tax return, *without more*, is a felony punishable as such under Section 145 (b).

There is nothing unusual or improper in the overlapping of criminal statutes. Not infrequently, the areas of conduct proscribed by federal penal statutes are overlapping, not contiguous territories.[27] The criminal statutes of the United States are not like a jigsaw puzzle in which the pieces all neatly interlock, with no gaps or laps. Many statutes do overlap, and it is not at all uncommon for a single act or transaction to violate more than one statute. *Pereira* v. *United States*, 347 U. S. 1, 9; *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 45; *Blockburger* v. *United*

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[27] The existence of a broad area of overlap between an old sanction and a new one is not unusual in the criminal law:

> Each new definition or drawing of lines around a thing thus newly made indictable is as likely to embrace within it some acts which were indictable before, by reason of lying within different lines, as to include what was not before indictable. The new and the old stand together, and a particular element of wrong may thus be found to be within any number of the law's enclosing circles. What is thus said applies, as already mentioned to the common law as well as to the statutes. The common law would be the perfection of folly, instead of meriting the praise bestowed upon it as the perfection of wisdom, if it attempted to divide the indictable into such classes that no transaction would fall into more than a single class.

(1 Bishop, *Criminal Law*, (1923 ed.) p. 558.

States, 284 U. S. 299, 304; *United States* v. *Noveck*, 273 U. S. 202, 206–207; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Hammer* v. *United States*, 271 U. S. 620, 625; *Gaviores* v. *United States*, 220 U. S. 338, 342; *Wood* v. *United States*, 16 Pet. 342, 363.[28]

Moreover, petitioner labors under the misapprehension that the trial judge's authority to impose sentence in this case derived from the fact that the indictment cited Section 145 (b) as the statute alleged to have been violated.[29] The authority of a federal judge to impose sentence in a criminal case derives from Congress, and not from any "election" by the prosecutor. Unless Section 145 (b) is deemed to be repealed by implication by Section 3616 (a) or to be otherwise inapplicable, it empowered the trial judge to impose the sentence he did in this case upon petitioner's conviction for willfully attempting to evade the income tax. If an indictment is valid in charging an offense under Section 145 (b), and if

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[28] As another example, an attempt to bribe a juror may be punishable as a felony under 18 U. S. C. 206, as a misdemeanor under 18 U. S. C. 1504, or possibly as a criminal contempt under 18 U. S. C. 401. Cf. *Slade* v. *United States*, 85 F. 2d 786 (C. A. 10); *United States* v. *Zullo*, 151 F. 2d 560 (C. A. 3); *Hawkins* v. *United States*, 190 F. 2d 782 (C. A. 4).

[29] Rule 7 (c) of the Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

the proof supports the defendant's conviction under that section, the trial judge can in his discretion impose any sentence that is lawful under that section, even though the proof may also show violation of another statute fixing a lesser penalty.

The overwhelming majority of criminal prosecutions relating to the income tax, as has already been noted (*supra*, pp. 14–15, fn. 8), have been conducted under Section 145 (b), the specific, comprehensive statute punishing attempts to defeat or evade the income tax "in any manner". The indictment in the instant case (which follows the standard form used for many years) alleges that on a certain date the defendant "did willfully and knowingly attempt to defeat and evade a large part of the income tax due and owing * * * by filing and causing to be filed with the Collector of Internal Revenue * * * a false and fraudulent income tax return * * *". (No. 430, R. 3–5.)

This indictment would have been valid as charging an offense under Section 145 (b) even if it had made no reference to the filing of false returns. Evasion can be attempted in various ways, and the filing of a false return is not an essential ingredient of the offense. *Spies* v. *United States*, *supra*, pp. 499–500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887. An indictment is sufficient if it charges a crime in the language of the statute, *United States* v. *Lepowitch*, 318 U. S. 702, 704; *Ekberg* v. *United States*, 167 F. 2d 380, 387 (C. A. 1), leaving further details of the charge to be furnished in a bill of particulars. Hence, omission of

an allegation, like that in the instant case, that the "manner" of attempted evasion was the filing of a false return would not affect the validity of the indictment under Section 145 (b). *Heasley* v. *United States*, 218 F. 2d 86, 88–89 (C. A. 8), certiorari denied, 350 U. S. 882; *United States* v. *Rosenblum*, 176 F. 2d 321, 324 (C. A. 7).

The significance of the allegation as to false returns is that it alleges one of the manners of evasion, thereby reducing or perhaps eliminating entirely the need for a bill of particulars. It is too much to say that its effect is also to reduce a felony to a misdemeanor, when any other allegation as to the manner of evasion would not have done so.

Moreover, petitioner's argument with respect to the indictment (Br. 8) is nothing more than a belated attack on its form, an attack which is required by Rule 12 (b), Federal Rules of Criminal Procedure, to be made before trial.[30] Had the appropriate pre-trial motion been made, the Government might have been able to cure any defect by seeking a superseding indictment.[31] By not making such a motion at the proper time, petitioner waived the right to attack the

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[30] Petitioner did file a pre-trial motion to dismiss the indictment. However, the Code provision there relied upon was not Section 3616 (a) but Section 3761 (a), relating to the compromise of civil tax liability. (No. 430, R. 7.)

[31] A new indictment could either have omitted mention of the means of evasion or have alleged that the attempted evasion was committed by maintaining and furnishing to the Treasury agents false books and records. The evidence showed that this was one of the devices petitioner employed. (R. 796 802, 910–913, 925–944).

indictment later. *Torres Martinez* v. *United States*, 220 F. 2d 740, 743 (C. A. 1).

Assuming, *arguendo*, that there is no such waiver in this case, we believe that there is no merit to the contention that the court lacked power to decide under which of the two statutes to impose sentence. Petitioner (Br. 9, fn. 7) points out that "the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304; *American Tobacco Co.* v. *United States* 328 U. S. 781; *Albrecht* v. *United States*, 273 U. S. 1, 11; *Morgan* v. *Devine*, 237 U. S. 632, 639–640; *Gavieres* v. *United States*, 220 U. S. 338, 342; *Burton* v. *United States*, 202 U. S. 344, 377. He quotes (Br. 7) the opinion in *Berra* v. *United States*, 351 U. S. 131, 134:

> For here the method of evasion charged was the filing of a false return, and it is apparent that the facts necessary to prove that petitioner "willfully" attempted to evade taxes by filing a false return (§ 145 (b)) were identical with those required to prove that he delivered a false return with "intent" to evade taxes (§ 3616 (a)). In this instance §§ 145 (b) and 3616 (a) covered precisely the same ground.

Petitioner (Br. 8–9) then argues that because only one offense was committed *here*, the two *statutes* are repugnant to each other and Section 145 (b) must fall. In other words, he urges that since he could not have been punished separately under both provisions, the Government lacked the power to prosecute for a felony. However, it does not follow that merely

because prosecution could have been had for a misdemeanor the Government lacked power to proceed as for a felony, thus providing the trial court with broad discretion in imposing sentence.[32] Indeed, the assumption that petitioner could not be punished under both statutes, far from supporting his argument that Section 145 (b) must be nullified, provides all the more reason why the two statutes may co-exist. *Freeman* v. *United States,* 146 F. 2d 978, 979 (C. A. 6); Cf. *Puerto Rico* v. *Shell Co.,* 302 U. S. 253, 264. We rely mainly upon *United States* v. *Gilliland,* 312 U. S. 86; *United States* v. *Beacon Brass Co.,* 344 U. S. 43; and *United States* v. *Moran,* 236 F. 2d 361 (C. A. 2), certiorari denied, 352 U. S. 909.

In *United States* v. *Gilliland,* 312 U. S. 86, this Court reversed the dismissal of indictments alleging

[32] An examination of the two statutes, without regard to the facts of this particular case, makes it clear that there is a real difference in the proof required to make out their violation. Section 145 (b) applies only to *income tax* violations, while Section 3616 (a) applies to *all* taxes. Section 145 (b) proscribes evasion in any manner, while Section 3616 (a) requires the filing or "disclos[ure]" to the collector of a "false or fraudulent list, return, account, or statement." Obviously, it is quite possible to violate Section 145 (b) without violating Section 3616 (a) (*Spies* v. *United States*, 317 U. S. 492, 500; *United States* v. *Smith*, 206 F. 2d 905, 908–910 (C. A. 3); *United States* v. *Kafes*, 214 F. 2d 887 (C. A. 3), certiorari denied, 348 U. S. 887) and to violate Section 3616 (a) without violating Section 145 (b) (*United States* v. *Rumsey*, 27 Fed. Cas. No. 16,207 (D. N. J., 1867); *United States* v. *McGinnis*, 26 Fed. Cas. No. 15,678 (D. N. J., 1866)). Although the overlap covers a broad area, the offenses defined in the two provisions are not identical. Section 145 (b) is both broader in scope (within the field of income tax) and in degree of culpability than is Section 3616. It follows that the two sections are not in irreconcilable conflict. Cf. *Bartlett* v. *United States*, 166 F. 2d 920, 926–927 (C. A. 10).

violations of the general "false statements" statute, then Section 35 of the Criminal Code, as amended in 1934 (now 18 U. S. C. 1001). The defendants were charged with having submitted false and fraudulent reports to a Government agency under the so-called "Hot Oil" Act of 1935, 49 Stat. 30. It was conceded that defendants' acts violated both Section 35, the felony statute, and the "Hot Oil" Act, which made such acts misdemeanors. It was argued that defendants could be prosecuted only under the latter Act, since it was (*a*) more specific, dealing with the precise subject matter involved, (*b*) enacted later, and (*c*) prescribed a less severe penalty. Arguing for repeal by implication, counsel for the defendants stated (see 312 U. S. 88): "Otherwise, we have the same offense created and punished by two distinct enactments; and at the election of the prosecuting officer the offender may receive as punishment not more than six months in jail or two thousand dollars fine, or ten years in the penitentiary and ten thousand dollars fine." The Government argued that the sanctions were merely "cumulative or auxiliary", citing *Wood* v. *United States*, 16 Pet. 342, 363, and stated "That the same act should be subject to prosecution as a felony or as a misdemeanor is one of the commonplaces of contemporary penal legislation." (No. 245, Oct. Term, 1940, Govt. Br., p. 33.) The Court held unanimously, per Hughes, C. J., that (312 U. S. 95–96):

> In the light of the text of the Act of 1934, amending § 35, and its legislative history, it is also clear that the fact that the penalty prescribed by § 35 was greater than that fixed by

the Act of February 22, 1935, *has no significance in connection with the construction and application of the former.* The matter of penalties lay within the discretion of Congress. Section 35 covered a variety of offenses and the penalties prescribed were maximum penalties which gave a range for judicial sentences *according to the circumstances and gravity of particular violations.*

Similarly lacking in merit is the contention that the Act of February 22, 1935, operated to repeal § 35 as amended in 1934, so far as the latter applied to affidavits, documents, etc., presented in relation to "hot oil." There was no express repeal and there was no repugnancy in the subject matter of the two statutes which would justify an implication of repeal. The Act of 1934, with its provision as to false and fraudulent papers, has its place as a *fitting complement* to the Act of 1935 as well as to other statutes under which, in connection with the authorized action of governmental departments or agencies, the presentation of affidavits, documents, etc., is required. There is no indication of an intent to make the Act of 1935 a substitute for any part of the provision in § 35. See *Posadas* v. *National City Bank*, 296 U. S. 497, 503, 504; *United States* v. *Borden Company*, 308 U. S. 188, 198, 199. [Emphasis added.]

We are unable to see a material distinction between the *Gilliland* case and the case at bar. In each case, proof of the felony charged in the indictment necessarily proved the commission of the misdemeanor, and vice versa. There, as here, the fact that the indictment charged and the proof showed violations of

both the felony and misdemeanor statutes was of no consequence. There, as here, neither statute provided a minimum sentence and the Government's invocation of the felony rather than the misdemeanor provision enlarged the area of the court's discretion in sentencing "according to the circumstances and gravity" of the case. Thus, the *Gilliland* case stands clearly for the proposition that an indictment charging a felony is valid, as such, even though the same allegations set forth a violation of a misdemeanor statute.

The principle laid down in *Gilliland,* i. e., that an offense punishable as a misdemeanor may nonetheless be prosecuted under an overlapping general felony statute, has been applied by the lower courts in *United States* v. *Aderman,* 191 F. 2d 980, 983–984 (C. A. 7);[33] *Corcoran* v. *United States,* 229 F. 2d 295, 297–298

[33] In the *Aderman* case, *supra,* it was contended that the action was wrongly prosecuted under the False Claims Act (a felony) and should have been prosecuted under the specific misdemeanor statute imposing penalties for making false statements in connection with claims arising under the Servicemen's Readjustment Act, 38 U. S. C. 715. The appellant relied upon two cases holding that transactions somewhat similar to his were properly prosecuted under the misdemeanor statute. The Seventh Circuit stated (191 F. 2d at 984):

> However, a reading of § 715 makes it clear that the penalties provided by it are not exclusive but are to be imposed "in addition to any and all other penalties imposed by law * * *." Hence the offense could properly be charged under either statute. *United States* v. *Gilliland,* 312 U. S. 86 * * *; *United States* v. *Heine,* 2 Cir., 149 F. 2d 485; *Heald* v. *United States,* 10 Cir., 175 F. 2d 878.

Note the similarity between the quoted provision in 38 U. S. C. 715 and the phrase in Section 145 (b) of the Internal Revenue Code of 1939 that its punishment shall be "in addition to other penalties provided by law * * *."

(C. A. 5); *Bartlett* v. *United States*, 166 F. 2d 920, 926–927 (C. A. 10); *United States* v. *Mamber*, 127 F. Supp. 925, 928 (D. Mass.); and *United States* v. *Gang*, 48 F. Supp. 323, 326 (D. Mass.). Cf. *Cohen* v. *United States*, 201 F. 2d 386, 392 (C. A. 9).

The second case which supports our view is *United States* v. *Beacon Brass Co.*, 344 U. S. 43. The question there was "whether by enacting a statute specifically outlawing all false statements in matters under the jurisdiction of agencies of the United States [18 U. S. C. 1001], Congress intended thereby to exclude the making of false statements from the scope of § 145 (b)". (344 U. S. at 46.) The Court answered in the negative, even though the statute of limitations barred prosecution of the defendant under 18 U. S. C. 1001, stating (344 U. S. at 45–46):

> We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. * * *
>
> We do not believe that Congress intended to require the tax-enforcement authorities to deal differently with false statements than with other methods of tax evasion. By providing that the sanctions of § 145 (b) should be "in addition to other penalties provided by law," Congress recognized that some methods of attempting to evade taxes would violate other statutes as well. See *Taylor* v. *United States*, 179 F. 2d 640, 644.[34]

[34] In *Taylor* v. *United States*, twice cited with approval by this Court in the *Beacon Brass* opinion, the Ninth Circuit stated (179 F. 2d at 643–644):

> Appellant further argues that 26 U. S. C. A. § 3616 (which makes it a misdemeanor to deliver or disclose to the collector

Moreover, since no distinction is made in § 35 (A) between written and oral statements, the reasoning of the court below would be equally applicable to false tax returns which are, of course, false *written* statements. But the Courts of Appeals have uniformly applied § 145 (b) to attempts to evade taxes by filing false returns. *E. g., Gaunt* v. *United States,* 184 F. 2d 284, 288; *Taylor* v. *United States, supra,* at 643–644.

That the rule just stated applies to the precise question presented in the case at bar has recently been held by the Court of Appeals for the Second Circuit in *United States* v. *Moran,* 236 F. 2d 361, 363–364, certiorari denied, 352 U. S. 909. The appellant, like petitioner, was convicted of violating Section 145 (b) under the standard form of indictment, and contended that the trial judge had no authority to impose a sentence in excess of that prescribed by Section 3616 (a).

"any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made * * *.") repealed by implication § 145 (b) insofar as the latter section might be construed to prohibit the evasion of income taxes by filing false returns. The legislative history of the two sections reveals that § 3616 was originally enacted long prior to the enactment of § 145 (b). It goes without saying that an existing statute cannot repeal, by implication or otherwise, a subsequent enactment. Both of these sections were re-enacted in the 1939 general codification of the Internal Revenue Code, 53 Stat. 62, 440. We further note that the penalties provided in § 145 (b) are made expressly "in addition to other penalties provided by law."

The Court of Appeals rejected the contention, stating (236 F. 2d at 363–364):

> In this case, as in Berra, there are facts falling within an area defined by the overlapping ambits of these two sections. Nevertheless, each section requires an element of proof not required by the other. This situation is directly controlled by *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 73 S. Ct. 77, 97 L. Ed. 61, wherein it was held that where two statutes, each of which proscribe some conduct not covered by the other, overlap, a single act or transaction may violate both, at least where some different proof is required for each offense. *United States* v. *Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598; *United States* v. *Lange*, D. C. S. D. N. Y., 128 F. Supp. 797.

We submit, therefore, that, assuming petitioner has not waived the right to attack the validity of the indictment at this stage of the proceedings (*supra*, pp. 37–38), the court did not exceed its authority in sentencing petitioner under Section 145 (b). Upon conviction the trial court was free to exercise its discretion in sentencing the defendant within the limits prescribed by the statute under which the conviction was had, even though the indictment and proof might also support a conviction under another statute fixing a lesser penalty. (See *Gilliland*, 312 U. S. at 95–96.) In the final analysis, it was for the court to determine the degree of punishment, within the limits provided by Congress. There is nothing improper in allowing the

sentencing court to enjoy such a discretion. This Court has said that "For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender." *Pennsylvania* v. *Ashe*, 302 U. S. 51, 55. Recognition of this principle accounts in part for the modern trend in the direction of increasing the discretionary sentencing power of the courts. See *Williams* v. *New York*, 337 U. S. 241, 246–249. Under the aggravated circumstances present in the case at bar, not the least of which was the large amount of tax evaded (*supra*, pp. 5–6), the trial court did not abuse its discretion in sentencing petitioner under Section 145 (b).[35] It is clear that the court, had it so desired, could have imposed a *de minimis* punishment, or an extremely severe one.

For the proposition that Section 145 (b) as here applied deprives him of the equal protection of the laws, petitioner relies (Br. 10–12) upon *State of Oregon* v. *Cory*, 204 Ore. 235; *State of Oregon* v. *Pirkey* 203 Ore. 697; *In re Olsen* v. *Delmore*, 48 Wash. 2d 545; *Ex parte Garrett*, 335 Mo. 1113; and *State* v. *Fowler*, 193 N. C. 290. All of these cases are clearly distinguishable.

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[35] As we have said (*supra*, pp. 10–11, fn. 1) we treat this case as though petitioner had received a sentence in excess of that provided by Section 3616, even though the recent reduction of sentence brings it within the limits there prescribed.

since they all struck down statutes which infringed upon the court's discretionary sentencing power. If a statute has the effect of vesting in the prosecuting authorities discretionary power which properly belongs to the courts, it may be held unconstitutional on that ground. *State* v. *Pirkey,* supra, p. 706. But that is not this case. Here the court had full power, within the limits provided by Congress, to impose whatever sentence it believed was warranted by the circumstances of the case.

There is no merit in the contention (Br. 13–16) that the differences between the penal provisions of the two sections create an "irreconcilable dilemma" which can only be resolved by holding that no valid sentence whatsoever can be imposed upon petitioner. The cases he mainly relies upon here are *State* v. *Hall,* 24 Ala. App. 336; *M. M. Moran* v. *The State,* 135 Tex. Cr. R. 645; and *United States* v. *Evans,* 333 U. S. 483.

The *Hall* case involved the sustaining of an indictment found under a statute providing alternative punishments. Appellant argued that since the conduct proscribed was made both a misdemeanor and a felony, he could not know the nature of the accusation against him. The court upheld the indictment on the ground that it alleged a felony, because the maximum punishment permitted was as for a felony. The court pointed out that the alternative punishments simply afforded "a wide range varying according to the facts of each case". (24 Ala. App. at 338.)

M. M. Moran v. *The State,* 135 Tex. Cr. R. 645, turned on inconsistent penal provisions in the same act. The court confessed its inability to ascertain the intent of the legislature and dismissed the prosecution, pointing out that "We are not dealing with repugnant statutes passed at different dates where the one last enacted might control * * * ." (135 Tex. Cr. R. at 649.) The decision appears to have turned partly on peculiar provisions of the Texas Penal Code.

United States v. *Evans,* 333 U. S. 483, involving the construction of Section 8 of the Immigration Act of 1917, dealt with a problem quite unrelated to the case at bar. The statute provided that "any person * * * who shall bring into or land in the United States [or shall attempt to do so] or shall conceal or harbor, or attempt to conceal or harbor, or assist or abet another to conceal or harbor in any place * * * any alien not duly admitted * * * shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding $2,000 and by imprisonment for a term not exceeding five years, *for each and every alien so landed or brought in or attempted to be landed or brought in.*" [Emphasis added.] The defendants were charged with concealing and harboring five aliens in violation of this provision. This Court upheld the district court's dismissal of the indictment, finding little assistance in the legislative history, and pointing out that the interpretation urged by the Government had been repeatedly urged on Congress without avail. The Court refused to speculate as to what the penalty clause meant in the circumstances of the case and

held that as applied to the defendants it was unenforceable.

The argument (Br. 26–27) that the trial court was required as a matter of law to impose sentence under the less harsh statute is also without merit. We can find no federal case holding that punishment may be imposed only under the less harsh of two overlapping criminal statutes.[36] The decisive question in every instance must be the intent of Congress, which has here been repeatedly manifested, namely, that income tax evasions attempted in *any* manner, including the filing of false returns, should be punished as felonies. Even if one accepts petitioner's argument that only one statute may apply, there is the further answer that it is Section 145 (b) which governs. A later enacted provision controls over an earlier, for it "expresses the will of the government as to the manner in which the offences shall be subsequently treated." *United States* v. *Tynen*, 11 Wall. 88, 93; *United States* v. *Yuginovich*, 256 U. S. 450, 463; Cf. *United States* v. *Barnes*, 222

[36] The cases cited by petitioner, *United States* v. *Universal C. I. T. Credit Corp.*, 344 U. S. 218; *Bell* v. *United States*, 349 U. S. 81; and *Prince* v. *United States*, 352 U. S. 322, involved questions relating to the measurement of the unit of punishment, i. e., whether Congress had condemned a particular course of conduct as constituting one offense or multiple offenses. In *Rosenberg* v. *United States*, 346 U. S. 273, the dissenting opinions expressed serious doubts as the legality of the trial court's imposition of a death sentence without the recommendation of the jury, as permitted by the Espionage Act of 1917, when Congress had provided in the Atomic Energy Act of 1946 (which also might have been held applicable to some of the overt acts of conspiracy proved) that no death sentence could be imposed without the concurrence of court and jury. In that case conviction was had and sentence imposed under the earlier of the two statutes.

U. S. 513, 520. Here it is apparent that Section 3616 (a), originally having been enacted much earlier than Section 145 (b), must yield if they are deemed to be in conflict. *Taylor* v. *United States,* 179 F. 2d 640, 643–644 (C. A. 9); Cf. *United States* v. *Sischo,* 262 U. S. 165, 168–169; *Adkins* v. *Arnold,* 235 U. S. 417, 421; *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187, 199; *Grunberg* v. *United States,* 145 Fed. 81, 85 (C. A. 1).

Petitioner's argument would ignore the legislative history of the sections in question, which shows clearly (*supra,* pp. 17–29) that Section 145 (b) reflects the grave view taken consistently by Congress since 1924 that the crime of income tax evasion in any manner shall be a felony, whereas Section 3616 (a) represents the earlier view that it should be treated as a misdemeanor. Petitioner would also ignore the historic basis for the differences in the definitions of the crime. The legislative history (*supra,* pp. 21–22 and fn. 17) shows conclusively that those differences arose in the evolution of the proscription which, particularly in the Revenue Acts of 1917 and 1918, broadened the definition to cover attempts to evade the tax in any manner, thus removing the former limitation that to be punishable the attempt had to be grounded on the filing of a false document. We submit that, even on the assumption that Sections 145 (b) and 3616 (a) cannot both be applied to income tax violations and that only one can survive, Congress has made it abundantly plain that Section 145 (b) is dominant and that the penalties therein provided should not be rendered nugatory.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834
(Consolidated)

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Because the Government suddenly reversed itself with respect to the meaning and applicability of Section 3616(a) only one week before Petitioner's Brief was required to be filed—after adhering to a contrary position on this issue for almost five years[1]—the Briefs heretofore filed in the case necessarily could not deal with this sudden and belated change of view in its entirety. In order to insure that this turnabout is given adequate treatment, we are compelled in this Reply Brief to discuss last things first and first things last.

Accordingly, the format of this Brief will be first to lay the apparition of the inapplicability of Section 3616(a) to income tax; second, to examine some of the circumstances surrounding and consequences of the Government's change in attitude at this late hour in respect to the applicability of Section 3616(a) to income tax; and third, to reply to the Government's arguments that the overlap between Sections 3616(a) and 145(b) do not vitiate Petitioner's conviction or require that it be reduced to a misdemeanor.

I

A. The extraordinary characteristic of the Government's historical argument with respect to the inapplicability of Section 3616(a) to income tax is that it does not rest upon the history of Section 3616(a), but rather upon statutes entirely different from it.

[1] Though the Government began to prosecute income tax violations under Section 3616(a) for the first time in 1952, it was aware many years earlier that the Section applied to income tax. See *infra*, p. 15.

The derivation of Section 3616(a) was exactly and precisely defined by the Congress itself. In enacting the Internal Revenue Code of 1939, Congress expressly stated the ancestry of this provision. Section 3616(a), according to the Congress, was specifically derived from Section 3179 of the Revised Statutes, 53 Stat. App., xxxii, Table A, "Derivation of Internal Revenue Code"; and conversely, Section 3179 of the Revised Statutes was expressly noted, by the Congress, as being Section 3616(a) of the Internal Revenue Code of 1939. *Id.*, xL, Table B, "Statutes Included in the Internal Revenue Code".

In like fashion, the ancestry of Section 3179 of the Revised Statutes was plainly described by the Congress. That Section, according to the Congress, was derived directly from Section 15 of the Act of June 30, 1864, 13 Stat. 223, 227. Side note to Section 3179, Revised Statutes, 1874 Ed., 614, 1878 Ed., 611.

There is no further legislative history to Section 3616(a) or Section 3179 of the Revised Statutes. Section 3616(a) stems directly from Section 3179 of the Revised Statutes and the latter Section was derived directly from Section 15 of the Act of June 30, 1864. This is the message of the Congress; no other statutory history is relevant or appropriate.

The significance of this short and simply history is that from the beginning in 1864 to the end in 1939, 3616(a) and its predecessors clearly and always have been applicable to income tax.[2]

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[2] The action of the Congress in enacting the Internal Revenue Code of 1954 confirms and corroborates this conclusion. The Congress stated that Section 7207 of the 1954 Code is the successor to Section 3616(a) of the 1939 Code. 68A Stat. 948. And there is absolutely no doubt that Section 7207 applies to income tax. See

B. We find nothing in the broadly etched presentation of the historical derivation of the tax laws—upon which the Government has pitched its entire case—which disturbs or affects the conclusion that Section 3616(a) applies to income tax. A review of the tax statutes, to the extent that they may bear on the question, need not be as complex as the Government has strained to make it. The relevant history is plainly and simply this:

(a) The Act of 1864, imposing an income tax, provided criminal penalties for filing false or fraudulent returns. The provision in that Act was patterned after, but made slightly more comprehensive than, similar provisions contained in the statutes of 1861 and 1862, both of which also had imposed income taxes. (Brief for the United States, pp. 17-18).

(b) In 1874 Congress enacted, in the Revised Statutes—as permanent legislation—Section 3179, expressly derived from the Act of 1864, establishing a criminal penalty for filing a false or fraudulent return, plainly and admittedly applicable to income tax (Brief for the United States, pp. 18-19).

(c) From 1870, when Congress repealed the Civil War income tax of 1864, until 1894 there were no income tax statutes. Section 3179 of the Revised Statutes, however, continued to remain as part of the permanent laws. (Brief for the United States, pp. 18-19).

Dillon v. *United States* (CA 8, 1955), 218 F. 2d 97, 103; *Cf. Berra* v. *United States*, 351 U. S. 131, 134, footnote 5. Furthermore, Congress made it clear that the applicability of Section 7207 to income tax was not a novel departure. Both House and Senate Committee Reports stated that the new section "contains no material change from existing law." Sen. Rept. No. 1622, H. R. Rept. No. 1337 (83d Cong., 2d Sess.), in U. S. Code Congr. and Adm. News (1954) at pp. 5253, 4573.

(d) The Act of 1894, imposing an income tax, and which was declared unconstitutional by this Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, contained no criminal provision, but the Government has conceded that Section 3179 of the Revised Statutes was applicable with respect to offenses under this Act. (Brief for the United States, p. 19).

(e) From the Act of 1894 until after the adoption of the Sixteenth Amendment, in 1913, there were no income tax statutes. Section 3179 of the Revised Statutes continued, in the meantime, in the permanent legislation.

(f) The Revenue Act of 1913 contained a criminal provision applicable to income tax. This provision, Section II(F) of the Act, while addressed to filing false or fraudulent returns, provided a maximum fine of $2,000, whereas Section 3179 provided a maximum fine of $1,000. (Brief for the United States, p. 20).

(g) The Revenue Act of 1917, applicable to all forms of taxes, again provided a criminal penalty for false or fraudulent returns, and made the penalty consistent with Section 3179. In addition, the Act applied the penalty to a new and broader offense of evading or attempting to evade any tax, including income tax. (Brief for the United States, pp. 21-22).

(h) The Revenue Act of 1918, and all succeeding acts up to the adoption of the Internal Revenue Code of 1939, contained no express mention of the offense of filing a false or fraudulent return—which continued to be comprehended by Section 3179 of the Revised Statutes. These Acts, however, contained provisions of the broader type which originated in the Act of 1917. (Brief for the United States, p. 22).

(i) In 1939, Congress brought together within the same Code, Section 3179 of the Revised Statutes, designating it as Section 3616(a), and the broader provision appearing in the earlier acts, which it designated as Section 145(b).

(j) In 1954, Congress reenacted both Sections 145(b) [as Section 7202] and 3616(a) [as Section 7207] eliminating from Section 3616(a) the element of "intent to defeat or evade" which caused the overlap with Section 145(b); and placed both sections in Chapter 75, devoted to "Crimes, Other Offenses, and Forfeitures".

This brief recapitulation, we firmly believe, sets forth a reasonably consistent pattern on the part of the Congress to continue in effect and retain an old criminal provision and at the same time to create and perfect a newer and more severe criminal provision which encompassed a broader area. These are the simple, guiding and unembroidered facts. The plethora of other unrelated statutes cited in the Government's Brief add nothing but confusion;[3] and it is this indiscriminate massing of fundamentally irrelevant materials which creates the alleged inconsistencies upon which the Government's argument is grounded.[4]

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[3] E.g. The Act of 1798 "was no federal income tax." Brief for the United States, p. 17, see also p. 14; the War Revenue Act of 1898 "levied no income tax" *Id.* at 19; and the Act of 1909 was not an income tax but "imposed an excise tax on corporations." *Id.* at 20.

[4] Throughout this litigation in the lower courts, in these and other cases, the Government has heretofore relied upon the same facts of legislative history it has now placed before this Court in support of its prior view that Section 3616(a) applied to income tax. See, e. g. Memorandum for the United States in *United States* v. *Berra*, (E.D. Mo.) No. 27866(2); Memorandum for the United States in *Poncet Davis* v. *United States* (N. D. Ohio), Crim. No. 20,632.

C. Throughout this entire history—and the Government does not claim otherwise—no act of Congress ever expressly attenuated, directly repealed, or otherwise in terms cast doubt upon the continuing applicability of Section 3179 of the Revised Statutes to income tax.

Not being able to point to any provision of law which expressly stated that Section 3179 of the Revised Statutes or Section 3616(a) of the Internal Revenue Code of 1939 are not applicable to income tax, the Government is forced to rely upon a purported series of "repeals by implication". In essence, the Government's view is that Section 3179 of the Revised Statutes—though never changed by the Congress and expressly incorporated as Section 3616(a) in the 1939 Code—became suspended in a limbo, on an occasional annual basis, whenever the Congress enacted a revenue law containing a criminal provision applicable to income tax. In the Government's view, the permanent and general statute—admittedly applicable to income tax—retained its force and effect except when Congress in *temporary annual* legislation provided an additional or different penalty for an offense which in terms was broader. The Government's argument requires the striking down of general and permanent legislation, which was ultimately reenacted in identical substance, by resort to the unfavored doctrine of repeal by implication.

Congress' opportunity to repeal expressly was always present, and the repeal of Revised Statutes in the Revenue Acts was a technique known and utilized by the Congress. Congress was aware of the relationship between the temporary revenue acts and the permanent legislation existing in the Revised Statutes.

In more than one revenue act, Congress expressly amended Sections of the Revised Statutes; when it desired. So, in the Revenue Act of 1924, it amended Revised Statutes, Sections 3164, 3165, 3167, 3172 and 3173. See Section 1018, 43 Stat. 344. These Sections, together with Section 3176 had been expressly amended also in the Act of 1918. See Section 1317, 40 Stat. 1146-1148. And Congress acted similarly in the 1916 Act. See Section 16, 39 Stat. 773-775.

Had Congress actually intended to repeal or amend Section 3179, it could easily have accorded that Section the same express and precise treatment which it had given to other Sections of Revised Statutes, which it desired to repeal or amend. To contend—as does the Government (Brief for the United States, pp. 20 *et seq.*)—that Section 3179 was repealed *by implication*, is to assert that Congress meant what it did not say and said what it did not mean.

D. Unable to point to an express repeal of Section 3179 of the Revised Statutes, recognizing that repeals by implication are not favored, cf. *United States* v. *Gilliland*, 312 U. S. 86, 95-6; *Taylor* v. *United States*, (C. A. 9) 179 F. 2d 640, 644; and bound by the Congress' explicit statement that Section 3616(a) is derived from Section 3179,[5] the Government argues that Section 3616(a) took on the meaning which Section 3179 had at the date of the enactment of 3616(a) in 1939; and argues that, by 1939, Section 3179 had become inapplicable to ~~income tax~~. (Brief for the United States, p. 26).[6]

That conclusion, in turn, rests on the assumption that the 1909 Act taxing corporations set the pattern for

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[5] 53 Stat. App., xxxii, Table A.

[6] This is an apparent contradiction of the Government's position stated on page 19 of its Brief.

later penal provisions limited to income tax; and that "Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for the violations thereof." (Brief for the United States, p. 20). That assumption is not supported by historical fact.

Except for the Revenue Act of 1913[7] which generally carried forward the criminal provisions of the 1909 Act, and except to the limited extent provided in the Revenue Act of 1917,[8] Congress did not legislate specifically with respect to penalties for income tax violations until the Revenue Act of 1928.

In the Revenue Act of 1928, Congress simply duplicated the criminal provisions of the 1924 Act with specific reference to income taxes. Neither the 1928 Revenue Act nor any later Revenue Act contained any specific criminal provision with respect to the other forms of taxes, with the exception of the Revenue Act of 1932 which contained a specific penalty provision covering gift taxes. Accordingly, the criminal provisions of the 1924 and 1926 Acts carried over into these later Acts, along with Section 3179 of the Revised Statutes. All of these were codified in the Internal Revenue Code of 1939. These special criminal provisions of the 1939 Code were drawn from Section 1017(a) and (b) of the 1924 Act, except for Section 3616(a) which, as already stated, derived from Section 3179 of the Revised Statutes. Congress did not actually pass special criminal provisions relative to any of the

[7] Sec. II(F), 38 Stat. 114, 171, known as the Tariff Act of 1913.

[8] Sec. 1004, 40 Stat. 300, 325. Section 253 of the Revenue Act of 1918, 40 Stat. 1057, 1085, removed the discrepancy between Section 3179 of the Revised Statutes and Section II(F) of the 1913 Act, by restoring the fine to $1,000.

miscellaneous taxes. Those provisions were inserted in the 1939 Code by the codifiers.

In consequence, the Government's position is not advanced by its argument that Section 3616(a) took on a limited meaning in 1939; because in 1939, Section 3179 of the Revised Statutes did not have a limited meaning. It applied as much to income taxes in 1939 as it did in all of the years since its inception. The Government's indiscriminate mixing of non-income tax statutes with income tax statutes throughout its historical discussion is misleading, for the reason that, with the exception of two statutes previously mentioned (Revenue Act of 1913 and Revenue Act of 1918), there was no specific legislation relating to income taxes prior to 1928.

E. The meaning which the Government seeks to attribute to Section 3616(a), by comparing it with other statutes in *pari materia* (Brief for the United States, pp. 29, *et seq.*), is also poorly taken. It is predicated on the assumption that the Congress intended to establish a perfectly consistent scheme of sanctions in which each sanction holds a separate and specially chosen niche. Such an assumption, however, flies in the face of the history of the development of the criminal provisions in the revenue laws, *supra*, page 6; and assumes the answer to the question posed by this case. It is because Sections 145(b) and 3616(a) overlap, and do not apply to different conduct, that the problem presented here has arisen. And because the statutory scheme created by the Congress is not neat, it does not follow that it is for the courts to make it so.

The plain and simple answer to the Government's "*pari materia* argument" lies in what the Congress

did in enacting the Internal Revenue Code of 1954. Cognizant at that time of the overlap between Sections 145(b) and 3616(a), and of the fact that the Government was prosecuting income tax evaders under both provisions, the Congress amended Section 3616(a) to remove the language which caused the overlap. By the change so wrought in 1954, Congress at one and the same time eliminated the overlap, and removed from the Executive Branch the power to choose between these two provisions, covering the same ground.

F. As a matter of fact, the excursion into legislative history forced upon us by the Government is really an exercise in irrelevance. Section 3616(a), on its face, plainly applies to income tax. As the Government has noted in its Brief: "The language of the section * * * is general and unqualified, and in terms it appears to embrace every type of federal tax return without exception." (p. 13). This then, "is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U. S. 366, 374. For this Court has many times held that: "there is no need to refer to the legislative history where the statutory language is clear." *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *American Trucking Associations*, 310 U. S. 534, 543 and cases therein cited; see also *United States* v. *McKesson and Robbins*, 351 U. S. 305, 315.

II

A. There is, in addition a further important reason why the Government's sudden disavowal should not be permitted to affect the applicability of Section 3616(a) to income tax: this is the well recognized principle

that "Such specific and established administrative interpretation of the statute is valid and 'should not be overruled except for weighty reasons.'" *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199; *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501; see also *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396-97, where this Court declined to accept the Government's *ad hoc* contention and adopted instead an undisturbed administrative interpretation. Here, we have a history—not merely of administrative *construction*—but of active and affirmative *prosecution* by the Government of income tax violations under Section 3616(a). If an established administrative construction cements meaning to a statute, a continuing and persistent course of prosecution certainly does.

And there is also another well recognized principle apposite. This is that congressional reenactment in the light of established administrative construction adopts as law the administrative construction. *Wilmette Park District* v. *Campbell*, 338 U. S. 411, 417-18; *White* v. *United States*, 305 U. S. 281, 291; *United States* v. *Leslie Salt Co., supra; cf. Morgan* v. *Commissioner*, 309 U. S. 78, 81. When the Congress, in 1954, aware that the Government had been proceeding under Section 3616(a) in income tax cases, reenacted Section 3616(a) as Section 7207 of the 1954 Code—which, as already indicated, is clearly applicable to income tax—the Congress solidified, if solidification was necessary, the view that Section 3616(a) applied to income tax.[9]

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[9] That Congress, in the 1954 Code, eliminated that portion of Section 3616(a) which caused the overlap with Section 145(b) is further indication of its awareness of the use of Section 3616(a) in income tax prosecutions. The obvious purpose of removing the

B. In view of its unseemly and belated change of attitude with respect to the meaning of Section 3616(a), the Government has been forced to lay before the Court the history of its prosecution of income tax violators under that provision. It has confessed that since October 1, 1952, of a total of 177 cases filed, it has so far obtained a total of 120 convictions for income tax evasion under Section 3616(a). (Brief for the United States, pp. 14-15). Its present position before the Court that Section 3616(a) is inapplicable to income tax is obviously and hopelessly in contradiction with the fact of these prosecutions. In its Memorandum filed in No. 834 on March 22, 1957 it suggested that the convictions obtained under Section 3616(a), if laid under the wrong statute, could be supported under Section 145(b). Memorandum for the United States in No. 834, O.T. 1956, p. 2, fn. 4.[10]

The case of *United States* v *Jones* (S.D. Fla., No. 636, Ocala, Criminal), a 3616(a) income tax prosecution, was instituted, according to the Government, by an information. (Brief for the United States, p. 14). The Government has not indicated how many of the remaining 119 successfully completed income tax cases under 3616(a) were commenced by information; but it is likely that most, if not all, were so instituted. Since a conviction under Section 145(b) is a felony, and under 3616(a), a misdemeanor, the convictions obtained under 3616(a) by information may not—in the absence of a waiver—be sustained under Section

language "with intent to defeat or evade" from Section 7207, was to eliminate the overlap with Section 7202 [formerly Section 145(b)].

[10] The Government's Brief on the Merits does not contain such an assertion, apparently in the hope that it can take the position that Section 3616(a) does not apply to income tax and at the same time not affect the convictions for income tax heretofore obtained under that provision. This is obvious casuistry.

145(b), which requires an indictment. Rule 7(a) F.R. Crim. Proc. In point of fact, all of the 3616(a) income tax convictions, founded on informations, must be nullified under the Government's sudden change of view.

And even without regard to whether these cases were founded on informations, it is important to note that 118 of them were disposed of on pleas of guilty or *nolo contendere*. How many, we must ask, of these income tax defendants would have pleaded guilty or *nolo contendere* if they knew that they were pleading to a felony, rather than to a misdemeanor? The critically different consequences which flow from conviction of a felony are too great to permit the Government's sleight-of-hand *retroactively* to convert pleas to a misdemeanor into convictions for a felony.

C. We feel compelled also to advert briefly to the unseemly argument implicit in footnote 3 at pages 14-15 of the Government's Brief. Here we find a new version of the "numbers game" which has become so popular in recent years. Inherent in this footnote is the suggestion that holding 3616(a) inapplicable to income tax will affect less people than will a holding in support of Petitioner's contentions. Certainly the implications of such an argument need not be pointed out to the Court. This Court has never decided a case on such an irrelevant basis; and we are satisfied that it will not decide this case on such a basis. The issue before the Court is whether, by virtue of the overlap between Sections 3616(a) and 145(b), Petitioner's conviction is vitiated or, at least governed by Section 3616(a). And this issue must, of course, be determined by the language of the statute, by reference to the background of the statute, if such reference is necessary, and by the guiding principles applicable to decision of the question posed. It can-

not be decided "by the numbers". *Cf.* this Court's response to a similar Government argument in *Spies* v. *United States*, 317 U. S. 492, 500.

D. The Government has given the impression that the applicability of Section 3616(a) to income tax was first discovered by it in 1952 when it launched a program of prosecutions for income tax violations under that Section. (Brief for the United States, pp. 13-14). But, of course, the Government must have been aware that Section 3616(a) was applicable to income tax violations many years before that. For it had itself urged this position in at least one case in 1945, *United States* v. *Koppelman*, 61 F. 2d 1007 (M.D. Pa.). And there were many cases which "tacitly sustained" the view that Section 3616(a) was applicable to income tax returns, some prior to *Koppelman*. See *Ex parte Cohen*, 191 F. 2d 300 (C.A. 9), certiorari denied, 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643-644 (C.A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597-598 (C.A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C.A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N.D. Ill.) see also 10 *Mertens, Law of Federal Income Taxation*, Sec. 55.66.[11] And see *United States* v. *Smith*, 13 F. 2d 923 (W. D. La.).

Equally misleading is the Government's explanation that "Prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F. 2d 97 (1955) there were no judicial holdings or intimations that Section 3616(a) could not be so applied." (Brief for the United States, p. 16). Among other things, the Government

[11] These cases were cited in the Government's Brief on the Merits in this Court in *Berra* v. *United States*, No. 60, O.T. 1955, at page 24.

itself in 1926, urged that Section 3179 of the Revised Statutes, the precursor of Section 3616(a), did not apply to income tax. See Government's Brief on the Merits in *United States* v. *Noveck*, 273 U. S. 202 (No. 395, O.T. 1926) pp. 16-19.[12]

Moreover, the Eighth Circuit's holding in the *Dillon* case, *supra*, that Section 3616(a) was inapplicable to income tax did not spring unprompted from that Court's imagination. That view had been urged upon the Court in the Government's brief. See *John H. Mitchell, "Current Developments in Fraud Prosecutions"*, New York University Institute on Federal Taxation, 15th Annual Institute (1957, Matthew Bender & Co.), p. 1222.

The Government's views that Section 3616(a) is applicable to income tax appear to parallel its views that Section 3616(a) is inapplicable to income tax. It is no wonder that at the very threshold of the argument of the case at bar, it was not abashed once again to reverse its position. Historically it had been on both sides of the question. Its pattern of change may, perhaps, be best described by paraphrasing the late Justice Jackson's observation in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 422, 427: The Government seems to have been "somersaulting in synchronism" with shifts for the specific strategy suggested by the particular case.

The *Dillon* case is a dramatic illustration of this somersaulting. In that case, we have the spectacle of

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[12] By citing its own Brief on the Merits in the *Noveck* case in this case (Brief for the United States, p. 13), the Government is obviously seeking to climb on its own boot straps. It is interesting to note that the decision of this Court in *United States* v. *Noveck*, 273 U.S. 202 did not accept the Government's contention with respect the inapplicability of R.S. 3179 to income tax.

the Government first arguing that Section 3616(a) is inapplicable to income tax; next, we have the Eighth Circuit adopting this view; then, we have the Government in its response to the petition for certiorari in this Court disavowing the view it urged before the Circuit Court, which the Circuit Court adopted; and now we see the Government reembracing the view it had earlier urged and disavowed. This vacillating conduct was not devoid of consequences. The Eighth Circuit, in *Dillon*, held that Section 3616(a) was inapplicable to income tax; it also noted that Section 3616(a) was succeeded by Section 7207 of the 1954 Code; and it observed that Section 7207 was applicable to income tax. 218 F. 2d at 103. The link which was missing, and which makes the contradiction complete, was the observation of the Congress in enacting Section 7207 of the 1954 Code, that Section 7207 effected no material changes in existing law. See fn. 2, *infra*, pp. 3-4.

III

On the assumption that this Court will hold Section 3616(a) applicable to income tax, and reject the Government's latest contention to the contrary, there still continues to remain the problem which arises from the resulting overlap between that Section and Section 145(b). Petitioner, as well as Amicus Curiae, have discussed at length in their Principal Briefs the reasons why a conviction is nullified or vitiated under such circumstances; or, alternatively, why the less harsh of the two applicable penalties must be imposed. We continue to stand on those arguments. There are, however, certain statements in the Government's Brief which call for reply.

A. In footnote 32, at page 39 of the Government's Brief, the Government makes an argument which in its own words is "without regard to the facts of this

particular case." The Government there suggests that Sections 145(b) and 3616(a) *theoretically* can apply to different situations, and that on this *hypothesis* a violation of one provision would not necessarily constitute a violation of the other. With this we plainly agree. To the extent that there is a violation of Section 145(b) which is not based upon the filing of a false or fraudulent return, there would be no overlap between 145(b) and 3616(a).[13]

But this case is addressed to the situation where there is an overlap between Sections 145(b) and 3616(a). And the Government has plainly conceded that this overlap will occur in "the overwhelming majority of criminal prosecutions relating to income tax," because in that overwhelming majority of cases, the charge is based upon the filing of false or fraudulent returns. (Brief for the United States, pp. 32, 36, see also fn. 3 pp. 14-15). It is with this situation, in which the facts of the instant case fall, that we deal here. And it is in this situation, as the Government has also conceded, that the proof required to make out the offense under Section 145(b) is identical with the proof required to make out the offense under Section 3616(a). (Brief for the United States, p. 33).[14]

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[13] Conversely, there are instances when a violation of Section 3616(a) may not constitute a violation of 145(b)—but, again that is not the case here.

[14] And an indictment under 145(b) which omitted the charge that evasion was by filing a false or fraudulent return (see Brief for the United States, pages 36-37), would not cure this problem. An indictment charging evasion, but without defining the manner of evasion, would—as the Government concedes—be subject to a Bill of Particulars. And when the Particulars indicated that the manner of evasion was by the filing of a false or fraudulent return, the question posed by the instant case would immediately and clearly emerge. For, as has been observed, "an indictment may validly

This admission on the part of the Government is at odds with the statement immediately following to the effect that Section 145(b), under Petitioner's view, would proscribe attempted evasion "in any manner except filing a false or fraudulent return." (Brief for the United States, p. 33). This misconceives the issue completely. It is precisely because both statutes proscribe the filing of a false or fraudulent return and both admittedly require identical proof, that questions concerning the invalidity of the conviction arise.

Likewise, the Government's admission at page 33 of its Brief that the proof in each case of filing a false or fraudulent return is identical, whether under 145(b) or 3616(a), defeats completely its statement at page 36 that "the filing of a false and fraudulent return is not an essential ingredient of the offense" under Section 145(b). That language is taken from *United States* v. *Albanese*, (C. A. 2) 224 F. 2d 879, 882, cert. den. 350 U. S. 845. But in that case, the indictment did not charge the filing of a false or fraudulent return; it charged "attempts" to evade the payment of tax. Accordingly, the charge in that indictment differed from the charge in Petitioner's indictment. See also, *United States* v. *Kafes* (C. A. 3) 214 F. 2d 887, cert. den. 348 U. S. 887; *Beaty* v. *United States* (C. A. 4) 213 F. 2d 712; *United States* v. *Smith* (C. A. 3) 206 F. 2d 905. And, in *Parr* v. *United States*, 351 U. S. 513, the Government admitted that where the indictment went only to the filing of a false or fraudulent return, the proof in such case was "simpler". (Brief for the United States, No. 320, O.T. 1955, at pp. 62, 74).

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satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations." *United States* v. *Hutcheson*, 312 U. S. 219, 229.

B. On this phase of the case, the Government has forthrightly set forth its position: "We rely", states the Government, "mainly upon *United States* v. *Gillilland*, 312 U. S. 86; *United States* v. *Beacon Brass Co.*, 344 U. S. 43; and *United States* v. *Moran*, 236 F. 2d 361 * * * ." (Brief for the United States, p. 39).

The Government's authorities can be readily answered. *United States* v. *Beacon Brass Co., supra*, is not apposite insofar as the question posed by this case is concerned. The two statutes before the Court in that case, though overlapping "in a narrow area", called for different proof, a condition not present in the instant case. This Court noted in *Beacon Brass*, that a conviction under the False Statements provision did not require an element of proof which is required under Section 145(b): "That the false statements were made in a willful effort to evade taxes." 344 U. S. at 45. Therefore, it did not necessarily follow that proof of violation of the False Statements provision would be proof of violation of Section 145(b). In this case, however, even the Government has conceded that the proof required to make out the offense under Section 3616(a) is identical to the proof required to make out the offense under Section 145(b). (Brief for the United States, p. 33). And this Court has so held. *Berra* v. *United States*, 351 U. S. 131, 134.

There is nothing in *United States* v. *Moran, supra*, which furthers the Government's position. In the *Moran* case the Second Circuit stated: "This situation is directly controlled by *United States* v. *Beacon Brass Co.*" 236 F. 2d at 363. Since *Beacon Brass*, does not help the Government, *Moran* certainly does not. Moreover, the *Moran* case is no different than any of the other Circuit Court decisions deciding the problem

now before this Court in this case. *Cf.* e.g. *United States* v. *Achilli* (C.A. 7) 234 F. 2d 797; *Hoover* v. *United States* (C.A. 3) 233 F. 2d 870; *Costello* v. *United States* (C.A. 2) 239 F. 2d 177. Relying on the *Moran* case as authority here is the same as citing as authority in this Court the decision from which the appeal is taken.

In *United States* v. *Gilliland*, 312 U. S. 86, the defendant was indicted under Section 35 of the Criminal Code for filing false statements relating to "hot oil" with the Department of the Interior. Upon a demurrer to the indictment defendant contended that Section 35 had been repealed by implication by a provision of the "Hot Oil" Act which specifically comprehended the filing of false statements with respect to the subjects covered by the Act. The District Court sustained the demurrer. On direct appeal to this Court, the District Court's determination was reversed.

This Court's holding was based on the peculiar history of Section 35, which had been amended at the express request of the Secretary of the Interior to cover the conduct in question. The language of the statute was held to be unambiguous, the intention of the Congress plain, and the legislative history clear. No determination was made in *Gilliland* with respect to the validity of a conviction under one or the other of the provisions—which, of course, is the issue before the Court in the case at bar. And, therefore, this Court did not in *Gilliland* face nor determine the issue posed by the instant case.

Moreover, in *Gilliland*, the conduct involved was proscribed by the provisions of two entirely different statutes; that is, the same conduct was within the reach of two different statutory schemes. Here, by

contrast, the provisions involved reside in a single statutory scheme, are part of the same "Code", and are necessarily directly related to each other.

If these significant differences between *Gilliland* and the instant case are not considered to be determinative, then we contend that the force of *Gilliland*, if any there be, was completely dissipated by this Court's holding in *United States* v. *Evans*, 333 U. S. 483.

It is, we suspect, more than accident that the Government has devoted less than one page in its Brief (p. 48) to a treatment of the *Evans* case despite the emphasis placed upon this case in both Petitioner's Main Brief and the Brief of Amicus Curiae. Moreover, the Government's discussion of *Evans* is more in the nature of a description of it than a discussion of its significance and application to the problem before the Court in this case. We continue to contend that the *Evans* case is directly applicable and provides the guidepost for decision of this case on this point.

Certainly the briefs in this case indicate that the question before the Court is a difficult one, and also that it is not an easy matter "to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind." *United States* v. *Evans*, 333 U. S. at 485. Indeed, the problem and the inconsistencies posed by the statutory provisions at issue in this case far exceed those posed by the provisions involved in *Evans*. And so, this

Court's conclusion in *Evans*, seems particularly appropriate here:

> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. 495.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the main brief, it is respectfully submitted that the sentence imposed upon the Petitioner is illegal and void, and should, therefore, be vacated and set aside; or at the least, that the sentence imposed under Section 145(b) as a felony be corrected as one under Section 3616(a) as a misdemeanor.

Respectfully submitted,

PETER B. ATWOOD
Attorney for Petitioner.

May 1, 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430 and No. 834
(Consolidated)

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PONCET DAVIS AS AMICUS CURIAE

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BRIEF OF PONCET DAVIS AS AMICUS CURIAE

With the consent of the parties, Poncet Davis files this brief as Amicus Curiae. The original copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Poncet Davis, has an interest in this proceeding in that he now has an appeal pending in the Court of Appeals for the Sixth Circuit, *Poncet Davis* v. *United States*, No. 13,042, in which the question involved is the same as that presented in the instant cases.

Amicus Curiae was tried and convicted in the United States District Court for the Northern District of Ohio of four counts of willfully attempting to defeat and evade payment of his income taxes by filing false and fraudulent income tax returns. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently, and fined $10,000 on each count, making a total sentence of five years imprisonment and a total fine of $40,000. The conviction was affirmed on appeal, 226 F. 2d 331, and certiorari was denied, 350 U.S. 965. Thereafter, the District Court reduced Amicus' sentence from five to four years on each count, the sentences to run concurrently.

After commencement of service of sentence, Amicus Curiae filed a motion to correct his sentence in the District Court in which he had been tried, contending that the crimes for which he had been convicted were, under law, misdemeanors rather than felonies, and that the penalty prescribed for such misdemeanors was imprisonment for a period not exceeding one year and a fine not exceeding $1,000. The motion was overruled by the United States District Court for the Northern District of Ohio on September 27, 1956 (Appendix A, *infra*).

Amicus Curiae took an appeal from that decision to the United States Court of Appeals for the Sixth Circuit and filed his brief in that Court on December 17, 1956. Thereafter, this Court granted the petition for writ of certiorari in No. 666, *Costello v. United States*. Following this Court's grant of certiorari in the *Costello* case, the Government filed a motion in Amicus Curiae's case in the Sixth Circuit Court of Appeals, requesting that Court to extend the Government's time

for filing its brief and appendix until sixty days after the issuance of the opinion and decision by this Court in *Costello*. On February 12, 1957 the Court of Appeals for the Sixth Circuit entered an order granting the Government's motion (Appendix B, *infra*).

On March 4, 1957, this Court granted the petition for writ of certiorari in No. 430, *Achilli v. United States*, limiting the grant to the same question as that involved in No. 666. On March 25, 1957, certiorari was granted in No. 834, *Achilli v. United States*, and it was ordered consolidated with No. 430.

The question presented in the *Achilli* and *Costello* cases is identical to the question presented in the appeal of Amicus Curiae to the Sixth Circuit. Moreover, the Sixth Circuit has suspended the proceedings in Amicus' case pending determination of these cases by this Court. Since the decision in these cases, in consequence, will be dispositive of Amicus' appeal, Amicus has a substantial and direct interest in the outcome of these proceedings.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois of three counts of willfully and knowingly attempting to defeat and evade the payment of his income taxes by filing and causing to be filed false and fraudulent income tax returns in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. § 145(b). He was sentenced to two years of imprisonment on each count, the sentences to run concurrently, and a fine of $2,000 on each count, aggregating a total of two years imprisonment and $6,000 in fines.

On appeal, the Court of Appeals for the Seventh Circuit reversed the conviction on one count, but affirmed the judgment of conviction on the two remaining counts. 234 F. 2d 797. On November 19, 1956, this Court denied certiorari. 352 U. S. 916.

Petitioner then filed in the District Court in which he had been convicted a motion to correct or reduce sentence contending, *inter alia*, that the crimes of which he had been convicted were misdemeanors under Section 3616(a) of the Internal Revenue Code of 1939 rather than felonies under Section 145(b), with the consequence that the sentence imposed on Petitioner was incorrect and possibly invalid.

On December 27, 1956, the District Court expressly denied Petitioner's motion to correct sentence, holding "that there is insufficient basis here to warrant granting the motion to correct." At the same time, however, the District Court granted the motion to reduce the sentence, reducing Petitioner's sentence to one year on each count, the sentences to run concurrently, and the fines to $1,000 on each count, thereby imposing a total sentence of one year's imprisonment and $2,000 in fines on the two counts.

Appeal was taken from the District Court to the Seventh Circuit. On March 4, 1957, this Court vacated its prior order denying the petition for writ of certiorari, and granted the petition limiting the grant to the single question of "whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939 where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939." U. S. . Thereafter, Petitioner filed a new petition for certiorari prior to

judgment by the Court of Appeals "for the purpose of bringing before the Court the entire record of the proceedings had subsequent to November 19, 1956." On March 25, 1957, this second petition was granted, and the cases were ordered consolidated. U. S.

SUMMARY OF ARGUMENT

The simple and dominant fact in this case, which the Government has conceded, is that the filing of a false or fraudulent return with intent to evade tax is, at one and the same time, a felony under Section 145(b) of the Internal Revenue Code of 1939 and a misdemeanor under Section 3616(a) of that Code, and the proof required to prove a violation of one provision is identical in all respects to the proof necessary to prove violation of the other. (See Memorandum of the U. S. in No. 666 at pp. 1-2).[1]

The overlap thus created, permits a prosecutor to discriminate between two persons convicted of doing the same unlawful act, and prosecute one for a felony and the other for a misdemeanor, though their conduct was identical and the proof against each precisely the same. Such power does not reside in the executive (or prosecuting) branch of the Government. It expressly violates a fundamental tenet of our system of criminal justice that all persons must be treated equally under law; and it usurps the prerogative of the Congress to

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[1] Before the United States District Court for the Northern District of Ohio, in *Amicus'* case, the Government stated in its Memorandum in Opposition: "The simple and dominant fact in this case is that Sections 145(b) and 3616(a) overlap, and in an area in which the facts of this case fall". The District Court adopted "the Government's brief in toto." (See Appendix A, *infra*.)

which the Constitution has reserved the function of declaring criminal penalties.

Two possible answers exist to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *First*, that no conviction under either provision is valid, because the two, when taken together in the context of these proceedings, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation, *United States* v. *Evans*, 333 U. S. 483. *Second*, that, if the two provisions may co-exist, then only the less harsh of the two provisions may be applied in this case, on the venerated principle that ambiguities in the enforcement of penal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 349 U. S. 81.

ARGUMENT

I

Beginning with *Gavieres* v. *United States* (1911) 220 U. S. 338, and thereafter in an unbroken line of decisions, *e.g.*, *Morgan* v. *Devine* (1915) 237 U. S. 632; *Albrecht* v. *United States* (1927) 273 U. S. 1; *United States* v. *Noveck* (1927) 273 U. S. 202; *Blockburger* v. *United States* (1932) 284 U. S. 299; *United States* v. *Gilliland* (1941) 312 U. S. 86; *United States* v. *Beacon Brass Co.* (1952) 344 U. S. 43; *Rosenberg* v. *United States* (1953) 346 U. S. 273; *Pereira* v. *United States* (1954) 347 U. S. 1, this Court has laid down as the test for determining whether a single course of conduct can violate more than one criminal statute without transgressing the prohibitions against double jeopardy or double punishment: "that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. at 304. Or, conversely, " . . . where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U. S. at 45.

In *Berra* v. *United States*, 351 U. S. 131, this Court declared:

> "the method of evasion charged was the filing of a false return, and it is apparent that the facts *necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade* taxes (§ 3616(a)). In this instance §§ 145(b) and 3616(a) covered *precisely* the same ground." 351 U. S. at 134. (Emphasis supplied.)

So, we begin with a definitive determination that—within the rubric of the double punishment cases cited *supra*—a defendant charged with filing a fraudulent income tax return could not be convicted under *both* Section 145(b) and Section 3616(a).

The *Berra* case and the instant case, in this respect, stand on all fours. Moreover, the Government has so conceded in its Memorandum in No. 666, *Costello* v. *United States*, at pp. 1-2:

> "Section 145(b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, to attempt wilfully 'in any manner to evade or defeat' the income tax. In the overwhelming majority of cases prosecuted under Section 145(b), the 'manner' of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145(b) has been

uniformly and repeatedly recognized by this Court and the courts of appeals.

"The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap." (footnotes omitted.)

And the same concession has been made by the Government in other cases where the issue has been raised. So in its Memorandum in Opposition to Amicus' Motion in the District Court for the Northern District of Ohio, in *United States* v. *Poucet Davis*, Cr. No. 20632, the Government stated:

"The simple and dominant fact in this case is that Sections 145(b) and 3616(a) overlap, and in an area within which the facts of this case fall. Section 145(b) makes it a felony to attempt willfully 'in any manner' to 'evade or defeat' the income tax. * * *

"The filing of a false or fraudulent return with intent to evade tax is also made a misdemeanor by Section 3616(a), and the scope of the misdemeanor, as we have said, overlaps the scope of the felony in the area within which the facts of this case fall." (P. 2, Mem. in Opp.)

Accordingly, when the statement in *Berra* concerning the "precisely" similar nature of the offenses un-

der 145(b) and 3616(a), and the concessions of the Government in other cases are placed together with the teaching of the double punishment cases, it is manifest that only one offense was committed here.

And this is the dominant factor in this case: the same proof necessary to make out a violation of Section 145(b) in this case, *necessarily* also proves a violation of Section 3616(a) in this case; and vice versa. No different element of proof is necessary in either instance and the proof of one—without more—makes out proof of the other.

No better illustration of the extent of the overlap between Sections 145(b) and 3616(a) can be had than by examining the revision of Section 3616(a) made by the Congress at the time of the enactment of the 1954 Revenue Code.[2] Section 7207 of the Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade", as was true under the prior Section 3616(a)[3]

[2] The argument in this Brief, at this point and hereafter, is predicated on the assumption that Section 3616(a) is applicable to income tax, which the Government has always heretofore conceded. Seen fn. 4, *infra*.

[3] Section 7207 of the Internal Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade" as was true under Section 3616(a). It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b).

The changes between former Section 3616(a) and present Section 7207 are graphically illustrated in the following ramseyred version:

~~Whenever~~ Any person who willfully delivers or discloses to the ~~collector or deputy~~ *Secretary or his delegate* any list, return, account, or statement, *or other document*, ~~with intent to defeat or evade the valuation, enumeration, or assessment intended to be made~~ *known by him to be fraudulent or to be false as to any material matter*, ~~he~~ shall be fined not ~~more than~~ *exceeding* $1,000, or be imprisoned not ~~exceeding~~ *more than* one year, or both, ~~at the discretion of the court, with costs of prosecution.~~

and, of course, it was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b). Thus, the "overlap" which existed between 3616(a) and 145(b) no longer exists between Section 7207 (formerly Section 3616(a)) and 7201 (formerly Section 145(b)) in the 1954 Code.

Undaunted by the fact that Sections 145(b) and 3616(a) cover "precisely the same ground" the Government has persistently contended in this and other similar proceedings, that it has the power to decide which of the applicable statutes, in any given situation, to invoke. It has relied, and presumably will rely in this Court, on such cases as *United States* v. *Beacon Brass Co.*, 344 U. S. 43; *United States* v. *Noveck*, 271 U. S. 202 and *Rosenberg* v. *United States*, 346 U. S. 273. But its efforts to bring the issue raised by these proceedings into the orbit of such cases is entirely inappropriate and therefore unavailing. For, in those cases, though the prescribed conduct violated more than one criminal statute, there was always the additional critical distinction that different proof was required to make out a violation of one or the other of the statutory provisions involved. Thus, in *Rosenberg*, *supra*, the relevant portion of the opinion reads as follows:

> "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: '*At least where different proof is required for each offense*, a single act or transaction may violate more than one criminal statute.'" *Rosenberg* v. *United States*, 346 U. S. 273, 294 (Opinion of Clark, J.). (Emphasis supplied.)

The decision in *United States v. Noveck*, *supra*, is similarly limited:

> "The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. *Each involved an element not found in the other.*" 273 U. S. 202, 206. (Emphasis supplied.)

And likewise, in *United States v. Beacon Brass Co.*, *supra*, the Court noted:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. *At least where different proof is required* for each offense, a single act or transaction may violate more than one criminal statute." 344 U. S. at 45. (Emphasis supplied.)

These cases stand only for the proposition that where an act or course of conduct may violate more than one criminal statute, *and where different proof is required*, the Government may select the statute under which to prosecute. In each instance, the two statutes called for differing proof to make an offense, but this is not the proposition at issue in this case. *Here no difference in proof is required* in a prosecution under either 145(b) or 3616(a), and, as we have already noted, conviction under one provision necessarily would result in conviction under the other, for the elements of the offense in each instance are identical.

Furthermore, the cases so strongly relied upon by the Government, in general involved conduct proscribed by the provisions of two *different* statutes; that is, the same conduct was within the reach of two different statutory schemes. So in *Beacon Brass* the choice was between the False Statements provision, 18 U. S. C.

Section 1001, and 145(b) of the Revenue Code; in *Rosenberg*, between the Espionage Act and the Atomic Energy Act; in *Noreck*, between the general perjury statute and a provision of the revenue laws. See also, *United States* v. *Gilliland*, 312 U. S. 86; involving the general False Statements provision and a provision of the "Hot Oil" Act. The statutory provisions involved in this case, by contrast, reside in a single statutory scheme, are part of the same "code", and are necessarily directly related to each other. *Cf. Spies* v. *United States*, 317 U. S. 492.

II

There thus arises the situation of a defendant convicted of certain acts as to which two distinct and different penalties are applicable; but which, at the same time, are mutually exclusive. Which of the two apply? The Congress to which the Constitution has reserved the function of declaring criminal penalties, *United States* v. *Hudson and Goodwin*, 7 Cranch (U. S.) 32; *United States* v. *Britton, et al.*, 108 U. S. 199; *United States* v. *Eaton*, 144 U. S. 677; *Viereck* v. *United States*, 318 U. S. 236, 241, 243-4, and hence of providing a standard, has failed to provide any criterion for choosing between them.

At the outset, it is clear that no guidance can be obtained by referring to the indictment. This Court long ago declared: "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. * * * We must look to the indictment itself, * * * although the representative of the United States may have supposed that the offense charged was covered by a different statute." *Williams*

v. *United States*, 168 U. S. 382, 389. And this rule has been applied through the years. In *United States v. Hutcheson*, 312 U. S. 219, the Supreme Court said:

> "In order to determine whether an indictment charges an offense against the United States, *designation by the pleader of the statute under which he purported to lay the charge is immaterial.* He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute * * *. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations." 312 U. S. at 229. (Emphasis supplied.)

The mere "labelling" of the indictment in this case, as a proceeding under Section 145(b), cannot make Section 3616(a) any the less applicable. The indictment in the instant case comes as much within 3616(a) as it does within 145(b). As this Court noted in *Berra*: "In this instance 145(b) and 3616(a) covered precisely the same ground." 351 U. S. 134. And " * * * the allegations of an indictment are to be judged by the relevant statute under which punishment may be meted out and not by the design of the prosecutor or the assumption of the trial court * * *." *Rosenberg v. United States*, 346 U. S. at 306. (Opinion of Frankfurter, J.)

Also, at the outset, we believe that the problem posed by the overlap of Sections 145(b) and 3616(a) cannot be solved by resort either to their legislative history or to the canons of statutory construction. As this Court noted in a similar context, "It is not to be denied that argumentative skill * * * could persuasively and not

unreasonably reach any of the conflicting constructions." *Bell* v. *United States*, 349 U. S. 81, 83.

Arguments based upon the legislative history of these provisions, reaching as they do as far back as 1798, prove as much in one direction as they do in the other. And the canons of construction, as the District Court in *Amicus'* case recognized (See Appendix A *infra*), are themselves conflicting in this context.

Moreover, the Government itself seems to have become confused by the history it has so persistently invoked in this litigation. It has repeatedly conceded the applicability of Section 3616(a) to income tax cases.[4] Indeed, it has based income tax prosecutions on that provision.[5] Yet, in a Memorandum filed in this case (No. 834) on March 22, 1957, for the first time the Government has announced that it now believes—based upon its "genesis and history"—that Section 3616(a) is *inapplicable* to income tax violations.

In view of the short period of time this sudden and belated shift of position permits for answer, and in

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[4] See, *eg.*, Brief for the United States in *Berra* v. *United States*, No. 60, O. T. 1955 at pp. 7, 10-13, and especially fn. 9 at pp. 23-4. In the *Berra* decision, this Court expressly relied upon the Government's concession that 3616(a) applied to income tax violations. 351 U. S. at 133.

See also p. 2, Memorandum for the United States in *Costello* v. *United States*, No. 666, O. T. 1956.

[5] See Mem. for the U. S. in No. 834, p. 2; *cf. Ex parte Cohen*, 191 F. 2d 300 (C. A. 9) cert. den. 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643-644 (C. A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597-598 (C. A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C. A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Koppelman*, 61 F. Supp. 1097, 1008-1009 (M. D. Pa.).

view, further, of the possibility that the Government may find still different meaning in the legislative history of the provisions before it files its Brief on the Merits, we now make no effort to controvert this latest view. If answer is necessary, it can be made in a Reply Brief. We call it to the Court's attention at this time, however, for the purpose of pointing up the chameleon-like character of the materials upon which the Government relies.

III

There are two possible answers to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *first*, that no conviction under either provision is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation; and *second*, that if the two provisions may co-exist, then only the less harsh of the two may be applied in this case.

It has been long settled that a criminal statute can be void for vagueness as much where the punishment to be inflicted is uncertain or open to speculation as where the acts prohibited are ambiguously or poorly defined. See *Holmes* v. *United States*, 267 F. 529, 531 (CA 5, 1920) cert. den. 254 U. S. 640; *Smith* v. *United States*, 145 F. 2d 643, 644-5 (CA 10, 1944) cert. den. 323 U. S. 803. "And a statute which . . . leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative." *Smith* v. *United States*, 145 F. 2d at 645.

This fundamental principle was unanimously applied by this Court in *United States* v. *Evans*, 333 U. S. 483. There the defendant was charged with concealing and harboring aliens in violation of Section 8 of the Immigration Act of 1917. Confusion existed as to the penalties applicable to the offenses charged in the indictment. The District Court granted a motion to dismiss the indictment and the Government appealed directly to this Court. Justice Rutledge, writing for a unanimous court, stated the problem of the case as follows:

> "The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses . . . The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting . . . inconsistent answers on the statute's wording." 333 U. S. at 484-5.

The opinion then sets out the alternative contentions:

> "the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty." 333 U. S. at 485.
>
> "Appellee . . . denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of as-

> surance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion . . . that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all." 333 U. S. at 485-6.

The Court noted the extreme nature of the appellee's argument, remarking: "where Congress has exhibited clearly the purpose to proscribe conduct * * * and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." (333 U. S. at 486). But the Court also observed:

> "But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree." 333 U. S. at 486-7.

After discussing the alternative punishments, this Court concluded:

> "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply . . .
>
> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its functions, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. at 495.

The rule enunciated and applied by this Court in the *Evans* case appears applicable to the situation posed by this case.[6] As in *Evans*, more than one penalty can be imposed here and it is not possible "either from the [statute's] wording or from the legislative history, to ascertain with any fair degree of assurance which one of the penal consequences Congress may have had in mind." Thus, one solution to the problem posed in this case might be to apply the reasoning in *Evans*.

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[6] For state court decisions applying this principle, see cases cited in Petitioner's Brief on the merits in No. 666, *Castillo v. United States*, at p. 11; and in Part I, Argument, in Petitioner's Brief on the merits in Nos. 430 and 834.

and hold any conviction for income tax evasion based upon the filing of false and fraudulent returns under 145(b) or 3616(a) to be void, in view of the fatal ambiguity relating to penalty inherent in these statutes.

IV

If the Court concludes that the ambiguity relating to the penalty for the crime of filing false and fraudulent returns with intent to defeat or evade tax is not so fatal as to make convictions under 145(b) or 3616(a) void, then there is a second alternative: To require the imposition of the less harsh of the two penalties, in any case in which the two provisions apply.

The rule that only the less harsh of two applicable penalties can be imposed is no more than an application of the well accepted principle that where there is ambiguity in the construction of penal statutes, doubts will be resolved in favor of the accused. Only recently, this Court applied this principle in *Bell v. United States*, 349 U. S. 81, where the issue was whether the Mann Act made the simultaneous transportation of more than one woman liable to cumulative punishment for each woman so transported. The Court, in that case observed:

> "Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?" 349 U. S. at 82-83.

In answering the question so posed, this Court's observations in *Bell* appear singularly relevant to the question presented in these proceedings.

> "[Congress] has not done so in words in the provisions defining the crime and fixing the pun-

ishment. Nor is guiding light afforded by the statute in its entirety or by any controlling gloss.

* * *

"It is not to be denied that argumentative skill * * * could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it * * *. *When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.*" 349 U. S. at 83 (emphasis supplied.)

The philosophy underlying the principle was also pungently described:

"And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.*" *Ibid.* (Emphasis supplied.)

The *Bell* case states in clear terms what this Court has often said before, and in other contexts. See, *e.g. United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-2; *Prince v. United States*, 77 S. Ct. 403, 407 (No. 132, O. T. 1956); *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10; see also *Wallis v. Tecchio*, 65 F. 2d 250, 252 (CA 5, 1933). And the rule is so well established that it was accepted in the *Evans* case as a basic axiom:

"The argument is therefore *not merely that a rule of strict construction should be applied in petitioner's favor.* It is rather that the choice the Government asks us to make is so broad and so deep . . . that we have no business to make it at all." 333 U. S. at 486. (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the sentence imposed upon the Petitioner is illegal and void and should therefore be vacated and set aside; or, at the least, that the sentence imposed under Section 145(b) as a felony, be corrected as one under Section 3616(a), as a misdemeanor.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cr. No. 20632

UNITED STATES OF AMERICA

v.

PONCET DAVIS.

McNamee, District Judge.

The brief of the Government in opposition to defendant's motion to correct sentence refutes effectively and completely the arguments advanced in support of the motion and demonstrates convincingly that the sentence imposed was in all respects legal. For these reasons I adopt the Government's brief in toto and incorporate it in this opinion. I would add only the following: It is a firmly established rule of statutory construction that where an Act contains special provisions, they are to be considered as exceptions to a general provision in a separate earlier or later enactment. 59 *Am. Jur.* Sec. 367, p. 371; id. Sec. 561, p. 562. The general principle is stated in 82 *C.J.S.* Sec. 369, p. 843, thus:

> "It is a fundamental rule that where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment."

Section 3616(a) is a general statute embracing many types of false documents and relating to all classes of taxes. Section 145(b) defines as a felony a willful attempt "in any manner to evade or defeat any tax imposed *by this Chapter*," etc. (Emph. sup.) Section 145(b) is in the chapter that deals specifically and solely with Income

Tax and should be considered and treated as an exception to Sec. 3616(b). See *Robinson* v. *United States*, 142 F. (2d) 431, and cases therein cited. Compare *United States* v. *Fiplitz*, 105 F. Supp. 512. I am not unmindful of the apparent conflict of the above with *United States* v. *Gilliland*, 312 U.S. 86; but in view of the legislative history of Section 145(b) I am of the opinion that the principle hereinabove referred to is applicable.

The motion is overruled.

/s/ CHARLES J. McNAMEE
United States District Judge

Sept. 27, 1956

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,042

PONCET DAVIS, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Order

Upon motion of counsel for the Appellee and for good cause shown, the Appellee is hereby granted an extension of time until sixty (60) days after the issuance of the decision and opinion of the Supreme Court of the United States in case No. 666 on the Docket of said Court, entitled *Frank Costello* v. *United States*, to file its brief and appendix in this case.

/s/ POTTER STEWART, J.
Court of Appeals
Sixth Circuit

Filed February 12, 1957

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your *amicus curiae* has heretofore on March 21st, 1957, filed a motion for leave to file this brief; however, since such motion will not be acted upon before the due date of petitioner's brief, that is, March 30th, this brief is lodged with the Clerk within such date, in order that it may be considered filed when, as and if permission is granted.

INTEREST OF AMICUS CURIAE

Your *amicus curiae* was Chief Counsel in filing the petition for Certiorari in the case at bar; and, upon denial of such petition on November 19, 1956, and remand to the District Court, withdrew from active participation in the case. Upon receipt of order of this Court dated March 4, 1957, vacating its order of November 19, 1956, your *amicus curiae* filed a motion to withdraw in order to conform to the wishes of the client and new counsel; and

Your *amicus curiae* has raised the same issue before the District Court of the United States for the Northern District of Ohio, Western Division, in the cases of the *United States of America* v. *C. O. Hanson* (Docket Nos. 21911, 21912) now pending before Judge Weick on motions in arrest of Judgment, for Judgment of Acquittal, and for a New Trial. In the *Hanson* case all the objections inherent in the issue were raised before trial, during trial and after trial; a situation that is not as clear in the *Achilli* or *Costello* cases.

SUMMARY OF ARGUMENT

Succinctly stated, it is the contention of this *amicus curiae* that Section 3616 (a) (a misdemeanor) and Section 145 (b) (a felony) of the Internal Revenue Code of 1939 are both in full force and effect; and both apply to income tax violations. However, where the crime fits the requirement of the felony charge, the aggravating elements must be stated in the indictment—otherwise the indictment charging violation of the felony statute is invalid and cannot stand as a misdemeanor unless such crime is charged in another count.

The rule that the incorrect citation of a statute in an indictment does not void such indictment has no application where a crime may be either a misdemeanor or a felony depending upon the elements composing the crime. Where the elements fit one or the other statute, the citation of the statute does attain a significance; and, to cite the felony statute where only the misdemeanor elements are charged is fatal. It constitutes an election that is binding; and, if the alternative is desirable, then the misdemeanor must be set forth in another count (Rule 8 (a) F.R.C.P.) of the indictment.

Here, the charging part of the indictment charges:

> "filing and causing to be filed . . . a false and fraudulent income tax return. . . ."

which comes squarely within the provisions of Section 3616 (a) of the Code, whereas Section 145 (b) of the Code provides that one who

> "willfully attempts *in any manner* to evade or defeat any tax. . . ." (italics supplied)

is guilty of a felony.

In our opinion "in any manner" embraces more than a "false and fraudulent" return; and that such further elements must be charged in the indictment.

ARGUMENT

(A) BOTH SECTIONS OF LAW APPLY TO INCOME TAX VIOLATIONS

We will not stop to trace the history of Sections 145 (b) and 3616 (a) of the Internal Revenue Code of 1939—that will be adequately covered in briefs by the parties.

We do, however, remind the Court that the Government has maintained prosecutions under each of such sections since the Internal Revenue Code of 1939 was adopted; and, as recently as March 1956 maintained the position that both sections were applicable to income tax violations before this Court in *Berra* v. *United States of America*, 351 U.S. 131, 133. Now the Government questions the soundness of its position in *Achilli* v. *United States of America* (Docket 834).

Congress included both sections of law when it enacted the Internal Revenue Code of 1939. The contention has been made that this was error—that Section 3616 (a) had been repealed by implication when Section 145 (b) was enacted and repeatedly re-enacted.

We do not believe this to be so; however, assuming arguendo that there was error, the fact remains that Congress by enacting the Internal Revenue Code of 1939 did enact both sections—that became the law of the land from that moment. Omissions from the Code it could be argued were error and should not be considered repealed; but affirmative action by enactment is not error—it becomes the law.

The existence of the two sections should cause no confusion nor is one repugnant to the other; the misdemeanor statute, Section 3616 (a), provides for one crime, that of filing a false and fraudulent return; the other, a felony statute, Section 145 (b), provides for a crime comprising aggravating elements; for example, maintaining a duplicate set of books, maintaining false books, obstructing the investigation of the return filed, concealing assets, or making false statements after the return is filed.

The crime encompassed by Section 3616 (a) is completed when the return is filed; whereas, the crime under Section 145 (b) may be incomplete on the filing date, but completed later.

The above examples clearly demonstrate that the same proof is not necessarily required for a prosecution under one section as would be required under the other section. Under Section 3616 (a) the charge would be the filing of a false and fraudulent return and proof of that fact. Under Section 145 (b) the charge would be more than the filing of a false and fraudulent return, the other elements—whatever device is availed of—must be charged and proven.

(B) ELECTION TO INDICT AND PROSECUTE AS A FELONY

A United States Attorney confronted with an income tax violation, upon examination of the evidence, has one of three choices to make; depending upon which the evidence fits; that is:

(1) Proceed under Section 3616 (a) as a misdemeanor;

(2) Proceed under Section 145 (b) as a felony; or

(3) In separate counts in the indictment proceed under both statutes.

The decision based upon what the prosecution can prove is not one based upon discretion but on proof. It does not repose in the prosecution an arbitrary power over the liberty of a defendant. He very simply determines which crime has been committed and proceeds to procure an indictment and prosecutes under the applicable statute, or both.

However, having made his choice and the Grand Jury indicting, he is bound by such choice or election. The indictment must meet the test of charging the offense chosen. If, for purposes not disclosed, he and the Grand Jury elect the felony charge instead of the misdemeanor charge or both in separate counts, then the indictment must measure up to the required felony elements. It will not do later to claim an error was committed, or that the citation of the statute was in error. There is no error of judgment respecting which statute to invoke. The choice of statute is deliberate and is binding. If the indictment then fails to measure up to the required felony elements and no misdemeanor count was included as a safeguard, the indictment is defective and invalid. As this Court said in *Rosenburg* v. *United States* (opinion of Mr. Justice Clark) 346 U.S. 273, 294:

> "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: 'At least where different proof is required for each offense, a single act or transaction may violate more than one criminal statute.'" (citing cases)

Here, then, the felony statute was selected and no misdemeanor statute was included as a separate count. The indictment, if it fails to measure up to the felony requirements by failure to charge the elements necessary to raise the misdemeanor to the felony stature, must fail. The filing of a false and fraudulent income tax return is a misdemeanor punishable under Section 3616 (a). The willful attempt in any manner to evade or defeat any tax is a felony. The felony is an

Aggravation of Offense

and the aggravation must be charged in the indictment. By aggravation of offense we do not mean the amount of tax involved, we mean additional elements of the crime, which by such additions create a felony of what otherwise would be a misdemeanor.

The aggravating elements must be contained in the indictment; otherwise it is invalid—invalid as a felony, and not susceptible to reduction to a misdemeanor because a felony is charged.

In *Aderhold, Warden* v. *Pace* (65 F. 2nd 701) (1933) (5 CCA)—a liquor case under the prohibition law, it was a misdemeanor to sell a quantity of less than a gallon, but a felony if the quantity sold amounted to more than a gallon—the Fifth Circuit stated: (p. 791)

> "Any aggravation of an offense for which the law authorizes an increase in punishment must be stated in the indictment. 1 Bishop's Cr. Law, Sec. 601. Mr. Bishop also says that to punish one for all of a crime where only a part of it is charged is to punish him without accusation. 1 Bishop's Cr. Pro. Sections 77, 80, 84. So far as we are aware, there is no authoritative decision to the contrary. Certainly it cannot fairly or justly be said that Pace, because he pleaded guilty to a charge of selling an unnamed quantity of intoxicating liquor, thereby admitted he had sold more than a gallon."

The above case arose by appeal from an order granting a writ of habeas corpus and discharging a prisoner who had pleaded guilty and had been sentenced under the felony statute. After serving the misdemeanor penalty the writ was applied for and the prisoner dicharged.

In *Martin* v. *United States* (99 F. 2nd 236) (1938) (10 CAA), also a liquor case, the Court affirmed the conviction, on the grounds that the sentence was within the limits of the particular statute. In its opinion, the Court said:

> "The offense laid in an indictment is charged by the allegations of fact, not by reference to statutes. *If reference to a statute is essential* for the reason that the indictment does not make sense or is lacking in necessary allegations without it, *an incorrect reference may be fatal.* But where an offense is otherwise sufficiently charged, an incorrect reference to a statute does not render the indictment invalid." (Italics supplied)

In *United States* v. *Berkowitz* (45 Fed. Supp. 564) (D.C.W.D. Mo. W.D.) (1942) the Court after citing and quoting from *Ruling Case Law*, Vol. 14, Sec. 55; *24 Corpus Juris Secundum, Criminal Law, Sec.* 1580, Page 100; the same volume Sec. 1962, page 1156, 31 C.J. Sec. 282, p. 734; *Olivito* v. *U.S.* (67 F. 2nd 564, 565) 9 CCA: *Aderhold* v. *Pace,* (supra) 65 F. 2d 790, 791; held: (p. 565)

> "In view of the foregoing authorities, and, in the absence of contrary ruling, it should be held that under said Section 216, 29 U.S.C.A., supra, an imprisonment penalty cannot be imposed except in those cases where a second offense has not only been committed, but where the indictment or information charges the fact.

In *Olivito* v. *United States* (67 F. 2nd 564) (1933) (9 CCA) the appellant prayed the case be remanded so that a new appropriate sentence be passed. The Court did so; and stated:

> "It is true ordinarily an indictment is not required to negative the cases falling under a proviso of an

> enactment. But here, definite lesser maximum penalties were provided for minor offenses, patently marking these acts as misdemeanors. Foster v. U.S. (CCA 7) 47 F. (2d) 892; Aderhold, Warden v. Pace (CCA 5) 65 F. (2d) 790, 791. It is also set out that if certain characteristics are added to these acts they fall under the brand of felonies. Under such circumstances, it is certain that the indictment should allege, in order to invoke the heavier penalty, that the sale was of a quantity more than a gallon.
>
> * * * * * * * * * *
>
> It is true the court may have had at hand other facts, not shown by the record, tending to establish habitual violation; but under the present law the discretionary power has been removed and the court is empowered to sentence only upon the findings of a jury, based upon appropriate allegations of the indictment."

Meyers v. United States (116 F. 2nd 601) (1941) (5 CCA) states (p. 603)

> "The facts constituting such aggravation of a crime as will increase the statutory punishment must be plainly charged or they are not confessed by a plea or established by a verdict of guilty. Aderhold, Warden v. Pace, 5 Cir., 65 F. 2nd 790."

There the defendant entered a plea of guilty, and while serving sentence for bank robbery and assault in the course thereof, the prisoner appealed. The statute cited in the indictment covered two offenses, one incurring a penalty of twenty years imprisonment, the other set the maximum penalty at twenty-five years. The Court had pronounced the greater sentence. The Fifth Circuit remanded for resentencing because the indictment charged only the lesser offense.

In *Jordan* v. *United States* (233 F. 2nd 362) (D.C. Appeals) (1956) the crime charged fitted section 22-501 of the D.C. Code although the indictment does not appear to set forth the citation of the statute (footnote 4, page 366). The proof showed the defendant was armed and on conviction a greater sentence was imposed under section 22-3202. The Court in remanding directed the vacation of the existing sentence and that the prisoner be resentenced under the lesser penalty statute, in distinguishing its holding from an earlier decision in another case, it stated: (p. 367)

> "On the other hand, where the aggravation arises from the manner in which the crime was committed, in substance a different aspect of the offense is sought to be punished. Accordingly, we think—as did the Fifth Circuit in the Meyers case—that *the facts in aggravation must be charged in the indictment* and found to be true by the jury. The sentence here imposed was accordingly erroneous. It must be vacated and a new and proper sentence imposed." (footnotes omitted) (Italics supplied)

In *U.S.* v. *McCulloch* (6 F.R.D. 559) (D.C. N.D. Ind. Fort Wayne Div.) (1947) the Court dismissed an indictment charging possession of three cartons of cigars, moving in interstate commerce, knowing the cigars to have been stolen. The statute (Sec. 409, Title 18, U.S.C.) described the mode of moving in interstate commerce, as railroad car, motortruck, wagon or other vehicle; station house, platform, depot, or terminal; steamboat, vessel or wharf; aircraft, airport, aircraft terminal, or air navigation facility. The indictment charged possession, moving in interstate commerce and that the cigars were stolen. In dismissing the Court said: (560)

"The indictment in this case does not contain all of the essential facts constituting the crime charged. That is, it does not charge that the goods were obtained from any of the places or facilities of transportation enumerated in the statute. Such omission is fatal. United States v. Cohen, 3 Cir., 274 F. 596; Wolkhoff v. United States, 6 Cir., 84 F. 2nd 17.

The motion to dismiss is well taken for an added reason. Justice Holtzoff in United States v. Starks, 6 F.R.D. 43, restates the general rule as to indictment, as follows:

'First, it must apprise the defendant of the specific offense with which he is charged. * * * The second test is that the indictment must be sufficiently definite in order that if the defendant is later charged with the same offense he will be in a position to interpose a plea of double jeopardy.'

The indictment under consideration does not meet these tests because it does not identify the stolen goods with sufficient definiteness. Allegations of ownership or other averments tantamount to identify by ownership are essential. Kasle v. United States, 6 Cir. 233 F. 878; Block v. United States, 5 Cir., 261 F. 321, 322."

and in disposing of the Government's contention that the indictment meets the requirements of Rule 7(c) of the Rules of Criminal Procedure, the Court states: (p. 560)

"There is no doubt that this rule was designed to bring about a simple form of indictment. Its purpose was to do away with the redundancy and verbiage which needlessly burden many indictments under the former practice. On the other hand *it did not change the essential requirements of a valid* indictment." (Italics supplied)

Wolkoff v. *U. S.* (84 F. 2nd 17) (6 CCA) (1936) brings into sharp focus the effect of an invalid and a valid indictment. There the defendant was tried by the Court; and the Court without rendering a decision, dismissed the case upon the grounds that the indictment was faulty, since it did not designate the place or vehicle from which the goods were stolen.

Upon reindictment, the defendant pleaded former jeopardy. The Court overruled and the Sixth Circuit affirmed on the grounds that since the first indictment was invalid there was no double jeopardy.

In *U. S.* v. *Standard Brewery, Inc.* (251 U.S. 210) (1920) this Court affirmed the decision of the lower court holding indictments invalid. The cases arose under the prohibition laws; and the Treasury Department by regulation held a beverage containing one-half of one per cent of alcohol to be intoxicating. In affirming the dismissal this Court said: (p. 220 U.S. Reports)

> "An indictment must charge each and every element of an offense, Evans v. United States, 153 U.S. 584, 587, 14 Sup. Cit. 934, 38 L. Ed. 830. We cannot say, as a matter of law, that a beverage containing not more than one-half of 1 per cent of alcohol is intoxicating, *and as neither indictment so charges* it follows that the courts below in each of the cases correctly construed the act of Congress and the judgments are affirmed." (Italics supplied)

Here, Section 145 (b) imposes a felony penalty on anyone who willfully attempts in any manner to evade or defeat any tax but the indictment charges only the offense punishable under Section 3616 (a)—the aggravating elements are not charged.

It is important to note that this Court in *Berra* v. *U. S.* (351 U.S. 131) states: (132, 133)

> "No motions addressed to the validity of the indictment, judgment of conviction, or sentence under Section 145 (b) were made before, during, or after trial, and we read the requested instruction as aimed at leaving to the jury the question of whether the defendant should be convicted under Section 145 (b) or Section 3616 (a), if the jury found him guilty."

Here, by motion, the defendant did question the validity of the indictments.

CONCLUSION

Your *amicus curiae* suggests that this Court in construing Sections 145 (b) and 3616 (a) of the Internal Revenue Code will conclude: that both sections of the Code, that is Sections 145 (b) and 3616 (a) are in full force and effect and that both are applicable to income tax violations; that an indictment under Section 145 (b) to be valid must set forth the aggravating elements necessary to raise the violation from a misdemeanor to a felony; and that the election to indict and prosecute as a felony precludes a trial under the misdemeanor statute unless a separate misdemeanor count is included in the felony indictment.

WHEREFORE, it is prayed that this Court will set at rest the law on all phases of the issue presented.

Respectfully submitted,

CARL J. BATTER
910-17th Street, N. W.
Washington 6, D. C.
Amicus Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

MOTION OF L. B. BINION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF AMICUS CURIAE

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MOTION OF L. B. BINION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Now comes L. B. BINION as *amicus curiae*, by his attorneys, and moves the Court for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support of said motion shows:

1. *Amicus curiae* is presently appellant in that certain cause now pending in the United States Court of Appeals for the Fifth Circuit, numbered 16,335, and entitled *L. B. Binion v. United States of America*. The question presented in that appeal is identical with the one presented

in the above-entitled case, namely, whether § 145(b) or § 3616(a) of the Internal Revenue Code of 1939 is applicable to conviction for filing a false income tax return.

2. In view of the identity of questions involved, this Court by order entered March 11, 1957, admitted the *amicus curiae* to bail pending disposition of the above entitled case. See *Binion* v. *United States*, 352 U.S. 1028.

3. The only question sought to be covered in the brief *amicus curiae*, which is appended hereto, is whether § 3616 (a) of the Internal Revenue Code applies to income tax returns.

4. Following are the reasons for believing that this question is not being adequately presented by the parties:

a. The Government's arguments as to the alleged inapplicability of § 3616(a) to income tax returns, see Memorandum for the United States heretofore filed in the present case, are diametrically in conflict with its prior position in similar cases, and are, as the attached brief indicates, of questionable soundness.

b. The brief of Poncet Davis as *amicus curiae* in this case states (pp. 14-15) that "we now make no effort to controvert this latest view" of the Government, viz., that § 3616(a) is inapplicable to income tax violations.

c. The brief of petitioner in No. 666, *Costello* v. *United States*, heretofore filed and involving the same basic question, assumes the applicability of § 3616(a) to income tax prosecutions without discussion, no doubt because the Government in its consent to the granting of certiorari in that case admitted the § 3616(a) point. See Memo. for U. S. in No. 666, this Term, p. 2.

d. Petitioner Achilli's brief herein admits (p. 25) that "Time has not permitted us to research this subject beyond what is here presented."

Amicus curiae therefore believes that the brief he proposes to file, which is not in any sense merely cumulative, will afford this Court assistance not available elsewhere for the resolution of one of the critical issues involved in the above-entitled case.

5. Both parties hereto have refused consent to the filing of a brief *amicus curiae*.

WHEREFORE it is respectfully submitted that the present motion for leave to file should be granted.

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APRIL 1957.

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BRIEF OF L. B. BINION, AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* in the present case is set forth in his motion for leave to file, and also appears in the *Per Curiam* order in *Binion* v. *United States*, 352 U.S. 1028.

SUMMARY OF ARGUMENT

For three successive Terms, the Government formally presented in this Court reasons why in its view § 3616(a), I.R.C. 1939, was applicable to income tax returns, and argued that there was an area of overlap between that provision and § 145(b) of the same compilation. Now the Government has suddenly reversed itself, and argues that

§ 3616(a) has nothing to do with the income tax. This brief deals only with the scope of § 3616(a), not with the consequences of the overlap.

1. Section 3616(a) of the Internal Revenue Code of 1939 is directly derived from R. S. § 3179, which in turn was directly taken from § 15 of the Act of June 30, 1864. Since the 1864 Act imposed an income tax, it necessarily follows that § 3616(a), I.R.C., now applies to income tax returns. The meaning of a statute does not change as, without substantive differences, it passes through one or more revisions.

2. R. S. § 3179 was never repealed, either expressly or by implication, but on the contrary was specifically reenacted.

It admittedly applied to the 1894 income tax. The more severe penal provision of the 1909 Act, relied on by the Government to show a supersession *pro tanto*, was specifically limited to the tax then imposed, which was not an income tax. *Flint* v. *Stone-Tracy Co.*, 220 U.S. 107.

The penalty for filing false income tax returns under the Acts of 1913 and 1916 was heavier than that provided in R. S. § 3179. But those penal provisions were limited to the particular Revenue Acts involved, and Congress in the 1916 Act amended numerous related provisions of the Revised Statutes without touching § 3179. Plainly it intended the latter provisions to stand.

In the Revenue Act of 1917, Congress removed the inconsistency as to the penalty for filing false returns, and added the misdemeanor of evading or attempting to evade the tax. In the Revenue Act of 1918, the penalty provision for the latter offense was increased, and nothing was said specifically about filing. Inasmuch as the 1918 Act again effected amendments to related sections of the Revised Statutes, the failure of Congress to deal with § 3179 requires the conclusion that it considered the latter provision adequate to punish the filing of false income tax returns.

In 1924, evading or attempting to evade the tax was made a felony. Nothing in any income tax statute after 1918 dealt with the filing of false income tax returns. Again, R. S. § 3179 was deemed ample to cover the latter offense, a conclusion that becomes irresistible in the face of the Congressional reenactment of R. S. § 3179 as § 3616(a) of the Internal Revenue Code of 1939, and the declaration in § 61 of the same Code that all administrative provisions, which necessarily included § 3616(a), were applicable to the income tax.

3. The Government has for some time prosecuted income tax offenders under § 3616(a). If that section is inapplicable to income tax returns, then the filing of false income tax returns is condemned only as a felony, under § 145(b). That being so, all prosecutions of income tax offenders under § 3616(a) that were commenced by information rather than by indictment have been unlawful. The Government makes no offer to restore persons so convicted.

ARGUMENT

SECTION 3616(a) OF THE INTERNAL REVENUE CODE OF 1939 APPLIES TO INCOME TAX RETURNS

For three successive Terms, on the basis of reasoned and articulated legal argument supported by full citation of authorities, as well as on the basis of the actual course of criminal prosecutions thereunder, it was the Government's position that § 3616(a) of the Internal Revenue Code of 1939 was applicable to income tax returns, and that there was accordingly an area of overlap between that section and § 145(b) of the same Internal Revenue Code. See Br. Op. 7-11 in *Dillon* v. *United States*, No. 629, Oct. T. 1954, certiorari granted, 349 U.S. 914, and dismissed and remanded, 350 U.S. 906; U. S. Br. 10-11, 22-24, in *Berra* v. *United States*, No. 60, Oct. T. 1955, 351 U. S. 131; U. S. Memo., p. 2, in *Costello* v. *United States*, No. 666, Oct. T. 1956, pending on the merits after grant of certiorari, 352

GIVES AS REASONS THEREFOR:

(1) Your movant was Chief Counsel in filing the petition for Certiorari in this case; and, upon denial of such petition on November 19, 1956, and remand to the District Court, withdrew from active participation in the case. Upon receipt of order of this Court dated March 4, 1957, vacating its order of November 19, 1956, your movant filed a motion to withdraw in order to conform to the wishes of the client and new counsel; and

(2) On this date, namely March 18th, your movant was advised by said new Counsel, Peter B. Atwood, Esq., by letter dated March 15th, that he would not consent to the filing of a brief *amicus curiae*; and

(3) The interest of the applicant is that the question of law presented be fully presented to the Court, because the applicant has raised the same issue before the District Court of the United States for the Northern District of Ohio, Western Division, in the cases of the *United States of America* v. *C. O. Hanson* (Docket Nos. 21911, 21912) now pending before Judge Weick on motions in arrest of Judgment, for Judgment of Acquittal, and for a New Trial. In the *Hanson* case all the objections inherent in the issue were raised before trial, during trial and after trial; a situation that is not as clear in the *Achilli* or *Costello* cases.

(4) Your applicant does not believe the questions of law will be adequately raised and presented for the reason that present counsel for *Achilli* states in his letter to applicant dated March 15th: "I am not sold on the point of 'aggravation' which you mentioned;" and, Edward B. Williams, Esq., Counsel in *Frank Costello* v. *U. S.* (Docket No. 666) has informed your

applicant that the point goes beyond the issue in that case; and

(5) The particular point of law your applicant wishes to present to the Court goes to the invalidity of the indictments based on and prosecuted under Section 145 (b) of the Internal Revenue Code of 1939, a felony statute, where the aggravating elements to raise a misdemeanor (Section 3616 (a)) to a felony are not set forth in the indictment. Our position is grounded on:

(a) Assuming arguendo, as this Court did in *Berra* v. *United States* (351 U.S. 131), that Sections 3616 (a) and 145 (b) of the Internal Revenue Code of 1939 both apply to income tax evasion cases; and that the government had the right of election respecting the statute under which the indictment and prosecution should be brought and prosecuted; then

(b) The rule that any aggravation of an offense for which the law authorizes an increase in punishment must be stated in the indictment applies. See *Aderhold, Warden* v. *Pace*, 65 Fed. 2nd 701; *United States* v. *Berkowitz*, 45 Fed. Supp. 564; *Olivito* v. *U. S.*, 67 Fed. 2nd 564; *Meyers* v. *U. S.*, 116 Fed. 2nd 601; *Jordan* v. *U. S.*, 233 Fed. 2nd 362; *U. S.* v. *Standard Brewery, Inc.*, 251 U.S. 210; and, that

(c) The indictments in the *Achilli, Costello* and *Hanson* cases, containing no aggravating elements, cannot stand as a felony; nor can they drop to a misdemeanor level without a separate misdemeanor count (Rule 8 (a) F.R.C.P.).

(d) The validity of the indictment and the right to prosecute the felony, and the absence of a misdemeanor

count are relevant to both the *Achilli* and *Costello* cases.

(e) The applicant has a brief in course of preparation now and will meet the filing date of March 30th, 1957, ordered in the *Achilli* case, should this Court grant this motion.

WHEREFORE, it is prayed that this motion for leave to file the brief and argue it be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834
(Consolidated)

SAM ACHILLI, *Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR REHEARING

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING

I

The opinion of the Court in this case has adopted the arguments of the Government with respect to the inapplicability of Section 3616(a) to income tax evasion. In so resting its decision, we believe that the Court may have fallen into serious error.

The Court's view of Section 3616(a) is based on its historical derivation and background. The Court's opinion begins with and projects from the following observation:

> "Section 3616(a) goes back to the Revenue Act of 1798, 1 Stat. 580, 586, when excise taxes and custom duties were the main sources of federal

> revenue. Being general in scope, this section was applicable to the first federal taxes on income, from 1861 to 1871, and again in 1894; those income tax laws made no separate provisions for punishing their evasion. See, *e.g.*, the Act of 1861, 12 Stat. 292, 309; the Act of 1894, 28 Stat. 509, 553."

In so concluding, the Court has, we believe, fallen into error.

The Act of 1798, as the Government has admitted in its brief, "was no federal income tax." (P. 17). The Act of 1861, imposing an income tax did not, as this Court concluded, rely upon any provision contained in the Revenue Act of 1798, but contained its own penalty provision. Sections 16, 49-51, c. 45, 12 Stat. 292, 298, 309. The 1862 Act, which also imposed an income tax, also contained separate penalty provisions, and did not rely upon the provision contained in the 1798 Act. The Act of July 1, 1862, as amended, Section 9, c. 119, 12 Stat. 432, 435. And the 1864 Act, which also imposed an income tax, also contained its own penalty provisions, and did not rely on the provision of the 1798 law. The Act of June 30, 1864, as amended, Sections 15, 116-123, c. 173, 13 Stat. 223, 227, 281. The Act of 1894, imposing an income tax, contained no criminal sanctions, since, by that time—in 1874—Section 3179 of the Revised Statutes had been enacted into general law, and clearly applied to income tax.

Briefly speaking, therefore, the preliminary basis on which the Court's opinion in the instant case is founded, appears to be factually incorrect.

This Court also appears to have fallen into serious error in its conclusion that Section II(F) of the 1913 Act impliedly repealed *pro tanto* Section 3179 of the Revised Statutes of 1874, and that Section 3179 was

"obviously inconsistent with Section II(F)." There is in fact no "different story" with respect to the 1913 Act in comparison with the pattern of criminal sanctions in the Acts of 1861-1871 and again in 1894. These Revenue Acts, as above indicated, did not rely on any provision contained in the Revenue Act of 1798. In plain fact, each of these Revenue Acts contained its own penalty provision:

(1) Act of 1861, Section 16 (12 Stat. 292, 298), made it a misdemeanor to file a "false . . . return . . . with intent to defeat or evade the tax", using language similar to the 1798 Act and the later Section 3179.

This provision applied to all taxes imposed by this Act, including an income tax.

(2) Act of July 1, 1862, Section 9 (c. 119; 12 Stat. 432, 435), and the Act of June 30, 1864, Section 15 (c. 173, 13 Stat. 223, 227), also imposed criminal penalties for filing a "false return" with intent to defeat or evade taxes imposed by those Acts.

The criminal penalty provision applied to all taxes imposed, including an income tax.

(3) Act of 1894, however, contained no criminal penalty provision at all, but relied on Section 3179 which in 1874 had been enacted into general law. It was derived, with minor changes in phraseology, from Section 15 of the 1864 Act.[1] This 1894 Act also imposed an income tax; and clearly Section 3179 applied.

---

[1] Section 3179 reads as follows: "Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglects to appear or to produce said books, he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

While it is true that Section II(F)[2] of the 1913 Act applied solely to income taxes imposed under that Act, Congress did not set any pattern in this respect. Congress provided separate criminal penalties for income taxes in 1916, 1917, 1918 and 1921,[3] but thereafter, up to the Revenue Act of 1928, criminal penalties were made applicable to all forms of taxes.[4] Thus, the general criminal provisions of these later Acts would have the effect of completely nullifying Section 3179, but nothing that Congress did during this period indicates a repeal by implication. Certainly one general statute cannot be said to repeal another general statute, especially where the one statute of general application (Section 3179) applies only to the filing of a false return by anyone or the filing of a false "statement" by anyone.

We suggest that this conclusion is particularly emphasized by the special application of these criminal provisions.

---

[2] Section II(F), 38 Stat. 114, 171, Tariff Act of 1913: "That if any person . . . liable to make the return or pay the tax aforesaid shall refuse or neglect to make a return at the time or times hereinbefore specified in each year, such person shall be liable to a penalty of not less than $20.00 nor more than $1,000.00. Any person . . . required by law to make, render, sign or verify any return who makes any false or fraudulent return or statement with intent to defeat or evade the assessment required by this section to be made shall be guilty of a misdemeanor, and shall be fined not exceeding $2,000.00 or be imprisoned not exceeding one year, or both. . . ."

[3] Revenue Act of 1916, Section 18, c. 463, 39 Stat. 756; Revenue Act of 1917, Section 1004, c. 63, 40 Stat. 300, 325; Revenue Act of 1918, Section 253, Title II, 40 Stat. 1057, 1085; Revenue Act of 1921, Section 253, Title II, 42 Stat. 227, 268.

[4] Revenue Act of 1924, Section 1017(a) and (b), c. 234, 43 Stat. 253, 344; Revenue Act of 1926, Section 1114(a) and (b), c. 27, 44 Stat. 9, 116.

Beginning with the Revenue Act of 1913, the Court's attention is directed to the fact that Section 3179 and Section II(F) were not in necessary conflict.

Section 3179 applied to two things: (1) anyone who delivers a false return or statement; and (2) matters relating to the production of books or testimony.

Section II(F) of the 1913 Act applied only to "any person *required* by law to make [a] return." Thus, as to the first subject covered by Section 3179, the prohibition went further than Section II(F), in that it would include agents acting for the taxpayer, such as an accountant who makes and delivers a false return, or "statement" in support of a return either accompanying the return or at a later date in connection with a review of the return. Thus, Section II(F) did not repeal Section 3179 as to income taxes.

Also, as to the second subject covered by Section 3179, it is apparent that Section II(F) did not purport to deal with that subject. That was brought into the scope of the income tax provisions by Section II(L), making "administrative and general tax provisions" applicable to income taxes. It seems clear, therefore, that the 1913 Act did not repeal *pro tanto* Section 3179 as to income taxes. This is further emphasized by the general scope of the criminal provisions of the later 1924 and 1926 Revenue Acts. These later Acts would not only repeal *pro tanto* Section 3179, but completely nullify it. Yet the section was incorporated by Congress in the 1939 Code, and again in the 1954 Code, with an important modification.

We believe the Court erred in its statement that repeal *pro tanto* by Section II(F) of the 1913 Act "is further demonstrated by the fact that §§ 3167, 3172,

3173 and 3176 of the Revised Statutes . . . were specifically incorporated, as modified, into § II but § 3179 was not." Section II(I) of the 1913 Act states: "That Sections 3167, 3172, 3173 and 3176 of the Revised Statutes of the United States, as amended, are hereby amended so as to read as follows:" We respectfully suggest that this language does not incorporate these sections of the Revised Statutes into Section II and make them applicable solely to income taxes. Congress did no more by the language quoted than to amend these sections in the manner set out. Instead of demonstrating any repeal of Section 3179 by this language, we think it emphasizes that Congress had no intention of modifying the effect of Section 3179 by the language of Section II(F).

As we have pointed out above, Section 3179 applied not only to the filing of a false return, but to this matter of production of books and the giving of testimony. Section 3616(b) of the 1939 Code quotes verbatim the language of that portion of Section 3179 relating to the production of books and the giving of testimony. In none of the Revenue Acts up to the codification in 1939 [5] did Congress specifically provide for the production of books or the giving of testimony other than in Section 3179. To such extent, Section 3179 was applicable during this entire period to income taxes. It seems to us unlikely that Congress intended that Section II(F) act as a repeal *pro tanto* only to the limited extent of taxpayers filing a false return, but keep it alive as to persons other than a taxpayer filing a false return or giving a false statement in support of a return.

---

[5] As Section 3616(b).

"We believe that the Court may also have fallen into serious error in its statement that the scope of Section 3616(a) "had been shrunk by a series of specific enactments that had the potency of implied repeals." At page 27 of the Government's brief in this case is an impressive list of specific criminal provisions with respect to specific taxes. This list immediately follows a statement appearing in the Government's brief at page 26 that, "In the income tax field, the provision, first appearing in the 1924 Act, that 'any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall . . . be guilty of a felony' was the 'capstone of a system of sanctions . . .'"

As we have pointed out above, the sanctions provided in the 1924 Act applied to all forms of taxes, there being no separate criminal provision with respect to income taxes. Thus, the reference in the above quotation from the Government's brief to the word "chapter" was erroneous. The word "Act" appears in the statute, and not the word "chapter."

At page 21 of our brief, we pointed out that, with the exception of the Revenue Act of 1932 which contained a separate penalty provision in the case of gift taxes (Section 525), none of the Revenue Acts from 1924 through 1938 contained any separate criminal provision in the case of taxes other than income taxes. A separate criminal penalty for excise taxes originally contained in Section 614 of the Revenue Act of 1932, as first introduced in Congress, did not become law. Thus, the criminal penalty provisions contained in the 1939 Code and set forth at page 27 of the Government's brief are all counterparts of the 1924 Revenue Act (Section 1017(a) and (b)). Congress did not at any

U.S. 988. In the first two cases cited, the Government specifically disagreed with the contrary conclusion that had been reached by the Eighth Circuit. *Dillon* v. *United States*, 218 F. 2d 97; *Berra* v. *United States*, 221 F. 2d 590.

In the present case, just two months after its submission in *Costello*, the Government has executed a complete about-face, and now argues that § 3616(a) is inapplicable to income tax returns. Memorandum for the United States, *passim*, hereinafter cited simply as U.S. Memo.

It is the position of *amicus curiae* that the Government was correct in *Dillon*, *Berra*, and *Costello*; that its present change of view is not well taken; that § 3616(a) does apply to income tax returns; and that there is accordingly an area of overlap between § 3616(a) and § 145(b) of the 1939 Internal Revenue Code.

The further question as to the consequence of that overlap is adequately covered by the other briefs on file and will not be discussed in the present brief.

I

The derivation of § 3616(a) is actually extremely easy to trace:

A. Section 3616(a) of the Internal Revenue Code of 1939 was derived from R. S. § 3179. See Appendix A to IRC of 1939, "Derivation of Internal Revenue Code," 53 Stat. App. p. xxxii, *s.v.* § 3616; Appendix B to *id.*, "Statutes included in Internal Revenue Code", 53 Stat. App. p. xl, *s.v.* R. S. § 3179. This derivation seems not to be in dispute.

B. In turn, R. S. § 3179 was derived from Sec. 15 of the Act of June 30, 1864, 13 Stat. 223, 227. See side note to R. S. § 3179 in the 1874 edition of the R. S., p. 614; *id.* in the 1878 edition, p. 611.

C. The Act of June 30, 1864, *supra*, imposed an income tax in its §§ 116-123, 13 Stat. at 281-285. Plainly, then,

Section 15 of the 1864 Act applied to false or fraudulent income tax returns when first enacted. This, again, is not in dispute. From that premise it necessarily follows that § 3616(a) still applies to the false or fraudulent income tax returns, for the reason that the meaning of a statute does not change simply because it passes through one or more revisions without changes in its substantive language. E.g., *Nye v. United States*, 313 U.S. 33; *Logan v. United States*, 144 U.S. 263, 302, and cases there cited.

D. Thus the genealogy of § 3616(a) is clear, and need not be obfuscated, as the Government unnecessarily proceeds to do (U. S. Memo. 5), by references to cognate legislation passed in 1798, 1861, and 1862, which was not carried into the Revised Statutes.

II

Sec. 3179 of the Revised Statutes was never repealed, either expressly or by implication, but on the contrary was specifically reenacted.

A. The Government admits (U. S. Memo. 6-7) that the applicability of R. S. § 3179 to income tax returns survived the repeal of the Civil War income tax and remained in force so as to govern returns filed pursuant to the income tax imposed by the Act of 1894. But it argues that in 1909 (U. S. Memo. 7) "Congress for the first time enacted a specific penal provision applicable to the income tax," and, since that latter provision involved the same penalties as R. S. § 3179, that "in relation to the income tax the general provision of Section 3179 was superseded *pro tanto* by the specific provision in the 1909 act."

The fallacy of the foregoing argument lies in its premise, for as a matter of law the 1909 Act did not levy an income tax. In the period between the decision of this Court that held the 1894 income tax unconstitutional (*Pollock v. Farmers' Loan & T. Co.*, 157 U.S. 429, 158 U.S. 601), and the effective date of the Sixteenth Amendment, Congress

could not and did not attempt to levy any income tax. Accordingly what was involved in the 1909 Act was an excise tax on corporations measured by income, and not an income tax. See *Flint* v. *Stone-Tracy Co.*, 220 U.S. 107, which sustained the constitutionality of the corporate excise tax imposed by the 1909 Act. Moreover, the penalty provision of the 1909 Act (Sec. 38 (Eighth), 36 Stat. at 117) applied in terms only to the filing of a false or fraudulent return with intent to defeat or evade "the assessment required by this section to be made." It was not general legislation.

In the face of this restrictive language in the penal provision of the 1909 Act, it is simply not possible, particularly when the nature of the tax imposed is borne in mind, to reach the conclusion now sought to be drawn by the Government, of a general supersession of R. S. § 3179 "in relation to the income tax."

B. The first true income tax law subsequent to 1894 was the Act of Oct. 3, 1913, c. 16, 38 Stat. 114. The penalty provision thereof, § II(F), 38 Stat. at 171, with its maximum of a year's imprisonment and a $2000 fine, was, as the Government correctly points out (U. S. Memo. 8), inconsistent with the penalty imposed by R. S. § 3179. The Government argues that the 1913 provision "implicitly qualified" § 3179, citing cases to the effect that a later provision for a heavier penalty necessarily supersedes an earlier provision carrying a less severe one. Actually, it would seem that, since both R. S. § 3179 and § II(F) of the 1913 Act remained in force, the principle more appropriately invoked is the rule that, where two penalties cover the same offense, the lesser necessarily governs. *Prince* v. *United States*, 352 U.S. 322; *Bell* v. *United States*, 349 U.S. 81, 83; *United States* v. *Universal C. I. T. Corp.*, 344 U.S. 218, 221-222; *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10. But it is not necessary to resolve this question, because, since § II(F) by its terms was restricted to "the assess-

ment required by this section to be made," it plainly can not be construed to have effected a permanent repeal of R. S. § 3179 with respect to the latter's applicability to all income tax returns in the future. Yet that untenable conclusion is actually involved in the Government's argument at this juncture (U. S. Memo. 8).

C. The penalty prescribed by Section 18 of the Revenue Act of 1916 (Act of Sept. 8, 1916, c. 463, 39 Stat. 756, 775; later expressly amended, in particulars not here material, by § 1209 of the Revenue Act of 1917, c. 63, 40 Stat. 300, 336) was the same as that set forth in § 11(F) of the 1913 Act. Again, the 1916 penalty was limited to a false return affecting "the assessment required by this title to be made." The transitory aspect of the 1913 penalty provision was emphasized by its repeal, except in respect of taxes already accrued, by Section 24 of the 1916 Act (39 Stat. at 776). And other provisions of the 1916 Act negative any notion that Congress ever supposed that it was repealing or permanently amending R. S. § 3179.

Section 16 of the 1916 Act, 39 Stat. at 773-775, expressly amended R. S. §§ 3167, 3172, 3173, and 3176. Plainly, then, Congress was concerned with possible inconsistencies between the provisions of the Revised Statutes relating to internal revenue, and those of the new act, and took appropriate steps to weld all of them into a coherent and consistent body of law. The circumstance that, after amending the enumerated sections of the Revised Statutes, R. S. § 3179 was left intact, unamended and unrepealed, is surely eloquent evidence that Congress intended that latter provision to stand.

D. We come now to the Revenue Act of 1917, which, according to the Government (U. S. Memo. 8), "after the usual prohibition against false or fraudulent returns, added the new misdemeanor of 'evad[ing] or attempt[ing] to evade any tax' imposed by the act."

This is somewhat less than full disclosure. Sec. 1004 of the 1917 Act, 40 Stat. at 325, was in pertinent part as follows:

> "That whoever fails to make any return required by this Act or the regulations made under authority thereof within the time prescribed or who makes any false or fraudulent return, and whoever evades or attempts to evade any tax imposed by this Act or fails to collect or truly to account for and pay over any such tax, shall be subject to a penalty of not more than $1,000, or to imprisonment for not more than one year, or both, at the discretion of the court, and in addition thereto a penalty of double the tax evaded * * *."

What the 1917 Act did, therefore, was two-fold: First, it removed the inconsistency between R. S. § 3179 and the particular income tax act with respect to the penalty for making a false return, by making the penalties under each identical; and, second, it added the new offense of evading or attempting to evade the tax.

It seems fairly clear, therefore, that Congress in the 1917 Act distinguished between the simple making of a false return, on the one hand, and the evasion or attempted evasion of the tax in any other manner, on the other.

E. The Government argues (U. S. Memo. 8) that, insofar as there were two offenses in 1917, they were merged by the penalty provision of the Revenue Act of 1918. Sec. 253 of that law (40 Stat. at 1085) did not specifically mention the filing or making of false or fraudulent returns, but denounced only the taxpayer "who willfully attempts in any manner to defeat or evade the tax imposed by this title * * *." It is argued by the Government (U. S. Memo. 8) that "This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns."

But the Government's conclusion does not follow from the premise.

To begin with, the maximum penalty imposed by § 253 of the 1918 Act was a $10,000 fine and a year's imprisonment. If, as the Government argues, § 253 covered the filing of a false return, its maximum would be inconsistent with the year and $1000 penalty which was the maximum in R. S. § 3179. But it is very easy to avoid any inconsistency, as follows:

Section 1004 of the 1917 Act, *supra*, distinguished between the two offenses of (a) filing a false, etc., return and (b) attempting to evade the tax. The 1917 Act denounced both offenses in a single section and prescribed the identical penalty for each. The 1918 Act, on the other hand, denounced (b) in its § 253, with a maximum fine of $10,000, and relegated the punishment of (a) to the provisions of R. S. § 3179. This construction, which avoids both inconsistency as well as any discussion of implied repeal, is fortified by the circumstance that, in § 1317 of the 1918 Act, 40 Stat. at 1146-1148, Congress expressly amended R. S. §§ 3164, 3165, 3167, 3172, 3173, and 3176. It neither amended nor repealed R. S. § 3179, but on the contrary, as petitioner has pointed out (Pet. Br. 19), made all existing administrative provisions of the internal revenue laws applicable to the income tax imposed by the 1918 Act. Sec. 1305, 40 Stat. at 1142.

It therefore necessarily follows that, with respect to punishing the simple filing of false returns, Congress intended to rely on R. S. § 3179, and that it is the latter intention which explains the fact (U. S. Memo. 8) that "from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns." And the reason for that omission is plain. The mere filing of false or fraudulent income tax returns did not need to be specifically prohibited in successive revenue acts, since such offenses were amply covered by the permanent provisions of R. S. § 3179.

F. In 1939, Congress enacted the Internal Revenue Code, in order, as the title of the Act indicates, "To consolidate and codify the internal revenue laws of the United States."

By 1939, the offense of attempting to evade the income tax in any manner had been a felony for some fifteen years, since the Revenue Act of 1924 (U. S. Memo. 8-9). Moreover, felony prosecutions for income tax evasion had become a part of the pattern of federal criminal prosecution which were well known and which had obtained public acceptance. If, then, the cognizant Congressional Committees and their expert technical staffs had been of the view that income tax evasion in its least complicated form, viz., the filing of a false or fraudulent return, deserved to be dealt with on the footing of felony, those agencies, as well as the Congress itself, were presented, in the course of the laborious codifying process, with an opportunity to eliminate every obsolescent statutory excrescence that remained from earlier days, and which reflected a different view of the social consequences of tax evasion in any form.

And what did Congress do when confronted with that opportunity? It reenacted R. S. § 3179 as § 3616(a) of the 1939 Internal Revenue Code, and it specifically provided in § 61 of the Code that all administrative provisions should be applicable to income taxes.

Section 3616(a) was a part of Subchapter B, Determination of Tax Liability, which in turn was a part of Chapter 34, Information and Returns, which in its turn was a part of Subtitle D of the Code, entitled General Administrative Provisions. While, of course, Congress stated in § 6 of the Act of Feb. 10, 1939 (53 Stat. 1a) that no inference of legislative construction should be drawn by reason of the location of any particular section, cf. *United States* v. *Dixon*, 347 U.S. 381, Section 61 of the Code would be meaningless if it were not possible to consider as administrative provi-

sions sections which were not only so labelled, but which were plainly administrative in substance.

The only conclusion possible, therefore, is that R. S. § 3179 was not only never repealed, but that Congress reaffirmed its provisions by specifically reenacting them.

III

It follows from the foregoing that, as the Government repeatedly argued in the past, there is an overlap between § 145(b) and § 3616(a) with respect to the filing of false or fraudulent income tax returns. The consequences of that overlap are adequately treated by the briefs already on file, and, as has been pointed out, will not be repeated here.

One additional comment will suffice. In the *Dillon* case (Br. Op., No. 629, Oct. T. 1954, at pp. 7 *et seq.*), the Government disclosed that § 3616(a) had frequently been invoked to prosecute minor income tax offenders whose acts were thought not to rise to the level of felony. See also U. S. Memo. 23, note 4, where it is said that "Even if it should be held that the offenses in these cases were laid under the wrong statute (Section 3616(a)), they were of course cognizable under Section 145(b)."

Of course the citation of the statute is no part of the indictment. Of course a mis-citation of the applicable statute is immaterial just so long as the acts charged in the indictment constitute a crime under any statute. But the Government does not explain how it could properly prosecute for misdemeanor when, on its present view, the only statute denouncing the filing of a false income tax return dealt with felony. Certainly if a defendant charged with filing a false income tax return had been prosecuted by information laid under § 3616(a), it is no answer to say that, if § 3616(a) is inapplicable to income tax returns, the prosecution is still valid because the acts charged amount to

felony in violation of § 145(b). For, plainly, an offense under § 145(b) can, in the absence of waiver, be prosecuted only by indictment (Rule 7(a), F. R. Crim. P.)—and the waiver must be an understanding one and must be made in open court. Rule 7(b), F. R. Crim. P.

Otherwise stated, if the Government is now right in saying that § 3616(a) has no application to the income tax, then every income tax violator heretofore prosecuted by information laid under that section has been illegally prosecuted.

It is against the foregoing background that the Government's latest expression must be evaluated. It now says (U. S. Memo. 14, note 22):

> "In view of the uncertainty surrounding the question whether Section 3616(a) applies to income tax violations, the Attorney General has directed that, pending definitive adjudication of the question by this Court, no prosecutions for income tax violations be instituted under that section."

The quoted statement, it is submitted, is quite meaningless on any footing.

If, as the Government seems to imply in its footnote 4, the question of § 3616(a) versus § 145(b) is simply one of citation, the matter quoted in its footnote 22 means no more than a promise to use a different citation in the future. But if the question is viewed as one of substance, involving the difference between prosecution by indictment or by information, then, as has been seen, every prosecution for income tax violations under § 3616(a) commenced by information has been illegal; for if § 3616(a) does not apply to income tax violations, then there is no misdemeanor provision prohibiting the filing of false income tax returns.

That being so, the Government should, if its recent about face is anything more than a tactical shift in the course of litigation, not only offer not to prosecute income tax viola-

tions under § 3616(a) in the future, it should undertake to recommend presidential pardons for all individuals convicted in the past of income tax violations prosecuted by informations laid under § 3616(a); it should likewise offer to sponsor appropriate legislation to refund fines collected in such prosecutions; and, if terms of imprisonment were actually served following such prosecutions, it should similarly offer to confess judgments in suits brought by the affected defendants to recover damages for unjust conviction and imprisonment pursuant to 28 U.S.C. § 2513.

CONCLUSION

For the foregoing reasons, this Court should hold that § 3616(a) of the Internal Revenue Code of 1939 applies to income tax returns.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430

SAM ACHILLI, *Petitioner*

v.

THE UNITED STATES OF AMERICA, *Respondent*

MOTION FOR LEAVE TO FILE AND ARGUE BRIEF AMICUS CURIAE

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IN THE

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MOTION FOR LEAVE TO FILE AND ARGUE BRIEF AMICUS CURIAE

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COMES NOW, Carl J. Batter, a member of the bar of this Court and formerly Counsel of Record in the above case, and who has since, on March 11th, withdrawn as such Counsel; and

MOVES THE COURT for leave to file a brief *amicus curiae* in the above cause; and to be granted time to argue the question of law raised; and

time enact these specific criminal provisions; they simply carried over from 1924 into the 1939 Code. Congress merely duplicated these identical criminal provisions in Section 146 of the 1928 Revenue Act and Section 145 of the later Revenue Acts and in the 1939 Code. There being no "specific enactments" during this period, there could be no implied repeal.

By breaking Section 3179 into two parts (Section 3616(a) and (b)), and placing these two subsections under the "General and Administrative" heading of the 1939 Code, the codifiers emphasized the application of these two subsections to all forms of taxes.

As was pointed out in the Petitioner's reply brief, the history of Section 3616(a) of the Internal Revenue Code of 1939 has been set forth and defined by the Congress itself. In enacting the Internal Revenue Code of 1939, Congress expressly stated the ancestry of this provision. Section 3616(a), according to the Congress, was specifically derived from Section 3179 of the Revised Statutes, 53 Stat. App., xxxii, Table A, "Derivation of Internal Revenue Code;" and conversely, Section 3179 of the Revised Statutes was expressly noted, by the Congress, as being Section 3616(a) of the Internal Revenue Code of 1939. *Id.*, xl, Table B, "Statutes Included in the Internal Revenue Code."

In like fashion, the ancestry of Section 3179 of the Revised Statutes was plainly described by the Congress. That Section, according to the Congress, was derived directly from Section 15 of the Act of June 30, 1864, 13 Stat. 223, 227. Side note to Section 3179, Revised Statutes, 1874 Ed., 614, 1878 Ed., 611.

There is no further legislative history to Section 3616(a) or Section 3179 of the Revised Statutes. See

tion 3616(a) stems directly from Section 3179 of the Revised Statutes and the latter Section was derived directly from Section 15 of the Act of June 30, 1864. This is the message of the Congress; no other statutory history is relevant or appropriate.

This short and simple history indicates that from the beginning in 1864 to the end in 1939, Section 3616(a) and its predecessors clearly and always have been applicable to income tax. There is nothing in this history which suggests or gives rise to the need for "implied repeals" as was the conclusion of this Court in its Opinion. As this Court has recognized on many earlier occasions, such repeals are not favored, e.g., *United States* v. *Gilliland*, 312 U. S. 86, 96; *cf. Taylor v. United States* (CA 9), 179 F. 2d 640, 644. The clearly etched history of Section 3616(a) hardly justified the resort to an unfavored doctrine nor to a conclusion that "*ad hoc* enactments" eroded away a broad general permanent statutory provision.

II

As the Court well knows, this case was briefed and argued on a highly accelerated schedule. In addition, only a few days before Petitioner's brief was due, the Government suddenly announced its extraordinary change of view as to the meaning of Section 3616(a) in a mimeographed memorandum filed with this Court. In this fashion, and in the very midst of this litigation, it reversed the legal position which it had consistently followed for at least five years,* and in effect

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* This Court's decision observes: "As long ago as 1926 it was the Government's position that the predecessor of § 145(b) effectively repealed § 3616(a)'s applicability to income tax evasion." See brief for the United States in *United States* v. *Norvell*, 273

confessed error in over 175 income tax evasion cases which it had prosecuted under 3616(a). In so doing, it also found new meaning in the same facts of legislative history it had used to support its prior view that Section 3616(a) applied to income tax.[7]

And the accelerated pace at which this litigation has been moving was not even slowed by this Court's decision of May 27, 1957. Only two days later, on May 29, 1957—and without waiting even for the filing, let alone disposition, of a petition for rehearing—the Justice Department announced that it had instructed United States Attorneys to dismiss or confess error in all income tax cases instituted under 3616(a). See *Flynn* v. *United States* (1955), 99 L. Ed. 1298, 1299. This release is set out in full as Appendix B to this Petition.

The questions posed by this case are too complex, and the consequences too far-reaching, to permit such precipitant and volatile action to be the basis for decision.

Aside from the errors in the decision, this case is, accordingly, one in which this Court's oft-repeated admonition seems particularly appropriate: that "to perform its high function in the best way 'justice

U. S. 202, pp. 16-19." But by citing a portion of a Government *brief*, the Court has permitted the Government twenty-one years later to pull itself up on its own bootstraps. Moreover, it is interesting to note that the decision of this Court in *Narcek* did not accept the Government's argument or even make reference to it.

[7] The "Appendix" setting forth the legislative history of Sections 145(b) and 3616(a), which had been routinely filed by the Government in the various cases raising the same point as the instant case is reproduced in full as Appendix A to this Petition. It is noteworthy that this "history" contains the same facts upon which the Government—and this Court—have now concluded that Section 3616(a) does not apply to income taxes; but was filed to support the view that 3616(a) was applicable to income tax. See particularly emphasized sentence at page 4a, Appendix.

must satisfy the appearance of justice'. *Offutt* v. *United States*, 348 U. S. 11." *In the Matters of Murchison and White*, 349 U. S. 133, 136.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that a rehearing be granted in the instant case.

Respectfully submitted,

PETER B. ATWOOD,
10 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

Certificate of Counsel

I, PETER B. ATWOOD, counsel for Petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and sets forth good and sufficient grounds for rehearing.

PETER B. ATWOOD,
10 South LaSalle Street,
Chicago 3, Illinois,
Counsel for Petitioner.

APPENDIX A

LEGISLATIVE HISTORY OF SECTIONS 145(b) AND 3616(a) OF THE INTERNAL REVENUE CODE OF 1939

In 1798 Congress first enacted a criminal statute punishing "any person [who] shall deliver or disclose * * * any false or fraudulent list, with intent to defeat or evade the valuation or enumeration hereby directed to be made."[1] Similar provisions appeared in various later revenue acts, including the first act (1861) imposing an income tax.[2] The scope of the prohibition was enlarged in the 1862 act to include a "list or statement"[3] and in the 1864 act to include a "list, return, account or statement."[4] Since the income tax provisions of those acts contained no separate criminal penalty, it would appear that this general criminal provision was intended to apply. The 1870 act repealed the income tax, effective as of the end of 1871, and added a provision punishing false oaths, then required in connection with each return, under the penalties of perjury.[5] In 1874, the criminal sanction provided in the 1864 act, with minor changes in phraseology, became Section 3179 of the Revised Statutes,[6] which, in turn later became Section

[1] Sec. 11, c. 70, 1 Stat. 580, 586.

[2] Secs. 16, 49-51, c. 45, 12 Stat. 292.

[3] Act of July 1, 1862, as amended, Sec. 9, c. 119, 12 Stat. 432.

[4] Act of June 30, 1864, as amended, Secs. 15, 116-123, 178, c. 173, 13 Stat. 223. This Act added the word "assessment" to valuation and "enumeration."

[5] Secs. 6, 11, 37, c. 255, 16 Stat. 256.

[6] Section 3179 reads as follows: "Whenever any person delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, or, being duly summoned to appear to testify, or to appear and produce such books as aforesaid, neglect to appear or to produce said books,

3616(a) of the Internal Revenue Code of 1939. Since there was no income tax law in effect in 1874 it could not have been the intent of Congress at that time that Section 3179 should apply to income tax. When the next income tax was enacted, however, in 1894, it contained no criminal sanctions but only the same civil penalties that had been imposed by the 1870 act—50 per cent of the tax for a wilful failure to file and 100 per cent for the filing of a wilfully false or fraudulent return.[7] It would appear that in omitting any mention of criminal sanctions in the 1894 act Congress intended that the comprehensive language of Section 3179 of the Revised Statutes should apply. *Puerto Rico* v. *Shell Co.*, 302 U. S. 253, 257 and cases cited; *Barr* v. *United States*, 324 U. S. 83, 90.

The 1909 corporation income tax law specifically imposed maximum criminal penalties of one year in prison and a $1,000 fine for wilfully making a false or fraudulent return with intent to defeat or evade the assessment,[8] the same penalties contained in Section 3179. Four years later, however, Section II of the Revenue Act of 1913, levying an income tax, imposed maximum criminal penalties of one year in prison and a fine of *$2,000* for that same offense.[9] Here was a patent inconsistency with Section 3179, which limited the fine to $1,000.[10] It may be that this inconsistency worked a repeal by implication *pro tanto* of Section 3179. *Tyner* v. *United States*, 78 U. S. 88, 92-93; *United States* v.

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he shall be fined not exceeding one thousand dollars, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

[7] Compare Sec. 29, c. 349, 28 Stat. 509 with Sec. 11, c. 255, 16 Stat. 256.

[8] Sec. 28(8), c. 6, 36 Stat. 11.

[9] Sec. II(F), c. 16, 38 Stat. 114.

[10] The Revenue Act of 1916 (39 Stat. 756) provided the same penalties as that of 1913.

Yuginovich, 256 U. S. 450, 463; *Posadas* v. *National City Bank*, 296 U. S. 497, 503; *Norris* v. *Crocker*, 54 U. S. 429, 439. *Cf. United States* v. *Barnes*, 222 U. S. 513, 520.

The Revenue Act of 1917, after the usual prohibition against false or fraudulent returns added the new offense of "evad[ing] or attempt[ing] to evade any tax" imposed by the act.[11] The Revenue Act of 1918 adopted this modification and further enlarged it to proscribe an attempt to evade the tax "in any manner," raising the maximum fine to $10,000 and retaining the one-year maximum prison sentence.[12] This enlargement eliminated the need for the specific prohibition against filing a false or fraudulent return, and from 1918 through 1938 none of the revenue acts prohibited in terms the filing of false or fraudulent returns.[13] *The Revenue Act of 1924 made attempted evasion a felony*, punishable by a maximum fine of $10,000 and a five-year maximum prison term.[14] The harsher penalties imposed by the 1924 Act were re-enacted in all subsequent legislation on the subject through 1938[15] and were incorporated into the Internal Revenue Code of 1939 as Section 145(b). The

[11] Sec. 1004, c. 63, 40 Stat. 300.

[12] Sec. 253, c. 18, 40 Stat. 1057.

[13] Revenue Act of 1921, Secs. 253, 1302 (b), c. 136, 42 Stat. 227, 268, 309. Revenue Act of 1924, Secs. 1017 (b), (c), c. 234, 43 Stat. 253. Revenue Act of 1926, Secs. 1114 (b), (c), c. 234, 43 Stat. 2, 9. Revenue Act of 1928, Sec. 146 (b), c. 852, 45 Stat. 791. Revenue Act of 1932, Sec. 145 (b), c. 209, 47 Stat. 169. Revenue Act of 1934, Sec. 145 (b), c. 277, 48 Stat. 680. Revenue Act of 1936, Sec. 145 (b), c. 690, 49 Stat. 1652. Revenue Act of 1938, Sec. 145 (b), c. 289, 52 Stat. 452.

[14] Sec. 1017 (b), c. 234, 43 Stat. 253. The House bill contained the old penalties but the Senate bill classified attempted evasion as a felony and increased the penalty. The Senate prevailed in conference. See Senate Report No. 398, 68th Cong., 1st Sess., p. 45 and Conference Report in House Report No. 844, 68th Cong., 1st Sess., p. 32.

[15] For citations see fn. 13, *supra*.

overwhelming majority of prosecutions for income tax evasion have, of course, been brought under this Section.

Section 3616(a) of the Internal Revenue Code of 1939 reenacted Section 3179 of the Revised Statutes, making only minor changes in phraseology. If the enacting clause had provided merely that the Code established *prima facie* the internal revenue laws, there might be serious doubt as to the continued applicability of the misdemeanor provision to income taxes in view of the legislative changes that had taken place between 1913 and 1924 (See *Smiley* v. *Holm*, 285 U. S. 355, 373; *United States* v. *California*, 297 U. S. 175, 187; *Cf. United States* v. *Auffmordt*, 122 U. S. 197, 210). **But the simultaneous enactment into positive law[16] of Sections 3616(a) and 145(b) manifests a clear intent, if the plain words of Congress are to be given effect, that the two provisions shall co-exist and that while Section 145(b) applies only to income taxes, 3616(a) applies to all classes of taxes.** (Emphasis added.) On the other hand, it should be noted that Congress enacted the 1939 Code not without some misgivings and that it was intended to be merely a restatement of existing law. It is possible that actually Congress was unaware of the overlap,[17] and intended that the crime of in-

[16] See Sec. 1, c. 2, 53 Stat. 1.

[17] The Chairman of the House Ways and Means Committee reported that the purpose of the bill was to enact into absolute law all the internal revenue laws then in force (84 Cong. Rec. 646). A members of the Committee stated that unlike some codifications which encompassed a "complete study of all laws, in an effort to take out the deadwood and inconsistencies, and resolve the inconsistencies in some form" the Joint Committee on Internal Revenue Taxation, in cooperation with the Treasury Department and the Department of Justice, "religiously stayed away from any attempt to make any change whatsoever." (84 Cong. Rec. 74.) Another member of the Committee stated that although the bill might contain "a few minor mistakes" this was bound to occur in the achievement of their broad purpose to "simplify the law for the benefit of the businessmen and the taxpayers of the country." (84 Cong. Rec. 16.) Although there was some protest in the House

come tax evasion should be punishable only under the statute relating specifically to income taxes, *i.e.*, Section 145(b).

We might point out that the Internal Revenue Code of 1954 made a substantial change in Section 3616(a) (re-enacted as Section 7207) in that the existence of a tax deficiency is no longer an essential element of the misdemeanor. In the new Code Congress has once again made clear (for the ninth time since 1924) its intention that wilful attempted income tax evasion shall be *punishable as a felony.* (See Section 7201, re-enacting Section 145(b) of the 1939 Code.)

APPENDIX B

DEPARTMENT OF JUSTICE

FOR IMMEDIATE RELEASE
WEDNESDAY, MAY 29, 1957

Attorney General Herbert Brownell, Jr., announced today that he has ordered immediate disposition of attempted income tax evasion cases brought under a misdemeanor section of the 1939 Internal Revenue Code.

In doing so, he said that the Supreme Court decision of May 27, 1957, in the *Achilli* case held that the exclusive sanction provided by Congress in such cases is the felony provision of the 1939 Code; and he noted that in rewriting the Code in 1954, Congress had revised the misdemeanor section of the 1939 Code, known as section 3616(a), in such

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that "no one has read the bill" and that there had been no hearings (84 Cong. Rec. 787-788), the bill was passed in reliance upon the work of "as fine a lot of experts as can be found" and the care and time which had been spent in compiling the Code. (84 Cong. Rec. 74.)

The Senate Committee on Finance reported that the bill made "no changes in existing law" and pointed out that "if any error is found in the Code, it can be remedied by amendatory legislation." (Senate Report No. 20, 76th Cong., 1st Sess., 1056-1057.)

a manner that it has not been applicable to attempted evasions occurring since August 1954.

He said that the appropriate United States Attorneys were instructed to initiate immediate action to effect the release of four persons serving prison sentences as a result of conviction under the misdemeanor section. An estimated 50 cases pending under the same section will be dismissed.

Section 145(b) of the 1939 Code makes it a felony to attempt to evade income taxes. Section 3616(a) of the 1939 Code made it a misdemeanor to deliver or disclose to a collector or deputy any false or fraudulent return with intent to defeat or evade the assessment. The Supreme Court held that section 3616(a) was not applicable to attempted income tax evasions and that Congress intended that such cases should be brought under the felony section, 145(b).

The misdemeanor statute had been used in a small percentage of income tax evasion cases in recent years, where the unreported income involved was small in amount, in practically all cases under $1,000. Those serving sentences whose release will be sought by the United States Attorneys upon proper application to the appropriate United States District Court are:

Leroy C. Daniel, Hempstead, New York, sentenced March 4, 1957, to three months, and serving in the Detention Headquarters, New York City.

Tommie Daniels, Tampa, Florida, sentenced September 19, 1956, to one year, and serving in the Federal Correctional Institution, Tallahassee, Florida.

Jimmie Lee Johnson, Tampa, Florida, sentenced November 21, 1956, to one year, and serving at Tallahassee.

George H. Peters, Pittsburgh, Pennsylvania, sentenced January 3, 1957, to 12 months, and serving in the Federal Prison Camp at Allenwood, Pennsylvania.